

# HOW DOES LAW PROTECT IN WAR?

Cases, Documents and Teaching Materials  
on Contemporary Practice  
in International Humanitarian Law

Marco Sassòli  
Antoine A. Bouvier  
Anne Quintin

**Volume II**  
Cases and Documents

**Third Edition**



**ICRC**

**Document No.1, The Hague Regulations**

[Source: Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907; available at [www.icrc.org](http://www.icrc.org)]

**Convention (IV) respecting the Laws and Customs of War on Land and its Annex:  
Regulations concerning the Laws and Customs of War on Land****The Hague, 18 October 1907**

Seeing that while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert;

Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;

Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible;

Have deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land.

According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice;

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

They declare that it is in this sense especially that Articles I and 2 of the Regulations adopted must be understood.

The High Contracting Parties, wishing to conclude a fresh Convention to this effect, have appointed the following as their Plenipotentiaries:

(Here follow the names of Plenipotentiaries)

Who, after having deposited their full powers, found in good and due form, have agreed upon the following:

#### **ARTICLE 1**

The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.

#### **ARTICLE 2**

The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention.

#### **ARTICLE 3**

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

#### **ARTICLE 4**

The present Convention, duly ratified, shall as between the Contracting Powers, be substituted for the Convention of 29 July 1899, respecting the laws and customs of war on land.

The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention.

#### **ARTICLE 5**

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

The first deposit of ratifications shall be recorded in a procès-verbal signed by the Representatives of the Powers which take part therein and by the Netherlands Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Netherlands Government and accompanied by the instrument of ratification.

A duly certified copy of the procès-verbal relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, as well as of the instruments of ratification, shall be immediately sent by the Netherlands Government, through the diplomatic channel, to the powers invited to the Second Peace Conference, as well as to the other Powers which have adhered to the Convention. In the cases contemplated in the preceding paragraph the said Government shall at the same time inform them of the date on which it received the notification.

**ARTICLE 6**

Non-Signatory Powers may adhere to the present Convention.

The Power which desires to adhere notifies in writing its intention to the Netherlands Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

This Government shall at once transmit to all the other Powers a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

**ARTICLE 7**

The present Convention shall come into force, in the case of the Powers which were a party to the first deposit of ratifications, sixty days after the date of the procès-verbal of this deposit, and, in the case of the Powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherlands Government.

**ARTICLE 8**

In the event of one of the Contracting Powers wishing to denounce the present Convention, the denunciation shall be notified in writing to the Netherlands Government, which shall at once communicate a duly certified copy of the notification to all the other Powers, informing them of the date on which it was received.

The denunciation shall only have effect in regard to the notifying Power, and one year after the notification has reached the Netherlands Government.

**ARTICLE 9**

A register kept by the Netherlands Ministry for Foreign Affairs shall give the date of the deposit of ratifications made in virtue of Article 5, paragraphs 3 and 4, as well as the date on which the notifications of adhesion (Article 6, paragraph 2), or of denunciation (Article 8, paragraph 1) were received.

Each Contracting Power is entitled to have access to this register and to be supplied with duly certified extracts.

In faith whereof the Plenipotentiaries have appended their signatures to the present Convention.

Done at The Hague 18 October 1907, in a single copy, which shall remain deposited in the archives of the Netherlands Government, and duly certified copies of which shall be sent, through the diplomatic channel to the Powers which have been invited to the Second Peace Conference.

(Here follow signatures)



**ANNEX TO THE CONVENTION**  
**REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND**

**SECTION I**  
**ON BELLIGERENTS**

**CHAPTER I**  
**The qualifications of belligerents**

**ARTICLE 1**

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

**ARTICLE 2**

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

**ARTICLE 3**

The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

**CHAPTER II**  
**Prisoners of war**

**ARTICLE 4**

Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

They must be humanely treated.

All their personal belongings, except arms, horses, and military papers, remain their property.

**ARTICLE 5**

Prisoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits; but they cannot be confined except as in indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

**ARTICLE 6**

The State may utilize the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war.

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the State is paid for at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.

When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance.

**ARTICLE 7**

The Government into whose hands prisoners of war have fallen is charged with their maintenance.

In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.

**ARTICLE 8**

Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.

Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.

**ARTICLE 9**

Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed.

**ARTICLE 10**

Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honour, scrupulously to fulfil, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.

In such cases their own Government is bound neither to require of nor accept from them any service incompatible with the parole given.

**ARTICLE 11**

A prisoner of war cannot be compelled to accept his liberty on parole; similarly the hostile Government is not obliged to accede to the request of the prisoner to be set at liberty on parole.

**ARTICLE 12**

Prisoners of war liberated on parole and recaptured bearing arms against the Government to whom they had pledged their honour, or against the allies of that Government, forfeit their right to be treated as prisoners of war, and can be brought before the courts.

**ARTICLE 13**

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.

**ARTICLE 14**

An inquiry office for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. It is the function of this office to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The office must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.

It is likewise the function of the inquiry office to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle or left by prisoners who have been released on parole, or exchanged, or who have escaped, or died in hospitals or ambulances, and to forward them to those concerned.

**ARTICLE 15**

Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort shall receive from the belligerents, for themselves and their duly accredited agents every facility for the efficient performance of their humane task within the bounds imposed by military necessities and administrative regulations. Agents of these societies may be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the latter may issue.

**ARTICLE 16**

Inquiry offices enjoy the privilege of free postage. Letters, money orders, and valuables, as well as parcels by post, intended for prisoners of war, or dispatched by them, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.

Presents and relief in kind for prisoners of war shall be admitted free of all import or other duties, as well as of payments for carriage by the State railways.

**ARTICLE 17**

Officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where they are detained, the amount to be ultimately refunded by their own Government.

**ARTICLE 18**

Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.

**ARTICLE 19**

The wills of prisoners of war are received or drawn up in the same way as for soldiers of the national army.

The same rules shall be observed regarding death certificates as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

**ARTICLE 20**

After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

**CHAPTER III**  
**The sick and wounded****ARTICLE 21**

The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention.

## **SECTION II HOSTILITIES**

### **CHAPTER I Means of injuring the enemy, sieges, and bombardments**

#### **ARTICLE 22**

The right of belligerents to adopt means of injuring the enemy is not unlimited.

#### **ARTICLE 23**

In addition to the prohibitions provided by special Conventions, it is especially forbidden

- (a) To employ poison or poisoned weapons;
- (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
- (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
- (d) To declare that no quarter will be given;
- (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering;
- (f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
- (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;
- (h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party. A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

#### **ARTICLE 24**

Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

#### **ARTICLE 25**

The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

#### **ARTICLE 26**

The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

**ARTICLE 27**

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

**ARTICLE 28**

The pillage of a town or place, even when taken by assault, is prohibited.

**CHAPTER II  
Spies****ARTICLE 29**

A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

**ARTICLE 30**

A spy taken in the act shall not be punished without previous trial.

**ARTICLE 31**

A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

**CHAPTER III  
Flags of truce****ARTICLE 32**

A person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and interpreter who may accompany him.

**ARTICLE 33**

The commander to whom a parlementaire is sent is not in all cases obliged to receive him.

He may take all the necessary steps to prevent the parlementaire taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the parlementaire temporarily.

**ARTICLE 34**

The parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason.

**CHAPTER IV  
Capitulations****ARTICLE 35**

Capitulations agreed upon between the Contracting Parties must take into account the rules of military honour.

Once settled, they must be scrupulously observed by both parties.

**CHAPTER V  
Armistices****ARTICLE 36**

An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

**ARTICLE 37**

An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

**ARTICLE 38**

An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities are suspended immediately after the notification, or on the date fixed.

**ARTICLE 39**

It rests with the Contracting Parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other.

**ARTICLE 40**

Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

**ARTICLE 41**

A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained.

**SECTION III****MILITARY AUTHORITY OVER THE TERRITORY OF THE HOSTILE STATE****ARTICLE 42**

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

**ARTICLE 43**

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

**ARTICLE 44**

A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.

**ARTICLE 45**

It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

**ARTICLE 46**

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

**ARTICLE 47**

Pillage is formally forbidden.

**ARTICLE 48**

If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray



the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

#### **ARTICLE 49**

If, in addition to the taxes mentioned in the above article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

#### **ARTICLE 50**

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

#### **ARTICLE 51**

No contribution shall be collected except under a written order, and on the responsibility of a commander-in-chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributors.

#### **ARTICLE 52**

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

#### **ARTICLE 53**

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

**ARTICLE 54**

Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

**ARTICLE 55**

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

**ARTICLE 56**

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

**Document No. 2, The First Geneva Convention**

[Source: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949; available at [www.icrc.org](http://www.icrc.org)]

**Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field****Geneva, 12 August 1949****Preamble**

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field of July 27, 1929, have agreed as follows:

**Chapter I. General Provisions****ARTICLE 1**

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

**ARTICLE 2**

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

**ARTICLE 3**

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

#### **ARTICLE 4**

Neutral Powers shall apply by analogy the provisions of the present Convention to the wounded and sick, and to members of the medical personnel and to chaplains of the armed forces of the Parties to the conflict, received or interned in their territory, as well as to dead persons found.

#### **ARTICLE 5**

For the protected persons who have fallen into the hands of the enemy, the present Convention shall apply until their final repatriation.

#### **ARTICLE 6**

In addition to the agreements expressly provided for in Articles 10, 15, 23, 28, 31, 36, 37 and 52, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them.

Wounded and sick, as well as medical personnel and chaplains, shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

**ARTICLE 7**

Wounded and sick, as well as members of the medical personnel and chaplains, may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

**ARTICLE 8**

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible, the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties. Their activities shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities.

**ARTICLE 9**

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief.

**ARTICLE 10**

The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When wounded and sick, or medical personnel and chaplains do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power, or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention

depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever, in the present Convention, mention is made of a Protecting Power, such mention also applies to substitute organizations in the sense of the present Article.

#### **ARTICLE 11**

In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, in particular of the authorities responsible for the wounded and sick, members of medical personnel and chaplains, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict, a person belonging to a neutral Power or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

### **Chapter II. Wounded and Sick**

#### **ARTICLE 12**

Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances.

They shall be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.

Only urgent medical reasons will authorize priority in the order of treatment to be administered.

Women shall be treated with all consideration due to their sex.

The Party to the conflict which is compelled to abandon wounded or sick to the enemy shall, as far as military considerations permit, leave with them a part of its medical personnel and material to assist in their care.

**ARTICLE 13**

The present Convention shall apply to the wounded and sick belonging to the following categories:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany.
- (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions in international law.
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

**ARTICLE 14**

Subject to the provisions of Article 12, the wounded and sick of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them.

**ARTICLE 15**

At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield.

Likewise, local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to that area.

#### **ARTICLE 16**

Parties to the conflict shall record as soon as possible, in respect of each wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification.

These records should if possible include:

- (a) designation of the Power on which he depends;
- (b) army, regimental, personal or serial number;
- (c) surname;
- (d) first name or names;
- (e) date of birth;
- (f) any other particulars shown on his identity card or disc;
- (g) date and place of capture or death;
- (h) particulars concerning wounds or illness, or cause of death.

As soon as possible the above mentioned information shall be forwarded to the Information Bureau described in Article 122 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, which shall transmit this information to the Power on which these persons depend through the intermediary of the Protecting Power and of the Central Prisoners of War Agency.

Parties to the conflict shall prepare and forward to each other through the same bureau, certificates of death or duly authenticated lists of the dead. They shall likewise collect and forward through the same bureau one half of a double identity disc, last wills or other documents of importance to the next of kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead. These articles, together with unidentified articles, shall be sent in sealed packets, accompanied by statements giving all particulars necessary for the identification of the deceased owners, as well as by a complete list of the contents of the parcel.

#### **ARTICLE 17**

Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. One half of the double identity disc, or the identity disc itself if it is a single disc, should remain on the body.



Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In case of cremation, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead.

They shall further ensure that the dead are honourably interred, if possible according to the rites of the religion to which they belonged, that their graves are respected, grouped if possible according to the nationality of the deceased, properly maintained and marked so that they may always be found. For this purpose, they shall organize at the commencement of hostilities an Official Graves Registration Service, to allow subsequent exhumations and to ensure the identification of bodies, whatever the site of the graves, and the possible transportation to the home country. These provisions shall likewise apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.

As soon as circumstances permit, and at latest at the end of hostilities, these Services shall exchange, through the Information Bureau mentioned in the second paragraph of Article 16, lists showing the exact location and markings of the graves, together with particulars of the dead interred therein.

#### **ARTICLE 18**

The military authorities may appeal to the charity of the inhabitants voluntarily to collect and care for, under their direction, the wounded and sick, granting persons who have responded to this appeal the necessary protection and facilities. Should the adverse Party take or retake control of the area, he shall likewise grant these persons the same protection and the same facilities.

The military authorities shall permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect and care for wounded or sick of whatever nationality. The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence.

No one may ever be molested or convicted for having nursed the wounded or sick.

The provisions of the present Article do not relieve the occupying Power of its obligation to give both physical and moral care to the wounded and sick.

### **Chapter III. Medical Units and Establishments**

#### **ARTICLE 19**

Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict. Should they fall into the hands of the adverse Party, their personnel shall be free to pursue their duties, as long as the capturing Power has not itself ensured the necessary care of the wounded and sick found in such establishments and units.

The responsible authorities shall ensure that the said medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety.

#### **ARTICLE 20**

Hospital ships entitled to the protection of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, shall not be attacked from the land.

#### **ARTICLE 21**

The protection to which fixed establishments and mobile medical units of the Medical Service are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.

#### **ARTICLE 22**

The following conditions shall not be considered as depriving a medical unit or establishment of the protection guaranteed by Article 19:

- (1) That the personnel of the unit or establishment are armed, and that they use the arms in their own defence, or in that of the wounded and sick in their charge.
- (2) That in the absence of armed orderlies, the unit or establishment is protected by a picket or by sentries or by an escort.
- (3) That small arms and ammunition taken from the wounded and sick and not yet handed to the proper service, are found in the unit or establishment.
- (4) That personnel and material of the veterinary service are found in the unit or establishment, without forming an integral part thereof.
- (5) That the humanitarian activities of medical units and establishments or of their personnel extend to the care of civilian wounded or sick.

#### **ARTICLE 23**

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital zones and localities so organized as to protect the wounded and sick from the effects of war, as well as the personnel entrusted with the organization and administration of these zones and localities and with the care of the persons therein assembled.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the hospital zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital zones and localities.

#### **Chapter IV. Personnel**

##### **ARTICLE 24**

Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.

##### **ARTICLE 25**

Members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick shall likewise be respected and protected if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands.

##### **ARTICLE 26**

The staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments, who may be employed on the same duties as the personnel named in Article 24, are placed on the same footing as the personnel named in the said Article, provided that the staff of such societies are subject to military laws and regulations.

Each High Contracting Party shall notify to the other, either in time of peace or at the commencement of or during hostilities, but in any case before actually employing them, the names of the societies which it has authorized, under its responsibility, to render assistance to the regular medical service of its armed forces.

##### **ARTICLE 27**

A recognized Society of a neutral country can only lend the assistance of its medical personnel and units to a Party to the conflict with the previous consent of its own Government and the authorization of the Party to the conflict concerned. That personnel and those units shall be placed under the control of that Party to the conflict.

The neutral Government shall notify this consent to the adversary of the State which accepts such assistance. The Party to the conflict who accepts such assistance is bound to notify the adverse Party thereof before making any use of it.

In no circumstances shall this assistance be considered as interference in the conflict.

The members of the personnel named in the first paragraph shall be duly furnished with the identity cards provided for in Article 40 before leaving the neutral country to which they belong.

**ARTICLE 28**

Personnel designated in Articles 24 and 26 who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require.

Personnel thus retained shall not be deemed prisoners of war. Nevertheless they shall at least benefit by all the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949. Within the framework of the military laws and regulations of the Detaining Power, and under the authority of its competent service, they shall continue to carry out, in accordance with their professional ethics, their medical and spiritual duties on behalf of prisoners of war, preferably those of the armed forces to which they themselves belong. They shall further enjoy the following facilities for carrying out their medical or spiritual duties:

- (a) They shall be authorized to visit periodically the prisoners of war in labour units or hospitals outside the camp. The Detaining Power shall put at their disposal the means of transport required.
- (b) In each camp the senior medical officer of the highest rank shall be responsible to the military authorities of the camp for the professional activity of the retained medical personnel. For this purpose, from the outbreak of hostilities, the Parties to the conflict shall agree regarding the corresponding seniority of the ranks of their medical personnel, including those of the societies designated in Article 26. In all questions arising out of their duties, this medical officer, and the chaplains, shall have direct access to the military and medical authorities of the camp who shall grant them the facilities they may require for correspondence relating to these questions.
- (c) Although retained personnel in a camp shall be subject to its internal discipline, they shall not, however, be required to perform any work outside their medical or religious duties.

During hostilities the Parties to the conflict shall make arrangements for relieving where possible retained personnel, and shall settle the procedure of such relief.

None of the preceding provisions shall relieve the Detaining Power of the obligations imposed upon it with regard to the medical and spiritual welfare of the prisoners of war.

**ARTICLE 29**

Members of the personnel designated in Article 25 who have fallen into the hands of the enemy, shall be prisoners of war, but shall be employed on their medical duties in so far as the need arises.

**ARTICLE 30**

Personnel whose retention is not indispensable by virtue of the provisions of Article 28 shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit.

Pending their return, they shall not be deemed prisoners of war. Nevertheless they shall at least benefit by all the provisions of the Geneva Convention relative to the Treatment

of Prisoners of War of 12 August 1949. They shall continue to fulfil their duties under the orders of the adverse Party and shall preferably be engaged in the care of the wounded and sick of the Party to the conflict to which they themselves belong.

On their departure, they shall take with them the effects, personal belongings, valuables and instruments belonging to them.

#### **ARTICLE 31**

The selection of personnel for return under Article 30 shall be made irrespective of any consideration of race, religion or political opinion, but preferably according to the chronological order of their capture and their state of health.

As from the outbreak of hostilities, Parties to the conflict may determine by special agreement the percentage of personnel to be retained, in proportion to the number of prisoners and the distribution of the said personnel in the camps.

#### **ARTICLE 32**

Persons designated in Article 27 who have fallen into the hands of the adverse Party may not be detained.

Unless otherwise agreed, they shall have permission to return to their country, or if this is not possible, to the territory of the Party to the conflict in whose service they were, as soon as a route for their return is open and military considerations permit.

Pending their release, they shall continue their work under the direction of the adverse Party; they shall preferably be engaged in the care of the wounded and sick of the Party to the conflict in whose service they were. On their departure, they shall take with them their effects personal articles and valuables and the instruments, arms and if possible the means of transport belonging to them.

The Parties to the conflict shall secure to this personnel, while in their power, the same food, lodging, allowances and pay as are granted to the corresponding personnel of their armed forces. The food shall in any case be sufficient as regards quantity, quality and variety to keep the said personnel in a normal state of health.

### **Chapter V. Buildings and Material**

#### **ARTICLE 33**

The material of mobile medical units of the armed forces which fall into the hands of the enemy, shall be reserved for the care of wounded and sick.

The buildings, material and stores of fixed medical establishments of the armed forces shall remain subject to the laws of war, but may not be diverted from their purpose as long as they are required for the care of wounded and sick. Nevertheless, the commanders of forces in the field may make use of them, in case of urgent military necessity, provided that they make previous arrangements for the welfare of the wounded and sick who are nursed in them.

The material and stores defined in the present Article shall not be intentionally destroyed.

**ARTICLE 34**

The real and personal property of aid societies which are admitted to the privileges of the Convention shall be regarded as private property.

The right of requisition recognized for belligerents by the laws and customs of war shall not be exercised except in case of urgent necessity, and only after the welfare of the wounded and sick has been ensured.

**Chapter VI. Medical Transports****ARTICLE 35**

Transports of wounded and sick or of medical equipment shall be respected and protected in the same way as mobile medical units.

Should such transports or vehicles fall into the hands of the adverse Party, they shall be subject to the laws of war, on condition that the Party to the conflict who captures them shall in all cases ensure the care of the wounded and sick they contain.

The civilian personnel and all means of transport obtained by requisition shall be subject to the general rules of international law.

**ARTICLE 36**

Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at heights, times and on routes specifically agreed upon between the belligerents concerned.

They shall bear, clearly marked, the distinctive emblem prescribed in Article 38, together with their national colours on their lower, upper and lateral surfaces. They shall be provided with any other markings or means of identification that may be agreed upon between the belligerents upon the outbreak or during the course of hostilities.

Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.

Medical aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

In the event of an involuntary landing in enemy or enemy-occupied territory, the wounded and sick, as well as the crew of the aircraft shall be prisoners of war. The medical personnel shall be treated according to Article 24 and the Articles following.

**ARTICLE 37**

Subject to the provisions of the second paragraph, medical aircraft of Parties to the conflict may fly over the territory of neutral Powers, land on it in case of necessity, or use it as a port of call. They shall give the neutral Powers previous notice of their passage over the said territory and obey all summons to alight, on land or water. They will be immune from attack only when flying on routes, at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Power concerned.

The neutral Powers may, however, place conditions or restrictions on the passage or landing of medical aircraft on their territory. Such possible conditions or restrictions shall be applied equally to all Parties to the conflict.

Unless agreed otherwise between the neutral Power and the Parties to the conflict, the wounded and sick who are disembarked, with the consent of the local authorities, on neutral territory by medical aircraft, shall be detained by the neutral Power, where so required by international law, in such a manner that they cannot again take part in operations of war. The cost of their accommodation and internment shall be borne by the Power on which they depend.

## **Chapter VII. The Distinctive Emblem**

### **ARTICLE 38**

As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the Medical Service of armed forces.

Nevertheless, in the case of countries which already use as emblem, in place of the red cross, the red crescent or the red lion and sun on a white ground, those emblems are also recognized by the terms of the present Convention.

### **ARTICLE 39**

Under the direction of the competent military authority, the emblem shall be displayed on the flags, armlets and on all equipment employed in the Medical Service.

### **ARTICLE 40**

The personnel designated in Article 24 and in Articles 26 and 27 shall wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority.

Such personnel, in addition to wearing the identity disc mentioned in Article 16, shall also carry a special identity card bearing the distinctive emblem. This card shall be water-resistant and of such size that it can be carried in the pocket. It shall be worded in the national language, shall mention at least the surname and first names, the date of birth, the rank and the service number of the bearer, and shall state in what capacity he is entitled to the protection of the present Convention. The card shall bear the photograph of the owner and also either his signature or his finger-prints or both. It shall be embossed with the stamp of the military authority.

The identity card shall be uniform throughout the same armed forces and, as far as possible, of a similar type in the armed forces of the High Contracting Parties. The Parties to the conflict may be guided by the model which is annexed, by way of example, to the present Convention. They shall inform each other, at the outbreak of hostilities, of the model they are using. Identity cards should be made out, if possible, at least in duplicate, one copy being kept by the home country.

In no circumstances may the said personnel be deprived of their insignia or identity cards nor of the right to wear the armlet. In case of loss, they shall be entitled to receive duplicates of the cards and to have the insignia replaced.

#### **ARTICLE 41**

The personnel designated in Article 25 shall wear, but only while carrying out medical duties, a white armlet bearing in its centre the distinctive sign in miniature; the armlet shall be issued and stamped by the military authority.

Military identity documents to be carried by this type of personnel shall specify what special training they have received, the temporary character of the duties they are engaged upon, and their authority for wearing the armlet.

#### **ARTICLE 42**

The distinctive flag of the Convention shall be hoisted only over such medical units and establishments as are entitled to be respected under the Convention, and only with the consent of the military authorities.

In mobile units, as in fixed establishments, it may be accompanied by the national flag of the Party to the conflict to which the unit or establishment belongs.

Nevertheless, medical units which have fallen into the hands of the enemy shall not fly any flag other than that of the Convention.

Parties to the conflict shall take the necessary steps, in so far as military considerations permit, to make the distinctive emblems indicating medical units and establishments clearly visible to the enemy land, air or naval forces, in order to obviate the possibility of any hostile action.

#### **ARTICLE 43**

The medical units belonging to neutral countries, which may have been authorized to lend their services to a belligerent under the conditions laid down in Article 27, shall fly, along with the flag of the Convention, the national flag of that belligerent, wherever the latter makes use of the faculty conferred on him by Article 42.

Subject to orders to the contrary by the responsible military authorities, they may on all occasions fly their national flag, even if they fall into the hands of the adverse Party.

#### **ARTICLE 44**

With the exception of the cases mentioned in the following paragraphs of the present Article, the emblem of the red cross on a white ground and the words "Red Cross" or "Geneva Cross" may not be employed, either in time of peace or in time of war, except to indicate or to protect the medical units and establishments, the personnel and material protected by the present Convention and other Conventions dealing with similar matters. The same shall apply to the emblems mentioned in Article 38, second paragraph, in respect of the countries which use them. The National Red Cross Societies and other societies designated in Article 26 shall have the right to use the distinctive emblem conferring the protection of the Convention only within the framework of the present paragraph.



Furthermore, National Red Cross (Red Crescent, Red Lion and Sun) Societies may, in time of peace, in accordance with their national legislation, make use of the name and emblem of the Red Cross for their other activities which are in conformity with the principles laid down by the International Red Cross Conferences. When those activities are carried out in time of war, the conditions for the use of the emblem shall be such that it cannot be considered as conferring the protection of the Convention; the emblem shall be comparatively small in size and may not be placed on armlets or on the roofs of buildings.

The international Red Cross organizations and their duly authorized personnel shall be permitted to make use, at all times, of the emblem of the red cross on a white ground.

As an exceptional measure, in conformity with national legislation and with the express permission of one of the National Red Cross (Red Crescent, Red Lion and Sun) Societies, the emblem of the Convention may be employed in time of peace to identify vehicles used as ambulances and to mark the position of aid stations exclusively assigned to the purpose of giving free treatment to the wounded or sick.

## **Chapter VIII. Execution of the Convention**

### **ARTICLE 45**

Each Party to the conflict, acting through its Commanders-in-Chief, shall ensure the detailed execution of the preceding Articles, and provide for unforeseen cases, in conformity with the general principles of the present Convention.

### **ARTICLE 46**

Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited.

### **ARTICLE 47**

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.

### **ARTICLE 48**

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

## **Chapter IX. Repression of Abuses and Infractions**

### **ARTICLE 49**

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following, of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

### **ARTICLE 50**

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

### **ARTICLE 51**

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

### **ARTICLE 52**

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

**ARTICLE 53**

The use by individuals, societies, firms or companies either public or private, other than those entitled thereto under the present Convention, of the emblem or the designation “Red Cross” or “Geneva Cross” or any sign or designation constituting an imitation thereof, whatever the object of such use, and irrespective of the date of its adoption, shall be prohibited at all times.

By reason of the tribute paid to Switzerland by the adoption of the reversed Federal colours, and of the confusion which may arise between the arms of Switzerland and the distinctive emblem of the Convention, the use by private individuals, societies or firms, of the arms of the Swiss Confederation, or of marks constituting an imitation thereof, whether as trademarks or commercial marks, or as parts of such marks, or for a purpose contrary to commercial honesty, or in circumstances capable of wounding Swiss national sentiment, shall be prohibited at all times.

Nevertheless, such High Contracting Parties as were not party to the Geneva Convention of 27 July 1929, may grant to prior users of the emblems, designations, signs or marks designated in the first paragraph, a time limit not to exceed three years from the coming into force of the present Convention to discontinue such use provided that the said use shall not be such as would appear, in time of war, to confer the protection of the Convention.

The prohibition laid down in the first paragraph of the present Article shall also apply, without effect on any rights acquired through prior use, to the emblems and marks mentioned in the second paragraph of Article 38.

**ARTICLE 54**

The High Contracting Parties shall, if their legislation is not already adequate, take measures necessary for the prevention and repression, at all times, of the abuses referred to under Article 53.

**Final Provisions****ARTICLE 55**

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

**ARTICLE 56**

The present Convention, which bears the date of this day, is open to signature until 12 February 1950, in the name of the Powers represented at the Conference which opened at Geneva on 21 April 1949; furthermore, by Powers not represented at that Conference but which are Parties to the Geneva Conventions of 1864, 1906 or 1929 for the Relief of the Wounded and Sick in Armies in the Field.

**ARTICLE 57**

The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

**ARTICLE 58**

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

**ARTICLE 59**

The present Convention replaces the Conventions of 22 August 1864, 6 July 1906, and 27 July 1929, in relations between the High Contracting Parties.

**ARTICLE 60**

From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

**ARTICLE 61**

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

**ARTICLE 62**

The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

**ARTICLE 63**

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

**ARTICLE 64**

The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

**IN WITNESS WHEREOF** the undersigned, having deposited their respective full powers, have signed the present Convention.

**DONE** at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the Signatory and Acceding States.

**Annex I.**  
**Draft Agreement Relating to Hospital Zones and Localities**

**ARTICLE 1**

Hospital zones shall be strictly observed for the persons named in Article 23 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field of 12 August 1949, and for the personnel entrusted with the organization and administration of these zones and localities, and with the care of the persons therein assembled.

Nevertheless, persons whose permanent residence is within such zones shall have the right to stay there.

**ARTICLE 2**

No persons residing, in whatever capacity, in a hospital zone shall perform any work, either within or without the zone, directly connected with military operations or the production of war material.

**ARTICLE 3**

The Power establishing a hospital zone shall take all necessary measures to prohibit access to all persons who have no right of residence or entry therein.

**ARTICLE 4**

Hospital zones shall fulfil the following conditions:

- (a) They shall comprise only a small part of the territory governed by the Power which has established them.
- (b) They shall be thinly populated in relation to the possibilities of accommodation.
- (c) They shall be far removed and free from all military objectives, or large industrial or administrative establishments.
- (d) They shall not be situated in areas which, according to every probability, may become important for the conduct of the war.

**ARTICLE 5**

Hospital zones shall be subject to the following obligations:

- (a) The lines of communication and means of transport which they possess shall not be used for the transport of military personnel or material, even in transit.
- (b) They shall in no case be defended by military means.

**ARTICLE 6**

Hospital zones shall be marked by means of red crosses (red crescents, red lions and suns) on a white background placed on the outer precincts and on the buildings. They may be similarly marked at night by means of appropriate illumination.

**ARTICLE 7**

The Powers shall communicate to all High Contracting Parties in peacetime or on the outbreak of hostilities, a list of the hospital zones in the territories governed by them. They shall also give notice of any new zones set up during hostilities.

As soon as the adverse Party has received the above-mentioned notification, the zone shall be regularly constituted.

If, however, the adverse Party considers that the conditions of the present agreement have not been fulfilled, it may refuse to recognize the zone by giving immediate notice thereof to the Party responsible for the said Zone, or may make its recognition of such zone dependent upon the institution of the control provided for in Article 8.

**ARTICLE 8**

Any Power having recognized one of several hospital zones instituted by the adverse Party shall be entitled to demand control by one or more Special Commissioners, for the purpose of ascertaining if the zones fulfil the conditions and obligations stipulated in the present agreement.

For this purpose, the members of the Special Commissions shall at all times have free access to the various zones and may even reside there permanently. They shall be given all facilities for their duties of inspection.

**ARTICLE 9**

Should the Special Commissions note any facts which they consider contrary to the stipulations of the present agreement, they shall at once draw the attention of the Power governing the said zone to these facts, and shall fix a time limit of five days within which the matter should be rectified. They shall duly notify the Power who has recognized the zone.

If, when the time limit has expired, the Power governing the zone has not complied with the warning, the adverse Party may declare that it is no longer bound by the present agreement in respect of the said zone.

**ARTICLE 10**

Any Power setting up one or more hospital zones and localities, and the adverse Parties to whom their existence has been notified, shall nominate or have nominated by neutral Powers, the persons who shall be members of the Special Commissions mentioned in Articles 8 and 9.

**ARTICLE 11**

In no circumstances may hospital zones be the object of attack. They shall be protected and respected at all times by the Parties to the conflict.

**ARTICLE 12**

In the case of occupation of a territory, the hospital zones therein shall continue to be respected and utilized as such.

Their purpose may, however, be modified by the Occupying Power, on condition that all measures are taken to ensure the safety of the persons accommodated.

#### **ARTICLE 13**

The present agreement shall also apply to localities which the Powers may utilize for the same purposes as hospital zones.



Annex II.  
Identity Card for Members of Medical and Religious Personnel  
attached to the Armed Forces

Front	<div><div><div></div><div></div></div><div><div>(Space reserved for the name of the country and military authority issuing this card)</div><div>IDENTITY CARD</div><div>for members of medical and religious personnel attached to the armed forces</div></div><div><div>Surname.....</div><div>First names.....</div><div>Date of birth.....</div><div>Rank.....</div><div>Army Number.....</div><div>The bearer of this card is protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, in his capacity as</div><div><div>Date of issue</div><div>Number of Card</div></div><div></div></div></div>	Reverse side	<div><div><div></div><div></div></div><div><div>Signature of bearer or finger-prints or both</div><div>Photo of bearer</div><div>Embossed stamp of military authority issuing card</div></div><div><div>Height</div><div>Eyes</div><div>Hair</div></div><div><div>Other distinguishing marks:</div><div></div><div></div><div></div><div></div><div></div></div></div>
-------	---	--------------	--

**Document No. 3, The Second Geneva Convention**

[Source: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949; available at [www.icrc.org](http://www.icrc.org)]

**Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea****Geneva, 12 August 1949****Preamble**

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the X<sup>th</sup> Hague Convention of October 18, 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906, have agreed as follows:

**Chapter I. General Provisions****ARTICLE 1**

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

**ARTICLE 2**

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

**ARTICLE 3**

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated

humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded, sick and shipwrecked shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

#### **ARTICLE 4**

In case of hostilities between land and naval forces of Parties to the conflict, the provisions of the present Convention shall apply only to forces on board ship.

Forces put ashore shall immediately become subject to the provisions of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.

#### **ARTICLE 5**

Neutral Powers shall apply by analogy the provisions of the present Convention to the wounded, sick and shipwrecked, and to members of the medical personnel and to chaplains of the armed forces of the Parties to the conflict received or interned in their territory, as well as to dead persons found.

#### **ARTICLE 6**

In addition to the agreements expressly provided for in Articles 10, 18, 31, 38, 39, 40, 43 and 53, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of wounded, sick and shipwrecked persons, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them.

Wounded, sick and shipwrecked persons, as well as medical personnel and chaplains, shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

#### **ARTICLE 7**

Wounded, sick and shipwrecked persons, as well as members of the medical personnel and chaplains, may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

#### **ARTICLE 8**

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties. Their activities shall only be restricted as an exceptional and temporary measure when this is rendered necessary by imperative military necessities.

#### **ARTICLE 9**

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded, sick and shipwrecked persons, medical personnel and chaplains, and for their relief.

#### **ARTICLE 10**

The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When wounded, sick and shipwrecked, or medical personnel and chaplains do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power, or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever, in the present Convention, mention is made of a Protecting Power, such mention also applies to substitute organizations in the sense of the present Article.

#### **ARTICLE 11**

In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, in particular of the authorities responsible for the wounded, sick and shipwrecked, medical personnel and chaplains, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict, a person belonging to a neutral Power or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

### **Chapter II. Wounded, Sick and Shipwrecked**

#### **ARTICLE 12**

Members of the armed forces and other persons mentioned in the following Article, who are at sea and who are wounded, sick or shipwrecked, shall be respected and protected in all circumstances, it being understood that the term "shipwreck" means shipwreck from any cause and includes forced landings at sea by or from aircraft.

Such persons shall be treated humanely and cared for by the Parties to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological

experiments; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.

Only urgent medical reasons will authorize priority in the order of treatment to be administered.

Women shall be treated with all consideration due to their sex.

#### **ARTICLE 13**

The present Convention shall apply to the wounded, sick and shipwrecked at sea belonging to the following categories:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany.
- (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
- (6) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

#### **ARTICLE 14**

All warships of a belligerent Party shall have the right to demand that the wounded, sick or shipwrecked on board military hospital ships, and hospital ships belonging to

relief societies or to private individuals, as well as merchant vessels, yachts and other craft shall be surrendered, whatever their nationality, provided that the wounded and sick are in a fit state to be moved and that the warship can provide adequate facilities for necessary medical treatment.

#### **ARTICLE 15**

If wounded, sick or shipwrecked persons are taken on board a neutral warship or a neutral military aircraft, it shall be ensured, where so required by international law, that they can take no further part in operations of war.

#### **ARTICLE 16**

Subject to the provisions of Article 12, the wounded, sick and shipwrecked of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them. The captor may decide, according to circumstances, whether it is expedient to hold them, or to convey them to a port in the captor's own country, to a neutral port or even to a port in enemy territory. In the last case, prisoners of war thus returned to their home country may not serve for the duration of the war.

#### **ARTICLE 17**

Wounded, sick or shipwrecked persons who are landed in neutral ports with the consent of the local authorities, shall, failing arrangements to the contrary between the neutral and the belligerent Powers, be so guarded by the neutral Power, where so required by international law, that the said persons cannot again take part in operations of war.

The costs of hospital accommodation and internment shall be borne by the Power on whom the wounded, sick or shipwrecked persons depend.

#### **ARTICLE 18**

After each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

Whenever circumstances permit, the Parties to the conflict shall conclude local arrangements for the removal of the wounded and sick by sea from a besieged or encircled area and for the passage of medical and religious personnel and equipment on their way to that area.

#### **ARTICLE 19**

The Parties to the conflict shall record as soon as possible, in respect of each shipwrecked, wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification. These records should if possible include:

- (a) designation of the Power on which he depends;
- (b) army, regimental, personal or serial number;

- (c) surname;
- (d) first name or names;
- (e) date of birth;
- (f) any other particulars shown on his identity card or disc;
- (g) date and place of capture or death;
- (h) particulars concerning wounds or illness, or cause of death.

As soon as possible the above-mentioned information shall be forwarded to the information bureau described in Article 122 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, which shall transmit this information to the Power on which these persons depend through the intermediary of the Protecting Power and of the Central Prisoners of War Agency.

Parties to the conflict shall prepare and forward to each other through the same bureau, certificates of death or duly authenticated lists of the dead. They shall likewise collect and forward through the same bureau one half of the double identity disc, or the identity disc itself if it is a single disc, last wills or other documents of importance to the next of kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead. These articles, together with unidentified articles, shall be sent in sealed packets, accompanied by statements giving all particulars necessary for the identification of the deceased owners, as well as by a complete list of the contents of the parcel.

#### **ARTICLE 20**

Parties to the conflict shall ensure that burial at sea of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. Where a double identity disc is used, one half of the disc should remain on the body.

If dead persons are landed, the provisions of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 shall be applicable.

#### **ARTICLE 21**

The Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick or shipwrecked persons, and to collect the dead.

Vessels of any kind responding to this appeal, and those having of their own accord collected wounded, sick or shipwrecked persons, shall enjoy special protection and facilities to carry out such assistance.

They may, in no case, be captured on account of any such transport; but, in the absence of any promise to the contrary, they shall remain liable to capture for any violations of neutrality they may have committed.



### **Chapter III. Hospital Ships**

#### **ARTICLE 22**

Military hospital ships, that is to say, ships built or equipped by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them, may in no circumstances be attacked or captured, but shall at all times be respected and protected, on condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed.

The characteristics which must appear in the notification shall include registered gross tonnage, the length from stem to stern and the number of masts and funnels.

#### **ARTICLE 23**

Establishments ashore entitled to the protection of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 shall be protected from bombardment or attack from the sea.

#### **ARTICLE 24**

Hospital ships utilized by National Red Cross Societies, by officially recognized relief societies or by private persons shall have the same protection as military hospital ships and shall be exempt from capture, if the Party to the conflict on which they depend has given them an official commission and in so far as the provisions of Article 22 concerning notification have been complied with.

These ships must be provided with certificates from the responsible authorities, stating that the vessels have been under their control while fitting out and on departure.

#### **ARTICLE 25**

Hospital ships utilized by National Red Cross Societies, officially recognized relief societies, or private persons of neutral countries shall have the same protection as military hospital ships and shall be exempt from capture, on condition that they have placed themselves under the control of one of the Parties to the conflict, with the previous consent of their own governments and with the authorization of the Party to the conflict concerned, in so far as the provisions of Article 22 concerning notification have been complied with.

#### **ARTICLE 26**

The protection mentioned in Articles 22, 24 and 25 shall apply to hospital ships of any tonnage and to their lifeboats, wherever they are operating. Nevertheless, to ensure the maximum comfort and security, the Parties to the conflict shall endeavour to utilize, for the transport of wounded, sick and shipwrecked over long distances and on the high seas, only hospital ships of over 2,000 tons gross.

#### **ARTICLE 27**

Under the same conditions as those provided for in Articles 22 and 24, small craft employed by the State or by the officially recognized lifeboat institutions for coastal

rescue operations, shall also be respected and protected, so far as operational requirements permit.

The same shall apply so far as possible to fixed coastal installations used exclusively by these craft for their humanitarian missions.

#### **ARTICLE 28**

Should fighting occur on board a warship, the sick-bays shall be respected and spared as far as possible. Sick-bays and their equipment shall remain subject to the laws of warfare, but may not be diverted from their purpose so long as they are required for the wounded and sick. Nevertheless, the commander into whose power they have fallen may, after ensuring the proper care of the wounded and sick who are accommodated therein, apply them to other purposes in case of urgent military necessity.

#### **ARTICLE 29**

Any hospital ship in a port which falls into the hands of the enemy shall be authorized to leave the said port.

#### **ARTICLE 30**

The vessels described in Articles 22, 24, 25 and 27 shall afford relief and assistance to the wounded, sick and shipwrecked without distinction of nationality.

The High Contracting Parties undertake not to use these vessels for any military purpose.

Such vessels shall in no wise hamper the movements of the combatants.

During and after an engagement, they will act at their own risk.

#### **ARTICLE 31**

The Parties to the conflict shall have the right to control and search the vessels mentioned in Articles 22, 24, 25 and 27. They can refuse assistance from these vessels, order them off, make them take a certain course, control the use of their wireless and other means of communication, and even detain them for a period not exceeding seven days from the time of interception, if the gravity of the circumstances so requires.

They may put a commissioner temporarily on board whose sole task shall be to see that orders given in virtue of the provisions of the preceding paragraph are carried out.

As far as possible, the Parties to the conflict shall enter in the log of the hospital ship in a language he can understand, the orders they have given the captain of the vessel.

Parties to the conflict may, either unilaterally or by particular agreements, put on board their ships neutral observers who shall verify the strict observation of the provisions contained in the present Convention.

#### **ARTICLE 32**

Vessels described in Articles 22, 24, 25 and 27 are not classed as warships as regards their stay in a neutral port.

**ARTICLE 33**

Merchant vessels which have been transformed into hospital ships cannot be put to any other use throughout the duration of hostilities.

**ARTICLE 34**

The protection to which hospital ships and sick-bays are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming in all appropriate cases a reasonable time limit, and after such warning has remained unheeded.

In particular, hospital ships may not possess or use a secret code for their wireless or other means of communication.

**ARTICLE 35**

The following conditions shall not be considered as depriving hospital ships or sick-bays of vessels of the protection due to them:

- (1) The fact that the crews of ships or sick-bays are armed for the maintenance of order, for their own defence or that of the sick and wounded.
- (2) The presence on board of apparatus exclusively intended to facilitate navigation or communication.
- (3) The discovery on board hospital ships or in sick-bays of portable arms and ammunition taken from the wounded, sick and shipwrecked and not yet handed to the proper service.
- (4) The fact that the humanitarian activities of hospital ships and sick-bays of vessels or of the crews extend to the care of wounded, sick or shipwrecked civilians.
- (5) The transport of equipment and of personnel intended exclusively for medical duties, over and above the normal requirements.

**Chapter IV. Personnel****ARTICLE 36**

The religious, medical and hospital personnel of hospital ships and their crews shall be respected and protected; they may not be captured during the time they are in the service of the hospital ship, whether or not there are wounded and sick on board.

**ARTICLE 37**

The religious, medical and hospital personnel assigned to the medical or spiritual care of the persons designated in Articles 12 and 13 shall, if they fall into the hands of the enemy, be respected and protected; they may continue to carry out their duties as long as this is necessary for the care of the wounded and sick. They shall afterwards be sent back as soon as the Commander-in-Chief, under whose authority they are, considers it practicable. They may take with them, on leaving the ship, their personal property.

If, however, it prove necessary to retain some of this personnel owing to the medical or spiritual needs of prisoners of war, everything possible shall be done for their earliest possible landing.

Retained personnel shall be subject, on landing, to the provisions of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.

## **Chapter V. Medical Transports**

### **ARTICLE 38**

Ships chartered for that purpose shall be authorized to transport equipment exclusively intended for the treatment of wounded and sick members of armed forces or for the prevention of disease, provided that the particulars regarding their voyage have been notified to the adverse Power and approved by the latter. The adverse Power shall preserve the right to board the carrier ships, but not to capture them or seize the equipment carried.

By agreement amongst the Parties to the conflict, neutral observers may be placed on board such ships to verify the equipment carried. For this purpose, free access to the equipment shall be given.

### **ARTICLE 39**

Medical aircraft, that is to say, aircraft exclusively employed for the removal of the wounded, sick and shipwrecked, and for the transport of medical personnel and equipment, may not be the object of attack, but shall be respected by the Parties to the conflict, while flying at heights, at times and on routes specifically agreed upon between the Parties to the conflict concerned.

They shall be clearly marked with the distinctive emblem prescribed in Article 41, together with their national colours, on their lower, upper and lateral surfaces. They shall be provided with any other markings or means of identification which may be agreed upon between the Parties to the conflict upon the outbreak or during the course of hostilities.

Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.

Medical aircraft shall obey every summons to alight on land or water. In the event of having thus to alight, the aircraft with its occupants may continue its flight after examination, if any.

In the event of alighting involuntarily on land or water in enemy or enemy-occupied territory, the wounded, sick and shipwrecked, as well as the crew of the aircraft shall be prisoners of war. The medical personnel shall be treated according to Articles 36 and 37.

### **ARTICLE 40**

Subject to the provisions of the second paragraph, medical aircraft of Parties to the conflict may fly over the territory of neutral Powers, land thereon in case of necessity, or use it as a port of call. They shall give neutral Powers prior notice of their passage

over the said territory, and obey every summons to alight, on land or water. They will be immune from attack only when flying on routes, at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Power concerned.

The neutral Powers may, however, place conditions or restrictions on the passage or landing of medical aircraft on their territory. Such possible conditions or restrictions shall be applied equally to all Parties to the conflict.

Unless otherwise agreed between the neutral Powers and the Parties to the conflict, the wounded, sick or shipwrecked who are disembarked with the consent of the local authorities on neutral territory by medical aircraft shall be detained by the neutral Power, where so required by international law, in such a manner that they cannot again take part in operations of war. The cost of their accommodation and internment shall be borne by the Power on which they depend.

## **Chapter VI. The Distinctive Emblem**

### **ARTICLE 41**

Under the direction of the competent military authority, the emblem of the red cross on a white ground shall be displayed on the flags, armlets and on all equipment employed in the Medical Service.

Nevertheless, in the case of countries which already use as emblem, in place of the red cross, the red crescent or the red lion and sun on a white ground, these emblems are also recognized by the terms of the present Convention.

### **ARTICLE 42**

The personnel designated in Articles 36 and 37 shall wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority.

Such personnel, in addition to wearing the identity disc mentioned in Article 19, shall also carry a special identity card bearing the distinctive emblem. This card shall be water-resistant and of such size that it can be carried in the pocket. It shall be worded in the national language, shall mention at least the surname and first names, the date of birth, the rank and the service number of the bearer, and shall state in what capacity he is entitled to the protection of the present Convention. The card shall bear the photograph of the owner and also either his signature or his fingerprints or both. It shall be embossed with the stamp of the military authority.

The identity card shall be uniform throughout the same armed forces and, as far as possible, of a similar type in the armed forces of the High Contracting Parties. The Parties to the conflict may be guided by the model which is annexed, by way of example, to the present Convention. They shall inform each other, at the outbreak of hostilities, of the model they are using. Identity cards should be made out, if possible, at least in duplicate, one copy being kept by the home country.

In no circumstances may the said personnel be deprived of their insignia or identity cards nor of the right to wear the armband. In case of loss they shall be entitled to receive duplicates of the cards and to have the insignia replaced.

#### **ARTICLE 43**

The ships designated in Articles 22, 24, 25 and 27 shall be distinctively marked as follows:

- (a) All exterior surfaces shall be white.
- (b) One or more dark red crosses, as large as possible, shall be painted and displayed on each side of the hull and on the horizontal surfaces, so placed as to afford the greatest possible visibility from the sea and from the air.

All hospital ships shall make themselves known by hoisting their national flag and further, if they belong to a neutral state, the flag of the Party to the conflict whose direction they have accepted. A white flag with a red cross shall be flown at the mainmast as high as possible.

Lifeboats of hospital ships, coastal lifeboats and all small craft used by the Medical Service shall be painted white with dark red crosses prominently displayed and shall, in general, comply with the identification system prescribed above for hospital ships.

The above-mentioned ships and craft, which may wish to ensure by night and in times of reduced visibility the protection to which they are entitled, must, subject to the assent of the Party to the conflict under whose power they are, take the necessary measures to render their painting and distinctive emblems sufficiently apparent.

Hospital ships which, in accordance with Article 31, are provisionally detained by the enemy, must haul down the flag of the Party to the conflict in whose service they are or whose direction they have accepted.

Coastal lifeboats, if they continue to operate with the consent of the Occupying Power from a base which is occupied, may be allowed, when away from their base, to continue to fly their own national colours along with a flag carrying a red cross on a white ground, subject to prior notification to all the Parties to the conflict concerned.

All the provisions in this Article relating to the red cross shall apply equally to the other emblems mentioned in Article 41.

Parties to the conflict shall at all times endeavour to conclude mutual agreements in order to use the most modern methods available to facilitate the identification of hospital ships.

#### **ARTICLE 44**

The distinguishing signs referred to in Article 43 can only be used, whether in time of peace or war, for indicating or protecting the ships therein mentioned, except as may be provided in any other international Convention or by agreement between all the Parties to the conflict concerned.

**ARTICLE 45**

The High Contracting Parties shall, if their legislation is not already adequate, take the measures necessary for the prevention and repression, at all times, of any abuse of the distinctive signs provided for under Article 43.

**Chapter VII. Execution of the Convention****ARTICLE 46**

Each Party to the conflict, acting through its Commanders-in-Chief, shall ensure the detailed execution of the preceding Articles and provide for unforeseen cases, in conformity with the general principles of the present Convention.

**ARTICLE 47**

Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited.

**ARTICLE 48**

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.

**ARTICLE 49**

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

**Chapter VIII. Repression of Abuses and Infractions****ARTICLE 50**

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

#### **ARTICLE 51**

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

#### **ARTICLE 52**

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

#### **ARTICLE 53**

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire, who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

### **Final Provisions**

#### **ARTICLE 54**

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

#### **ARTICLE 55**

The present Convention, which bears the date of this day, is open to signature until February 12, 1950, in the name of the Powers represented at the Conference which opened at Geneva on April 21, 1949; furthermore, by Powers not represented at that Conference, but which are parties to the X<sup>th</sup> Hague Convention of October 13, 1907 for the adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906, or to the Geneva Conventions of 1864, 1906 or 1929 for the Relief of the Wounded and Sick in Armies in the Field.



**ARTICLE 56**

The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

**ARTICLE 57**

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

**ARTICLE 58**

The present Convention replaces the X<sup>th</sup> Hague Convention of October 18, 1907, for the adaptation to Maritime Warfare of the principles of the Geneva Convention of 1906, in relations between the High Contracting Parties.

**ARTICLE 59**

From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

**ARTICLE 60**

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

**ARTICLE 61**

The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

**ARTICLE 62**

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.



#### **ARTICLE 63**

The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

**IN WITNESS WHEREOF** the undersigned, having deposited their respective full powers, have signed the present Convention.

**DONE** at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the signatory and acceding States.

**Annex**  
**Identity Card for Members of Medical and Religious Personnel attached to the**  
**Armed Forces at Sea**

Front	Reverse side						
<div style="display: flex; justify-content: space-between; align-items: center;"><div style="text-align: center;"> (Space reserved for the name of the country and military authority issuing this card)</div><div style="text-align: center;"></div></div> <div style="text-align: center; margin-top: 20px;"><h2 style="margin: 0;">IDENTITY CARD</h2><p style="margin: 0;">for members of medical and religious personnel attached to the armed forces at sea</p></div> <div style="margin-top: 20px;"><p>Surname.....</p><p>First names .....</p><p>Date of birth .....</p><p>Rank .....</p><p>Army Number.....</p><p>The bearer of this card is protected by the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, in his capacity as</p><p>.....</p><div style="display: flex; justify-content: space-between; margin-top: 20px;"><div>Date of issue</div><div>Number of Card</div></div><p>.....</p></div>	<div style="display: flex; justify-content: space-around; align-items: center; margin-bottom: 20px;"><div style="border: 1px dashed black; width: 150px; height: 80px; text-align: center; line-height: 80px;">Photo of bearer</div><div style="border: 1px dashed black; border-radius: 50%; width: 100px; height: 100px; text-align: center; line-height: 100px;">Embossed stamp of military authority issuing card</div></div> <div style="display: flex; justify-content: space-between; margin-bottom: 20px;"><div style="width: 45%; text-align: center;">Signature of bearer or finger-prints or both</div></div> <table border="1" style="width: 100%; border-collapse: collapse; margin-bottom: 20px;"><tr><td style="width: 33%; text-align: center; vertical-align: middle;">Height</td><td style="width: 33%; text-align: center; vertical-align: middle;">Eyes</td><td style="width: 33%; text-align: center; vertical-align: middle;">Hair</td></tr><tr><td style="height: 40px;"></td><td style="height: 40px;"></td><td style="height: 40px;"></td></tr></table> <p>Other distinguishing marks:</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>	Height	Eyes	Hair			
Height	Eyes	Hair					

**Document No. 4, The Third Geneva Convention**

[Source: Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949; available at [www.icrc.org](http://www.icrc.org)]

**Convention (III) relative to the Treatment of Prisoners of War**

**Geneva, 12 August 1949**

**Preamble**

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Convention concluded at Geneva on July 27, 1929, relative to the Treatment of Prisoners of War, have agreed as follows:

**PART I. GENERAL PROVISIONS****ARTICLE 1**

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

**ARTICLE 2**

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

**ARTICLE 3**

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

#### **ARTICLE 4**

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the

welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

- (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

- (1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.
- (2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

#### ARTICLE 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

**ARTICLE 6**

In addition to the agreements expressly provided for in Articles 10, 23, 28, 33, 60, 65, 66, 67, 72, 73, 75, 109, 110, 118, 119, 122 and 132, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the rights which it confers upon them.

Prisoners of war shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

**ARTICLE 7**

Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

**ARTICLE 8**

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

**ARTICLE 9**

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.

**ARTICLE 10**

The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When prisoners of war do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an

organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article.

#### **ARTICLE 11**

In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for prisoners of war, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

### **PART II. GENERAL PROTECTION OF PRISONERS OF WAR**

#### **ARTICLE 12**

Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.



Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

#### **ARTICLE 13**

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

Measures of reprisal against prisoners of war are prohibited.

#### **ARTICLE 14**

Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.

Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires.

#### **ARTICLE 15**

The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health.

#### **ARTICLE 16**

Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.

## **PART III. CAPTIVITY**

### **Section 1. Beginning of Captivity**

#### **ARTICLE 17**

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.

If he wilfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.

Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth. The identity card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the Party to the conflict may wish to add concerning persons belonging to its armed forces. As far as possible the card shall measure 6.5 x 10 cm. and shall be issued in duplicate. The identity card shall be shown by the prisoner of war upon demand, but may in no case be taken away from him.

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

Prisoners of war who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such prisoners shall be established by all possible means, subject to the provisions of the preceding paragraph.

The questioning of prisoners of war shall be carried out in a language which they understand.

#### **ARTICLE 18**

All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment.

At no time should prisoners of war be without identity documents. The Detaining Power shall supply such documents to prisoners of war who possess none.

Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.

Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after the amount and particulars of the owner have

been recorded in a special register and an itemized receipt has been given, legibly inscribed with the name, rank and unit of the person issuing the said receipt. Sums in the currency of the Detaining Power, or which are changed into such currency at the prisoner's request, shall be placed to the credit of the prisoner's account as provided in Article 64.

The Detaining Power may withdraw articles of value from prisoners of war only for reasons of security; when such articles are withdrawn, the procedure laid down for sums of money impounded shall apply.

Such objects, likewise sums taken away in any currency other than that of the Detaining Power and the conversion of which has not been asked for by the owners, shall be kept in the custody of the Detaining Power and shall be returned in their initial shape to prisoners of war at the end of their captivity.

#### **ARTICLE 19**

Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.

Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone.

Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone.

#### **ARTICLE 20**

The evacuation of prisoners of war shall always be effected humanely and in conditions similar to those for the forces of the Detaining Power in their changes of station.

The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention. The Detaining Power shall take all suitable precautions to ensure their safety during evacuation, and shall establish as soon as possible a list of the prisoners of war who are evacuated.

If prisoners of war must, during evacuation, pass through transit camps, their stay in such camps shall be as brief as possible.

## **Section II. Internment of Prisoners of War**

### **Chapter I. General Observations**

#### **ARTICLE 21**

The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to

safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend. Such measures shall be taken particularly in cases where this may contribute to the improvement of their state of health. No prisoner of war shall be compelled to accept liberty on parole or promise.

Upon the outbreak of hostilities, each Party to the conflict shall notify the adverse Party of the laws and regulations allowing or forbidding its own nationals to accept liberty on parole or promise. Prisoners of war who are paroled or who have given their promise in conformity with the laws and regulations so notified, are bound on their personal honour scrupulously to fulfil, both towards the Power on which they depend and towards the Power which has captured them, the engagements of their paroles or promises. In such cases, the Power on which they depend is bound neither to require nor to accept from them any service incompatible with the parole or promise given.

#### **ARTICLE 22**

Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.

Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate.

The Detaining Power shall assemble prisoners of war in camps or camp compounds according to their nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.

#### **ARTICLE 23**

No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.

Prisoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population. With the exception of those engaged in the protection of their quarters against the aforesaid hazards, they may enter such shelters as soon as possible after the giving of the alarm. Any other protective measure taken in favour of the population shall also apply to them.

Detaining Powers shall give the Powers concerned, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of prisoner of war camps.

Whenever military considerations permit, prisoner of war camps shall be indicated in the day-time by the letters PW or PG, placed so as to be clearly visible from the air. The Powers concerned may, however, agree upon any other system of marking. Only prisoner of war camps shall be marked as such.

**ARTICLE 24**

Transit or screening camps of a permanent kind shall be fitted out under conditions similar to those described in the present Section, and the prisoners therein shall have the same treatment as in other camps.

**Chapter II. Quarters, Food and Clothing of Prisoners of War****ARTICLE 25**

Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.

The foregoing provisions shall apply in particular to the dormitories of prisoners of war as regards both total surface and minimum cubic space, and the general installations, bedding and blankets.

The premises provided for the use of prisoners of war individually or collectively, shall be entirely protected from dampness and adequately heated and lighted, in particular between dusk and lights out. All precautions must be taken against the danger of fire.

In any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them.

**ARTICLE 26**

The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners.

The Detaining Power shall supply prisoners of war who work with such additional rations as are necessary for the labour on which they are employed.

Sufficient drinking water shall be supplied to prisoners of war. The use of tobacco shall be permitted.

Prisoners of war shall, as far as possible, be associated with the preparation of their meals; they may be employed for that purpose in the kitchens. Furthermore, they shall be given the means of preparing, themselves, the additional food in their possession.

Adequate premises shall be provided for messing.

Collective disciplinary measures affecting food are prohibited.

**ARTICLE 27**

Clothing, underwear and footwear shall be supplied to prisoners of war in sufficient quantities by the Detaining Power, which shall make allowance for the climate of the region where the prisoners are detained. Uniforms of enemy armed forces captured by the Detaining Power should, if suitable for the climate, be made available to clothe prisoners of war.

The regular replacement and repair of the above articles shall be assured by the Detaining Power. In addition, prisoners of war who work shall receive appropriate clothing, wherever the nature of the work demands.

#### **ARTICLE 28**

Canteens shall be installed in all camps, where prisoners of war may procure foodstuffs, soap and tobacco and ordinary articles in daily use. The tariff shall never be in excess of local market prices.

The profits made by camp canteens shall be used for the benefit of the prisoners; a special fund shall be created for this purpose. The prisoners' representative shall have the right to collaborate in the management of the canteen and of this fund.

When a camp is closed down, the credit balance of the special fund shall be handed to an international welfare organization, to be employed for the benefit of prisoners of war of the same nationality as those who have contributed to the fund. In case of a general repatriation, such profits shall be kept by the Detaining Power, subject to any agreement to the contrary between the Powers concerned.

### **Chapter III. Hygiene and Medical Attention**

#### **ARTICLE 29**

The Detaining Power shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics.

Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them.

Also, apart from the baths and showers with which the camps shall be furnished prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose.

#### **ARTICLE 30**

Every camp shall have an adequate infirmary where prisoners of war may have the attention they require, as well as appropriate diet. Isolation wards shall, if necessary, be set aside for cases of contagious or mental disease.

Prisoners of war suffering from serious disease, or whose condition necessitates special treatment, a surgical operation or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given, even if their repatriation is contemplated in the near future. Special facilities shall be afforded for the care to be given to the disabled, in particular to the blind, and for their rehabilitation, pending repatriation.

Prisoners of war shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality.

Prisoners of war may not be prevented from presenting themselves to the medical authorities for examination. The detaining authorities shall, upon request, issue to every prisoner who has undergone treatment, an official certificate indicating the nature of his illness or injury, and the duration and kind of treatment received. A duplicate of this certificate shall be forwarded to the Central Prisoners of War Agency.

The costs of treatment, including those of any apparatus necessary for the maintenance of prisoners of war in good health, particularly dentures and other artificial appliances, and spectacles, shall be borne by the Detaining Power.

#### **ARTICLE 31**

Medical inspections of prisoners of war shall be held at least once a month. They shall include the checking and the recording of the weight of each prisoner of war. Their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of prisoners and to detect contagious diseases, especially tuberculosis, malaria and venereal disease. For this purpose the most efficient methods available shall be employed, e.g. periodic mass miniature radiography for the early detection of tuberculosis.

#### **ARTICLE 32**

Prisoners of war who, though not attached to the medical service of their armed forces, are physicians, surgeons, dentists, nurses or medical orderlies, may be required by the Detaining Power to exercise their medical functions in the interests of prisoners of war dependent on the same Power. In that case they shall continue to be prisoners of war, but shall receive the same treatment as corresponding medical personnel retained by the Detaining Power. They shall be exempted from any other work under Article 49.

### **Chapter IV. Medical Personnel and Chaplains Retained to Assist Prisoners of War**

#### **ARTICLE 33**

Members of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of the present Convention, and shall also be granted all facilities necessary to provide for the medical care of, and religious ministrations to prisoners of war.

They shall continue to exercise their medical and spiritual functions for the benefit of prisoners of war, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the Detaining Power and under the control of its competent services, in accordance with their professional etiquette. They shall also benefit by the following facilities in the exercise of their medical or spiritual functions:

- (a) They shall be authorized to visit periodically prisoners of war situated in working detachments or in hospitals outside the camp. For this purpose, the Detaining Power shall place at their disposal the necessary means of transport.

- (b) The senior medical officer in each camp shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel. For this purpose, Parties to the conflict shall agree at the outbreak of hostilities on the subject of the corresponding ranks of the medical personnel, including that of societies mentioned in Article 26 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949. This senior medical officer, as well as chaplains, shall have the right to deal with the competent authorities of the camp on all questions relating to their duties. Such authorities shall afford them all necessary facilities for correspondence relating to these questions.
- (c) Although they shall be subject to the internal discipline of the camp in which they are retained, such personnel may not be compelled to carry out any work other than that concerned with their medical or religious duties.

During hostilities, the Parties to the conflict shall agree concerning the possible relief of retained personnel and shall settle the procedure to be followed.

None of the preceding provisions shall relieve the Detaining Power of its obligations with regard to prisoners of war from the medical or spiritual point of view.

## **Chapter V. Religious, Intellectual and Physical Activities**

### **ARTICLE 34**

Prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities.

Adequate premises shall be provided where religious services may be held.

### **ARTICLE 35**

Chaplains who fall into the hands of the enemy Power and who remain or are retained with a view to assisting prisoners of war, shall be allowed to minister to them and to exercise freely their ministry amongst prisoners of war of the same religion, in accordance with their religious conscience. They shall be allocated among the various camps and labour detachments containing prisoners of war belonging to the same forces, speaking the same language or practising the same religion. They shall enjoy the necessary facilities, including the means of transport provided for in Article 33, for visiting the prisoners of war outside their camp. They shall be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Letters and cards which they may send for this purpose shall be in addition to the quota provided for in Article 71.

### **ARTICLE 36**

Prisoners of war who are ministers of religion, without having officiated as chaplains to their own forces, shall be at liberty, whatever their denomination, to minister freely to the members of their community. For this purpose, they shall receive the same



treatment as the chaplains retained by the Detaining Power. They shall not be obliged to do any other work.

#### **ARTICLE 37**

When prisoners of war have not the assistance of a retained chaplain or of a prisoner of war minister of their faith, a minister belonging to the prisoners' or a similar denomination, or in his absence a qualified layman, if such a course is feasible from a confessional point of view, shall be appointed, at the request of the prisoners concerned, to fill this office. This appointment, subject to the approval of the Detaining Power, shall take place with the agreement of the community of prisoners concerned and, wherever necessary, with the approval of the local religious authorities of the same faith. The person thus appointed shall comply with all regulations established by the Detaining Power in the interests of discipline and military security.

#### **ARTICLE 38**

While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment.

Prisoners shall have opportunities for taking physical exercise, including sports and games, and for being out of doors. Sufficient open spaces shall be provided for this purpose in all camps.

### **Chapter VI. Discipline**

#### **ARTICLE 39**

Every prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power. Such officer shall have in his possession a copy of the present Convention; he shall ensure that its provisions are known to the camp staff and the guard and shall be responsible, under the direction of his government, for its application.

Prisoners of war, with the exception of officers, must salute and show to all officers of the Detaining Power the external marks of respect provided for by the regulations applying in their own forces.

Officer prisoners of war are bound to salute only officers of a higher rank of the Detaining Power; they must, however, salute the camp commander regardless of his rank.

#### **ARTICLE 40**

The wearing of badges of rank and nationality, as well as of decorations, shall be permitted.

#### **ARTICLE 41**

In every camp the text of the present Convention and its Annexes and the contents of any special agreement provided for in Article 6, shall be posted, in the prisoners' own

language, in places where all may read them. Copies shall be supplied, on request, to the prisoners who cannot have access to the copy which has been posted.

Regulations, orders, notices and publications of every kind relating to the conduct of prisoners of war shall be issued to them in a language which they understand. Such regulations, orders and publications shall be posted in the manner described above and copies shall be handed to the prisoners' representative. Every order and command addressed to prisoners of war individually must likewise be given in a language which they understand.

#### **ARTICLE 42**

The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.

### **Chapter VII. Rank of Prisoners of War**

#### **ARTICLE 43**

Upon the outbreak of hostilities, the Parties to the conflict shall communicate to one another the titles and ranks of all the persons mentioned in Article 4 of the present Convention, in order to ensure equality of treatment between prisoners of equivalent rank. Titles and ranks which are subsequently created shall form the subject of similar communications.

The Detaining Power shall recognize promotions in rank which have been accorded to prisoners of war and which have been duly notified by the Power on which these prisoners depend.

#### **ARTICLE 44**

Officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.

In order to ensure service in officers' camps, other ranks of the same armed forces who, as far as possible, speak the same language, shall be assigned in sufficient numbers, account being taken of the rank of officers and prisoners of equivalent status. Such orderlies shall not be required to perform any other work.

Supervision of the mess by the officers themselves shall be facilitated in every way.

#### **ARTICLE 45**

Prisoners of war other than officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.

Supervision of the mess by the prisoners themselves shall be facilitated in every way.

## **Chapter VIII. Transfer of Prisoners of War after their Arrival in Camp**

### **ARTICLE 46**

The Detaining Power, when deciding upon the transfer of prisoners of war, shall take into account the interests of the prisoners themselves, more especially so as not to increase the difficulty of their repatriation.

The transfer of prisoners of war shall always be effected humanely and in conditions not less favourable than those under which the forces of the Detaining Power are transferred. Account shall always be taken of the climatic conditions to which the prisoners of war are accustomed and the conditions of transfer shall in no case be prejudicial to their health.

The Detaining Power shall supply prisoners of war during transfer with sufficient food and drinking water to keep them in good health, likewise with the necessary clothing, shelter and medical attention. The Detaining Power shall take adequate precautions especially in case of transport by sea or by air, to ensure their safety during transfer, and shall draw up a complete list of all transferred prisoners before their departure.

### **ARTICLE 47**

Sick or wounded prisoners of war shall not be transferred as long as their recovery may be endangered by the journey, unless their safety imperatively demands it.

If the combat zone draws closer to a camp, the prisoners of war in the said camp shall not be transferred unless their transfer can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining on the spot than by being transferred.

### **ARTICLE 48**

In the event of transfer, prisoners of war shall be officially advised of their departure and of their new postal address. Such notifications shall be given in time for them to pack their luggage and inform their next of kin.

They shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited, if the conditions of transfer so require, to what each prisoner can reasonably carry, which shall in no case be more than twenty-five kilograms per head.

Mail and parcels addressed to their former camp shall be forwarded to them without delay. The camp commander shall take, in agreement with the prisoners' representative, any measures needed to ensure the transport of the prisoners' community property and of the luggage they are unable to take with them in consequence of restrictions imposed by virtue of the second paragraph of this Article.

The costs of transfers shall be borne by the Detaining Power.

### **Section III. Labour of Prisoners of War**

#### **ARTICLE 49**

The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude, and with a view particularly to maintaining them in a good state of physical and mental health.

Non-commissioned officers who are prisoners of war shall only be required to do supervisory work. Those not so required may ask for other suitable work which shall, so far as possible, be found for them.

If officers or persons of equivalent status ask for suitable work, it shall be found for them, so far as possible, but they may in no circumstances be compelled to work.

#### **ARTICLE 50**

Besides work connected with camp administration, installation or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes:

- (a) agriculture;
- (b) industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose;
- (c) transport and handling of stores which are not military in character or purpose;
- (d) commercial business, and arts and crafts;
- (e) domestic service;
- (f) public utility services having no military character or purpose.

Should the above provisions be infringed, prisoners of war shall be allowed to exercise their right of complaint, in conformity with Article 78.

#### **ARTICLE 51**

Prisoners of war must be granted suitable working conditions, especially as regards accommodation, food, clothing and equipment; such conditions shall not be inferior to those enjoyed by nationals of the Detaining Power employed in similar work; account shall also be taken of climatic conditions.

The Detaining Power, in utilizing the labour of prisoners of war, shall ensure that in areas in which such prisoners are employed, the national legislation concerning the protection of labour, and, more particularly, the regulations for the safety of workers, are duly applied.

Prisoners of war shall receive training and be provided with the means of protection suitable to the work they will have to do and similar to those accorded to the nationals of the Detaining Power. Subject to the provisions of Article 52, prisoners may be submitted to the normal risks run by these civilian workers.

Conditions of labour shall in no case be rendered more arduous by disciplinary measures.

**ARTICLE 52**

Unless he be a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature.

No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces.

The removal of mines or similar devices shall be considered as dangerous labour.

**ARTICLE 53**

The duration of the daily labour of prisoners of war, including the time of the journey to and fro, shall not be excessive, and must in no case exceed that permitted for civilian workers in the district, who are nationals of the Detaining Power and employed on the same work.

Prisoners of war must be allowed, in the middle of the day's work, a rest of not less than one hour. This rest will be the same as that to which workers of the Detaining Power are entitled, if the latter is of longer duration. They shall be allowed in addition a rest of twenty-four consecutive hours every week, preferably on Sunday or the day of rest in their country of origin. Furthermore, every prisoner who has worked for one year shall be granted a rest of eight consecutive days, during which his working pay shall be paid him.

If methods of labour such as piece work are employed, the length of the working period shall not be rendered excessive thereby.

**ARTICLE 54**

The working pay due to prisoners of war shall be fixed in accordance with the provisions of Article 62 of the present Convention.

Prisoners of war who sustain accidents in connection with work, or who contract a disease in the course, or in consequence of their work, shall receive all the care their condition may require. The Detaining Power shall furthermore deliver to such prisoners of war a medical certificate enabling them to submit their claims to the Power on which they depend, and shall send a duplicate to the Central Prisoners of War Agency provided for in Article 123.

**ARTICLE 55**

The fitness of prisoners of war for work shall be periodically verified by medical examinations at least once a month. The examinations shall have particular regard to the nature of the work which prisoners of war are required to do.

If any prisoner of war considers himself incapable of working, he shall be permitted to appear before the medical authorities of his camp. Physicians or surgeons may recommend that the prisoners who are, in their opinion, unfit for work, be exempted therefrom.

**ARTICLE 56**

The organization and administration of labour detachments shall be similar to those of prisoner of war camps.

Every labour detachment shall remain under the control of and administratively part of a prisoner of war camp. The military authorities and the commander of the said camp shall be responsible, under the direction of their government, for the observance of the provisions of the present Convention in labour detachments.

The camp commander shall keep an up-to-date record of the labour detachments dependent on his camp, and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross, or of other agencies giving relief to prisoners of war, who may visit the camp.

**ARTICLE 57**

The treatment of prisoners of war who work for private persons, even if the latter are responsible for guarding and protecting them, shall not be inferior to that which is provided for by the present Convention. The Detaining Power, the military authorities and the commander of the camp to which such prisoners belong shall be entirely responsible for the maintenance, care, treatment, and payment of the working pay of such prisoners of war.

Such prisoners of war shall have the right to remain in communication with the prisoners' representatives in the camps on which they depend.

**Section IV. Financial Resources of Prisoners of War****ARTICLE 58**

Upon the outbreak of hostilities, and pending an arrangement on this matter with the Protecting Power, the Detaining Power may determine the maximum amount of money in cash or in any similar form, that prisoners may have in their possession. Any amount in excess, which was properly in their possession and which has been taken or withheld from them, shall be placed to their account, together with any monies deposited by them, and shall not be converted into any other currency without their consent.

If prisoners of war are permitted to purchase services or commodities outside the camp against payment in cash, such payments shall be made by the prisoner himself or by the camp administration who will charge them to the accounts of the prisoners concerned. The Detaining Power will establish the necessary rules in this respect.

**ARTICLE 59**

Cash which was taken from prisoners of war, in accordance with Article 18, at the time of their capture, and which is in the currency of the Detaining Power, shall be placed to their separate accounts, in accordance with the provisions of Article 64 of the present Section.

The amounts, in the currency of the Detaining Power, due to the conversion of sums in other currencies that are taken from the prisoners of war at the same time, shall also be credited to their separate accounts.

**ARTICLE 60**

The Detaining Power shall grant all prisoners of war a monthly advance of pay, the amount of which shall be fixed by conversion, into the currency of the said Power, of the following amounts:

- Category I : Prisoners ranking below sergeants: eight Swiss francs.
- Category II : Sergeants and other non-commissioned officers, or prisoners of equivalent rank: twelve Swiss francs.
- Category III : Warrant officers and commissioned officers below the rank of major or prisoners of equivalent rank: fifty Swiss francs.
- Category IV : Majors, lieutenant-colonels, colonels or prisoners of equivalent rank: sixty Swiss francs.
- Category V : General officers or prisoners of war of equivalent rank: seventy-five Swiss francs.

However, the Parties to the conflict concerned may by special agreement modify the amount of advances of pay due to prisoners of the preceding categories.

Furthermore, if the amounts indicated in the first paragraph above would be unduly high compared with the pay of the Detaining Power's armed forces or would, for any reason, seriously embarrass the Detaining Power, then, pending the conclusion of a special agreement with the Power on which the prisoners depend to vary the amounts indicated above, the Detaining Power:

- (a) shall continue to credit the accounts of the prisoners with the amounts indicated in the first paragraph above;
- (b) may temporarily limit the amount made available from these advances of pay to prisoners of war for their own use, to sums which are reasonable, but which, for Category I, shall never be inferior to the amount that the Detaining Power gives to the members of its own armed forces.

The reasons for any limitations will be given without delay to the Protecting Power.

**ARTICLE 61**

The Detaining Power shall accept for distribution as supplementary pay to prisoners of war sums which the Power on which the prisoners depend may forward to them, on condition that the sums to be paid shall be the same for each prisoner of the same category, shall be payable to all prisoners of that category depending on that Power, and shall be placed in their separate accounts, at the earliest opportunity, in accordance with the provisions of Article 64. Such supplementary pay shall not relieve the Detaining Power of any obligation under this Convention.

**ARTICLE 62**

Prisoners of war shall be paid a fair working rate of pay by the detaining authorities direct. The rate shall be fixed by the said authorities, but shall at no time be less than one-fourth of one Swiss franc for a full working day. The Detaining Power shall inform

prisoners of war, as well as the Power on which they depend, through the intermediary of the Protecting Power, of the rate of daily working pay that it has fixed.

Working pay shall likewise be paid by the detaining authorities to prisoners of war permanently detailed to duties or to a skilled or semi-skilled occupation in connection with the administration, installation or maintenance of camps, and to the prisoners who are required to carry out spiritual or medical duties on behalf of their comrades.

The working pay of the prisoners' representative, of his advisers, if any, and of his assistants, shall be paid out of the fund maintained by canteen profits. The scale of this working pay shall be fixed by the prisoners' representative and approved by the camp commander. If there is no such fund, the detaining authorities shall pay these prisoners a fair working rate of pay.

#### **ARTICLE 63**

Prisoners of war shall be permitted to receive remittances of money addressed to them individually or collectively.

Every prisoner of war shall have at his disposal the credit balance of his account as provided for in the following Article, within the limits fixed by the Detaining Power, which shall make such payments as are requested. Subject to financial or monetary restrictions which the Detaining Power regards as essential, prisoners of war may also have payments made abroad. In this case payments addressed by prisoners of war to dependents shall be given priority.

In any event, and subject to the consent of the Power on which they depend, prisoners may have payments made in their own country, as follows: the Detaining Power shall send to the aforesaid Power through the Protecting Power, a notification giving all the necessary particulars concerning the prisoners of war, the beneficiaries of the payments, and the amount of the sums to be paid, expressed in the Detaining Power's currency. The said notification shall be signed by the prisoners and countersigned by the camp commander. The Detaining Power shall debit the prisoners' account by a corresponding amount; the sums thus debited shall be placed by it to the credit of the Power on which the prisoners depend.

To apply the foregoing provisions, the Detaining Power may usefully consult the Model Regulations in Annex V of the present Convention.

#### **ARTICLE 64**

The Detaining Power shall hold an account for each prisoner of war, showing at least the following:

- (1) The amounts due to the prisoner or received by him as advances of pay, as working pay or derived from any other source; the sums in the currency of the Detaining Power which were taken from him; the sums taken from him and converted at his request into the currency of the said Power.



- (2) The payments made to the prisoner in cash, or in any other similar form; the payments made on his behalf and at his request; the sums transferred under Article 63, third paragraph.

#### **ARTICLE 65**

Every item entered in the account of a prisoner of war shall be countersigned or initialled by him, or by the prisoners' representative acting on his behalf.

Prisoners of war shall at all times be afforded reasonable facilities for consulting and obtaining copies of their accounts, which may likewise be inspected by the representatives of the Protecting Powers at the time of visits to the camp.

When prisoners of war are transferred from one camp to another, their personal accounts will follow them. In case of transfer from one Detaining Power to another, the monies which are their property and are not in the currency of the Detaining Power will follow them. They shall be given certificates for any other monies standing to the credit of their accounts.

The Parties to the conflict concerned may agree to notify to each other at specific intervals through the Protecting Power, the amount of the accounts of the prisoners of war.

#### **ARTICLE 66**

On the termination of captivity, through the release of a prisoner of war or his repatriation, the Detaining Power shall give him a statement, signed by an authorized officer of that Power, showing the credit balance then due to him. The Detaining Power shall also send through the Protecting Power to the government upon which the prisoner of war depends, lists giving all appropriate particulars of all prisoners of war whose captivity has been terminated by repatriation, release, escape, death or any other means, and showing the amount of their credit balances. Such lists shall be certified on each sheet by an authorized representative of the Detaining Power.

Any of the above provisions of this Article may be varied by mutual agreement between any two Parties to the conflict.

The Power on which the prisoner of war depends shall be responsible for settling with him any credit balance due to him from the Detaining Power on the termination of his captivity.

#### **ARTICLE 67**

Advances of pay, issued to prisoners of war in conformity with Article 60, shall be considered as made on behalf of the Power on which they depend. Such advances of pay, as well as all payments made by the said Power under Article 63, third paragraph, and Article 68, shall form the subject of arrangements between the Powers concerned, at the close of hostilities.

#### **ARTICLE 68**

Any claim by a prisoner of war for compensation in respect of any injury or other disability arising out of work shall be referred to the Power on which he depends,

through the Protecting Power. In accordance with Article 54, the Detaining Power will, in all cases, provide the prisoner of war concerned with a statement showing the nature of the injury or disability, the circumstances in which it arose and particulars of medical or hospital treatment given for it. This statement will be signed by a responsible officer of the Detaining Power and the medical particulars certified by a medical officer.

Any claim by a prisoner of war for compensation in respect of personal effects monies or valuables impounded by the Detaining Power under Article 18 and not forthcoming on his repatriation, or in respect of loss alleged to be due to the fault of the Detaining Power or any of its servants, shall likewise be referred to the Power on which he depends. Nevertheless, any such personal effects required for use by the prisoners of war whilst in captivity shall be replaced at the expense of the Detaining Power. The Detaining Power will, in all cases, provide the prisoner of war with a statement, signed by a responsible officer, showing all available information regarding the reasons why such effects, monies or valuables have not been restored to him. A copy of this statement will be forwarded to the Power on which he depends through the Central Prisoners of War Agency provided for in Article 123.

## **Section V. Relations of Prisoners of War With the Exterior**

### **ARTICLE 69**

Immediately upon prisoners of war falling into its power, the Detaining Power shall inform them and the Powers on which they depend, through the Protecting Power, of the measures taken to carry out the provisions of the present Section. They shall likewise inform the parties concerned of any subsequent modifications of such measures.

### **ARTICLE 70**

Immediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp, likewise in case of sickness or transfer to hospital or to another camp, every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand, a card similar, if possible, to the model annexed to the present Convention, informing his relatives of his capture, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any manner.

### **ARTICLE 71**

Prisoners of war shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each prisoner of war, the said number shall not be less than two letters and four cards monthly, exclusive of the capture cards provided for in Article 70, and conforming as closely as possible to the models annexed to the present Convention. Further limitations may be imposed only if the Protecting Power is satisfied that it would be in the interests of the prisoners of war concerned to do so owing to difficulties of translation caused by the Detaining Power's inability to find sufficient qualified linguists to carry out the necessary censorship. If limitations must be placed on the correspondence addressed to prisoners of war, they may be ordered only by the Power on which the prisoners

depend, possibly at the request of the Detaining Power. Such letters and cards must be conveyed by the most rapid method at the disposal of the Detaining Power; they may not be delayed or retained for disciplinary reasons.

Prisoners of war who have been without news for a long period, or who are unable to receive news from their next of kin or to give them news by the ordinary postal route, as well as those who are at a great distance from their homes, shall be permitted to send telegrams, the fees being charged against the prisoners of war's accounts with the Detaining Power or paid in the currency at their disposal. They shall likewise benefit by this measure in cases of urgency.

As a general rule, the correspondence of prisoners of war shall be written in their native language. The Parties to the conflict may allow correspondence in other languages.

Sacks containing prisoner of war mail must be securely sealed and labelled so as clearly to indicate their contents, and must be addressed to offices of destination.

#### **ARTICLE 72**

Prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character which may meet their needs, including books, devotional articles, scientific equipment, examination papers, musical instruments, sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities.

Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

The only limits which may be placed on these shipments shall be those proposed by the Protecting Power in the interest of the prisoners themselves, or by the International Committee of the Red Cross or any other organization giving assistance to the prisoners, in respect of their own shipments only, on account of exceptional strain on transport or communications.

The conditions for the sending of individual parcels and collective relief shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the prisoners of relief supplies. Books may not be included in parcels of clothing and foodstuffs. Medical supplies shall, as a rule, be sent in collective parcels.

#### **ARTICLE 73**

In the absence of special agreements between the Powers concerned on the conditions for the receipt and distribution of collective relief shipments, the rules and regulations concerning collective shipments, which are annexed to the present Convention, shall be applied.

The special agreements referred to above shall in no case restrict the right of prisoners' representatives to take possession of collective relief shipments intended for prisoners of war, to proceed to their distribution or to dispose of them in the interest of the prisoners.

Nor shall such agreements restrict the right of representatives of the Protecting Power, the International Committee of the Red Cross or any other organization giving assistance to prisoners of war and responsible for the forwarding of collective shipments, to supervise their distribution to the recipients.

#### **ARTICLE 74**

All relief shipments for prisoners of war shall be exempt from import, customs and other dues.

Correspondence, relief shipments and authorized remittances of money addressed to prisoners of war or despatched by them through the post office, either direct or through the Information Bureaux provided for in Article 122 and the Central Prisoners of War Agency provided for in Article 123, shall be exempt from any postal dues, both in the countries of origin and destination, and in intermediate countries.

If relief shipments intended for prisoners of war cannot be sent through the post office by reason of weight or for any other cause, the cost of transportation shall be borne by the Detaining Power in all the territories under its control. The other Powers party to the Convention shall bear the cost of transport in their respective territories.

In the absence of special agreements between the Parties concerned, the costs connected with transport of such shipments, other than costs covered by the above exemption, shall be charged to the senders.

The High Contracting Parties shall endeavour to reduce, so far as possible, the rates charged for telegrams sent by prisoners of war, or addressed to them.

#### **ARTICLE 75**

Should military operations prevent the Powers concerned from fulfilling their obligation to assure the transport of the shipments referred to in Articles 70, 71, 72 and 77, the Protecting Powers concerned, the International Committee of the Red Cross or any other organization duly approved by the Parties to the conflict may undertake to ensure the conveyance of such shipments by suitable means (railway wagons, motor vehicles, vessels or aircraft, etc.). For this purpose, the High Contracting Parties shall endeavour to supply them with such transport and to allow its circulation, especially by granting the necessary safe-conducts.

Such transport may also be used to convey:

- (a) correspondence, lists and reports exchanged between the Central Information Agency referred to in Article 123 and the National Bureaux referred to in Article 122;
- (b) correspondence and reports relating to prisoners of war which the Protecting Powers, the International Committee of the Red Cross or any other body assisting the prisoners, exchange either with their own delegates or with the Parties to the conflict.

These provisions in no way detract from the right of any Party to the conflict to arrange other means of transport, if it should so prefer, nor preclude the granting of safe-conducts, under mutually agreed conditions, to such means of transport.

In the absence of special agreements, the costs occasioned by the use of such means of transport shall be borne proportionally by the Parties to the conflict whose nationals are benefited thereby.

#### **ARTICLE 76**

The censoring of correspondence addressed to prisoners of war or despatched by them shall be done as quickly as possible. Mail shall be censored only by the despatching State and the receiving State, and once only by each.

The examination of consignments intended for prisoners of war shall not be carried out under conditions that will expose the goods contained in them to deterioration; except in the case of written or printed matter, it shall be done in the presence of the addressee, or of a fellow-prisoner duly delegated by him. The delivery to prisoners of individual or collective consignments shall not be delayed under the pretext of difficulties of censorship.

Any prohibition of correspondence ordered by Parties to the conflict, either for military or political reasons, shall be only temporary and its duration shall be as short as possible.

#### **ARTICLE 77**

The Detaining Powers shall provide all facilities for the transmission, through the Protecting Power or the Central Prisoners of War Agency provided for in Article 123 of instruments, papers or documents intended for prisoners of war or despatched by them, especially powers of attorney and wills.

In all cases they shall facilitate the preparation and execution of such documents on behalf of prisoners of war; in particular, they shall allow them to consult a lawyer and shall take what measures are necessary for the authentication of their signatures.

### **Section VI. Relations Between Prisoners of War and the Authorities**

#### **Chapter I. Complaints of Prisoners of War Respecting the Conditions of Captivity**

#### **ARTICLE 78**

Prisoners of war shall have the right to make known to the military authorities in whose power they are, their requests regarding the conditions of captivity to which they are subjected.

They shall also have the unrestricted right to apply to the representatives of the Protecting Powers either through their prisoners' representative or, if they consider it necessary, direct, in order to draw their attention to any points on which they may have complaints to make regarding their conditions of captivity.

These requests and complaints shall not be limited nor considered to be a part of the correspondence quota referred to in Article 71. They must be transmitted immediately. Even if they are recognized to be unfounded, they may not give rise to any punishment.

Prisoners' representatives may send periodic reports on the situation in the camps and the needs of the prisoners of war to the representatives of the Protecting Powers.

## **Chapter II. Prisoner of War Representatives**

### **ARTICLE 79**

In all places where there are prisoners of war, except in those where there are officers, the prisoners shall freely elect by secret ballot, every six months, and also in case of vacancies, prisoners' representatives entrusted with representing them before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. These prisoners' representatives shall be eligible for re-election.

In camps for officers and persons of equivalent status or in mixed camps, the senior officer among the prisoners of war shall be recognized as the camp prisoners' representative. In camps for officers, he shall be assisted by one or more advisers chosen by the officers; in mixed camps, his assistants shall be chosen from among the prisoners of war who are not officers and shall be elected by them.

Officer prisoners of war of the same nationality shall be stationed in labour camps for prisoners of war, for the purpose of carrying out the camp administration duties for which the prisoners of war are responsible. These officers may be elected as prisoners' representatives under the first paragraph of this Article. In such a case the assistants to the prisoners' representatives shall be chosen from among those prisoners of war who are not officers.

Every representative elected must be approved by the Detaining Power before he has the right to commence his duties. Where the Detaining Power refuses to approve a prisoner of war elected by his fellow prisoners of war, it must inform the Protecting Power of the reason for such refusal.

In all cases the prisoners' representative must have the same nationality, language and customs as the prisoners of war whom he represents. Thus, prisoners of war distributed in different sections of a camp, according to their nationality, language or customs, shall have for each section their own prisoners' representative, in accordance with the foregoing paragraphs.

### **ARTICLE 80**

Prisoners' representatives shall further the physical, spiritual and intellectual well-being of prisoners of war.

In particular, where the prisoners decide to organize amongst themselves a system of mutual assistance, this organization will be within the province of the prisoners'

representative, in addition to the special duties entrusted to him by other provisions of the present Convention.

Prisoners' representatives shall not be held responsible, simply by reason of their duties, for any offences committed by prisoners of war.

#### **ARTICLE 81**

Prisoners' representatives shall not be required to perform any other work, if the accomplishment of their duties is thereby made more difficult.

Prisoners' representatives may appoint from amongst the prisoners such assistants as they may require. All material facilities shall be granted them, particularly a certain freedom of movement necessary for the accomplishment of their duties (inspection of labour detachments, receipt of supplies, etc.).

Prisoners' representatives shall be permitted to visit premises where prisoners of war are detained, and every prisoner of war shall have the right to consult freely his prisoners' representative.

All facilities shall likewise be accorded to the prisoners' representatives for communication by post and telegraph with the detaining authorities, the Protecting Powers, the International Committee of the Red Cross and their delegates, the Mixed Medical Commissions and the bodies which give assistance to prisoners of war. Prisoners' representatives of labour detachments shall enjoy the same facilities for communication with the prisoners' representatives of the principal camp. Such communications shall not be restricted, nor considered as forming a part of the quota mentioned in Article 71.

Prisoners' representatives who are transferred shall be allowed a reasonable time to acquaint their successors with current affairs.

In case of dismissal, the reasons therefor shall be communicated to the Protecting Power.

### **Chapter III. Penal and Disciplinary Sanctions**

#### **I. General Provisions**

#### **ARTICLE 82**

A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed.

If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only.

**ARTICLE 83**

In deciding whether proceedings in respect of an offence alleged to have been committed by a prisoner of war shall be judicial or disciplinary, the Detaining Power shall ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary rather than judicial measures.

**ARTICLE 84**

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.

**ARTICLE 85**

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

**ARTICLE 86**

No prisoner of war may be punished more than once for the same act or on the same charge.

**ARTICLE 87**

Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.

When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.

Collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden.

No prisoner of war may be deprived of his rank by the Detaining Power, or prevented from wearing his badges.

**ARTICLE 88**

Officers, non-commissioned officers and men who are prisoners of war undergoing a disciplinary or judicial punishment, shall not be subjected to more severe treatment



than that applied in respect of the same punishment to members of the armed forces of the Detaining Power of equivalent rank.

A woman prisoner of war shall not be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a woman member of the armed forces of the Detaining Power dealt with for a similar offence.

In no case may a woman prisoner of war be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the Detaining Power dealt with for a similar offence.

Prisoners of war who have served disciplinary or judicial sentences may not be treated differently from other prisoners of war.

## **II. Disciplinary Sanctions**

### **ARTICLE 89**

The disciplinary punishments applicable to prisoners of war are the following:

- (1) A fine which shall not exceed 50 per cent of the advances of pay and working pay which the prisoner of war would otherwise receive under the provisions of Articles 60 and 62 during a period of not more than thirty days.
- (2) Discontinuance of privileges granted over and above the treatment provided for by the present Convention.
- (3) Fatigue duties not exceeding two hours daily.
- (4) Confinement.

The punishment referred to under (3) shall not be applied to officers.

In no case shall disciplinary punishments be inhuman, brutal or dangerous to the health of prisoners of war.

### **ARTICLE 90**

The duration of any single punishment shall in no case exceed thirty days. Any period of confinement awaiting the hearing of a disciplinary offence or the award of disciplinary punishment shall be deducted from an award pronounced against a prisoner of war.

The maximum of thirty days provided above may not be exceeded, even if the prisoner of war is answerable for several acts at the same time when he is awarded punishment, whether such acts are related or not.

The period between the pronouncing of an award of disciplinary punishment and its execution shall not exceed one month.

When a prisoner of war is awarded a further disciplinary punishment, a period of at least three days shall elapse between the execution of any two of the punishments, if the duration of one of these is ten days or more.

**ARTICLE 91**

The escape of a prisoner of war shall be deemed to have succeeded when:

- (1) he has joined the armed forces of the Power on which he depends, or those of an allied Power;
- (2) he has left the territory under the control of the Detaining Power, or of an ally of the said Power;
- (3) he has joined a ship flying the flag of the Power on which he depends, or of an allied Power, in the territorial waters of the Detaining Power, the said ship not being under the control of the last named Power.

Prisoners of war who have made good their escape in the sense of this Article and who are recaptured, shall not be liable to any punishment in respect of their previous escape.

**ARTICLE 92**

A prisoner of war who attempts to escape and is recaptured before having made good his escape in the sense of Article 91 shall be liable only to a disciplinary punishment in respect of this act, even if it is a repeated offence.

A prisoner of war who is recaptured shall be handed over without delay to the competent military authority.

Article 88, fourth paragraph, notwithstanding, prisoners of war punished as a result of an unsuccessful escape may be subjected to special surveillance. Such surveillance must not affect the state of their health, must be undergone in a prisoner of war camp, and must not entail the suppression of any of the safeguards granted them by the present Convention.

**ARTICLE 93**

Escape or attempt to escape, even if it is a repeated offence, shall not be deemed an aggravating circumstance if the prisoner of war is subjected to trial by judicial proceedings in respect of an offence committed during his escape or attempt to escape.

In conformity with the principle stated in Article 83, offences committed by prisoners of war with the sole intention of facilitating their escape and which do not entail any violence against life or limb, such as offences against public property, theft without intention of self-enrichment, the drawing up or use of false papers, or the wearing of civilian clothing, shall occasion disciplinary punishment only.

Prisoners of war who aid or abet an escape or an attempt to escape shall be liable on this count to disciplinary punishment only.

**ARTICLE 94**

If an escaped prisoner of war is recaptured, the Power on which he depends shall be notified thereof in the manner defined in Article 122, provided notification of his escape has been made.

**ARTICLE 95**

A prisoner of war accused of an offence against discipline shall not be kept in confinement pending the hearing unless a member of the armed forces of the Detaining Power would be so kept if he were accused of a similar offence, or if it is essential in the interests of camp order and discipline.

Any period spent by a prisoner of war in confinement awaiting the disposal of an offence against discipline shall be reduced to an absolute minimum and shall not exceed fourteen days.

The provisions of Articles 97 and 98 of this Chapter shall apply to prisoners of war who are in confinement awaiting the disposal of offences against discipline.

**ARTICLE 96**

Acts which constitute offences against discipline shall be investigated immediately.

Without prejudice to the competence of courts and superior military authorities, disciplinary punishment may be ordered only by an officer having disciplinary powers in his capacity as camp commander, or by a responsible officer who replaces him or to whom he has delegated his disciplinary powers.

In no case may such powers be delegated to a prisoner of war or be exercised by a prisoner of war.

Before any disciplinary award is pronounced, the accused shall be given precise information regarding the offences of which he is accused, and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter. The decision shall be announced to the accused prisoner of war and to the prisoners' representative.

A record of disciplinary punishments shall be maintained by the camp commander and shall be open to inspection by representatives of the Protecting Power.

**ARTICLE 97**

Prisoners of war shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.

All premises in which disciplinary punishments are undergone shall conform to the sanitary requirements set forth in Article 25. A prisoner of war undergoing punishment shall be enabled to keep himself in a state of cleanliness, in conformity with Article 29.

Officers and persons of equivalent status shall not be lodged in the same quarters as non-commissioned officers or men.

Women prisoners of war undergoing disciplinary punishment shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women.

**ARTICLE 98**

A prisoner of war undergoing confinement as a disciplinary punishment, shall continue to enjoy the benefits of the provisions of this Convention except in so far as these are necessarily rendered inapplicable by the mere fact that he is confined. In no case may he be deprived of the benefits of the provisions of Articles 78 and 126.

A prisoner of war awarded disciplinary punishment may not be deprived of the prerogatives attached to his rank.

Prisoners of war awarded disciplinary punishment shall be allowed to exercise and to stay in the open air at least two hours daily.

They shall be allowed, on their request, to be present at the daily medical inspections. They shall receive the attention which their state of health requires and, if necessary, shall be removed to the camp infirmary or to a hospital.

They shall have permission to read and write, likewise to send and receive letters. Parcels and remittances of money however, may be withheld from them until the completion of the punishment; they shall meanwhile be entrusted to the prisoners' representative, who will hand over to the infirmary the perishable goods contained in such parcels.

**III. Judicial Proceedings****ARTICLE 99**

No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

**ARTICLE 100**

Prisoners of war and the Protecting Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power.

Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power on which the prisoners of war depend.

The death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.

**ARTICLE 101**

If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives, at an indicated address, the detailed communication provided for in Article 107.

**ARTICLE 102**

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

**ARTICLE 103**

Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.

Any period spent by a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty.

The provisions of Articles 97 and 98 of this Chapter shall apply to a prisoner of war whilst in confinement awaiting trial.

**ARTICLE 104**

In any case in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war, it shall notify the Protecting Power as soon as possible and at least three weeks before the opening of the trial. This period of three weeks shall run as from the day on which such notification reaches the Protecting Power at the address previously indicated by the latter to the Detaining Power.

The said notification shall contain the following information:

- (1) Surname and first names of the prisoner of war, his rank, his army, regimental, personal or serial number, his date of birth, and his profession or trade, if any;
- (2) Place of internment or confinement;
- (3) Specification of the charge or charges on which the prisoner of war is to be arraigned, giving the legal provisions applicable;
- (4) Designation of the court which will try the case, likewise the date and place fixed for the opening of the trial.

The same communication shall be made by the Detaining Power to the prisoners' representative.

If no evidence is submitted, at the opening of a trial, that the notification referred to above was received by the Protecting Power, by the prisoner of war and by the prisoners' representative concerned, at least three weeks before the opening of the trial, then the latter cannot take place and must be adjourned.

#### ARTICLE 105

The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial.

Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The Detaining Power shall deliver to the said Power, on request, a list of persons qualified to present the defence. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defence.

The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defence, including prisoners of war. He shall have the benefit of these facilities until the term of appeal or petition has expired.

Particulars of the charge or charges on which the prisoner of war is to be arraigned, as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the Detaining Power, shall be communicated to the accused prisoner of war in a language which he understands, and in good time before the opening of the trial. The same communication in the same circumstances shall be made to the advocate or counsel conducting the defence on behalf of the prisoner of war.

The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held *in camera* in the interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.

#### ARTICLE 106

Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

#### ARTICLE 107

Any judgment and sentence pronounced upon a prisoner of war shall be immediately reported to the Protecting Power in the form of a summary communication, which shall also indicate whether he has the right of appeal with a view to the quashing of

the sentence or the reopening of the trial. This communication shall likewise be sent to the prisoners' representative concerned. It shall also be sent to the accused prisoner of war in a language he understands, if the sentence was not pronounced in his presence. The Detaining Power shall also immediately communicate to the Protecting Power the decision of the prisoner of war to use or to waive his right of appeal.

Furthermore, if a prisoner of war is finally convicted or if a sentence pronounced on a prisoner of war in the first instance is a death sentence, the Detaining Power shall as soon as possible address to the Protecting Power a detailed communication containing:

- (1) the precise wording of the finding and sentence;
- (2) a summarized report of any preliminary investigation and of the trial, emphasizing in particular the elements of the prosecution and the defence;
- (3) notification, where applicable, of the establishment where the sentence will be served.

The communications provided for in the foregoing sub-paragraphs shall be sent to the Protecting Power at the address previously made known to the Detaining Power.

#### **ARTICLE 108**

Sentences pronounced on prisoners of war after a conviction has become duly enforceable, shall be served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power. These conditions shall in all cases conform to the requirements of health and humanity.

A woman prisoner of war on whom such a sentence has been pronounced shall be confined in separate quarters and shall be under the supervision of women.

In any case, prisoners of war sentenced to a penalty depriving them of their liberty shall retain the benefit of the provisions of Articles 78 and 126 of the present Convention. Furthermore, they shall be entitled to receive and despatch correspondence, to receive at least one relief parcel monthly, to take regular exercise in the open air, to have the medical care required by their state of health, and the spiritual assistance they may desire. Penalties to which they may be subjected shall be in accordance with the provisions of Article 87, third paragraph.

### **PART IV. TERMINATION OF CAPTIVITY**

#### **Section I. Direct Repatriation and Accommodation in Neutral Countries**

#### **ARTICLE 109**

Subject to the provisions of the third paragraph of this Article, Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel, in accordance with the first paragraph of the following Article.

Throughout the duration of hostilities, Parties to the conflict shall endeavour, with the cooperation of the neutral Powers concerned, to make arrangements for the accommodation in neutral countries of the sick and wounded prisoners of war referred to in the second paragraph of the following Article.

They may, in addition, conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.

No sick or injured prisoner of war who is eligible for repatriation under the first paragraph of this Article, may be repatriated against his will during hostilities.

#### ARTICLE 110

The following shall be repatriated direct:

- (1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.
- (2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.
- (3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.

The following may be accommodated in a neutral country:

- (1) Wounded and sick whose recovery may be expected within one year of the date of the wound or the beginning of the illness, if treatment in a neutral country might increase the prospects of a more certain and speedy recovery.
- (2) Prisoners of war whose mental or physical health, according to medical opinion, is seriously threatened by continued captivity, but whose accommodation in a neutral country might remove such a threat.

The conditions which prisoners of war accommodated in a neutral country must fulfil in order to permit their repatriation shall be fixed, as shall likewise their status, by agreement between the Powers concerned. In general, prisoners of war who have been accommodated in a neutral country, and who belong to the following categories, should be repatriated:

- (1) Those whose state of health has deteriorated so as to fulfil the condition laid down for direct repatriation;
- (2) Those whose mental or physical powers remain, even after treatment, considerably impaired.

If no special agreements are concluded between the Parties to the conflict concerned, to determine the cases of disablement or sickness entailing direct repatriation or accommodation in a neutral country, such cases shall be settled in accordance with the principles laid down in the Model Agreement concerning direct repatriation and



accommodation in neutral countries of wounded and sick prisoners of war and in the Regulations concerning Mixed Medical Commissions annexed to the present Convention.

#### **ARTICLE 111**

The Detaining Power, the Power on which the prisoners of war depend, and a neutral Power agreed upon by these two Powers, shall endeavour to conclude agreements which will enable prisoners of war to be interned in the territory of the said neutral Power until the close of hostilities.

#### **ARTICLE 112**

Upon the outbreak of hostilities, Mixed Medical Commissions shall be appointed to examine sick and wounded prisoners of war, and to make all appropriate decisions regarding them. The appointment, duties and functioning of these Commissions shall be in conformity with the provisions of the Regulations annexed to the present Convention.

However, prisoners of war who, in the opinion of the medical authorities of the Detaining Power, are manifestly seriously injured or seriously sick, may be repatriated without having to be examined by a Mixed Medical Commission.

#### **ARTICLE 113**

Besides those who are designated by the medical authorities of the Detaining Power, wounded or sick prisoners of war belonging to the categories listed below shall be entitled to present themselves for examination by the Mixed Medical Commissions provided for in the foregoing Article:

- (1) Wounded and sick proposed by a physician or surgeon who is of the same nationality, or a national of a Party to the conflict allied with the Power on which the said prisoners depend, and who exercises his functions in the camp.
- (2) Wounded and sick proposed by their prisoners' representative.
- (3) Wounded and sick proposed by the Power on which they depend, or by an organization duly recognized by the said Power and giving assistance to the prisoners.

Prisoners of war who do not belong to one of the three foregoing categories may nevertheless present themselves for examination by Mixed Medical Commissions, but shall be examined only after those belonging to the said categories.

The physician or surgeon of the same nationality as the prisoners who present themselves for examination by the Mixed Medical Commission, likewise the prisoners' representative of the said prisoners, shall have permission to be present at the examination.

#### **ARTICLE 114**

Prisoners of war who meet with accidents shall, unless the injury is self-inflicted, have the benefit of the provisions of this Convention as regards repatriation or accommodation in a neutral country.

**ARTICLE 115**

No prisoner of war on whom a disciplinary punishment has been imposed and who is eligible for repatriation or for accommodation in a neutral country, may be kept back on the plea that he has not undergone his punishment.

Prisoners of war detained in connection with a judicial prosecution or conviction, and who are designated for repatriation or accommodation in a neutral country, may benefit by such measures before the end of the proceedings or the completion of the punishment, if the Detaining Power consents.

Parties to the conflict shall communicate to each other the names of those who will be detained until the end of the proceedings or the completion of the punishment.

**ARTICLE 116**

The cost of repatriating prisoners of war or of transporting them to a neutral country shall be borne, from the frontiers of the Detaining Power, by the Power on which the said prisoners depend.

**ARTICLE 117**

No repatriated person may be employed on active military service.

**Section II. Release and Repatriation of Prisoners of War  
at the Close of Hostilities****ARTICLE 118**

Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.

In either case, the measures adopted shall be brought to the knowledge of the prisoners of war.

The costs of repatriation of prisoners of war shall in all cases be equitably apportioned between the Detaining Power and the Power on which the prisoners depend. This apportionment shall be carried out on the following basis:

- (a) If the two Powers are contiguous, the Power on which the prisoners of war depend shall bear the costs of repatriation from the frontiers of the Detaining Power.
- (b) If the two Powers are not contiguous, the Detaining Power shall bear the costs of transport of prisoners of war over its own territory as far as its frontier or its port of embarkation nearest to the territory of the Power on which the prisoners of war depend. The Parties concerned shall agree between themselves as to

the equitable apportionment of the remaining costs of the repatriation. The conclusion of this agreement shall in no circumstances justify any delay in the repatriation of the prisoners of war.

#### **ARTICLE 119**

Repatriation shall be effected in conditions similar to those laid down in Articles 46 to 48 inclusive of the present Convention for the transfer of prisoners of war, having regard to the provisions of Article 118 and to those of the following paragraphs.

On repatriation, any articles of value impounded from prisoners of war under Article 18, and any foreign currency which has not been converted into the currency of the Detaining Power, shall be restored to them. Articles of value and foreign currency which, for any reason whatever, are not restored to prisoners of war on repatriation, shall be despatched to the Information Bureau set up under Article 122.

Prisoners of war shall be allowed to take with them their personal effects, and any correspondence and parcels which have arrived for them. The weight of such baggage may be limited, if the conditions of repatriation so require, to what each prisoner can reasonably carry. Each prisoner shall in all cases be authorized to carry at least twenty-five kilograms.

The other personal effects of the repatriated prisoner shall be left in the charge of the Detaining Power which shall have them forwarded to him as soon as it has concluded an agreement to this effect, regulating the conditions of transport and the payment of the costs involved, with the Power on which the prisoner depends.

Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence.

Parties to the conflict shall communicate to each other the names of any prisoners of war who are detained until the end of the proceedings or until punishment has been completed.

By agreement between the Parties to the conflict, commissions shall be established for the purpose of searching for dispersed prisoners of war and of assuring their repatriation with the least possible delay.

### **Section III. Death of Prisoners of War**

#### **ARTICLE 120**

Wills of prisoners of war shall be drawn up so as to satisfy the conditions of validity required by the legislation of their country of origin, which will take steps to inform the Detaining Power of its requirements in this respect. At the request of the prisoner of war and, in all cases, after death, the will shall be transmitted without delay to the Protecting Power; a certified copy shall be sent to the Central Agency.

Death certificates, in the form annexed to the present Convention, or lists certified by a responsible officer, of all persons who die as prisoners of war shall be forwarded as rapidly as possible to the Prisoner of War Information Bureau established in accordance with Article 122. The death certificates or certified lists shall show particulars of identity as set out in the third paragraph of Article 17, and also the date and place of death, the cause of death, the date and place of burial and all particulars necessary to identify the graves.

The burial or cremation of a prisoner of war shall be preceded by a medical examination of the body with a view to confirming death and enabling a report to be made and, where necessary, establishing identity.

The detaining authorities shall ensure that prisoners of war who have died in captivity are honourably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected, suitably maintained and marked so as to be found at any time. Wherever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place.

Deceased prisoners of war shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his express wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased.

In order that graves may always be found, all particulars of burials and graves shall be recorded with a Graves Registration Service established by the Detaining Power. Lists of graves and particulars of the prisoners of war interred in cemeteries and elsewhere shall be transmitted to the Power on which such prisoners of war depended. Responsibility for the care of these graves and for records of any subsequent moves of the bodies shall rest on the Power controlling the territory, if a Party to the present Convention. These provisions shall also apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.

#### **ARTICLE 121**

Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power.

A communication on this subject shall be sent immediately to the Protecting Power. Statements shall be taken from witnesses, especially from those who are prisoners of war, and a report including such statements shall be forwarded to the Protecting Power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all measures for the prosecution of the person or persons responsible.

## **PART V. INFORMATION BUREAUX AND RELIEF SOCIETIES FOR PRISONERS OF WAR**

### **ARTICLE 122**

Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall institute an official Information Bureau for prisoners of war who are in its power. Neutral or non-belligerent Powers who may have received within their territory persons belonging to one of the categories referred to in Article 4, shall take the same action with respect to such persons. The Power concerned shall ensure that the Prisoners of War Information Bureau is provided with the necessary accommodation, equipment and staff to ensure its efficient working. It shall be at liberty to employ prisoners of war in such a Bureau under the conditions laid down in the Section of the present Convention dealing with work by prisoners of war.

Within the shortest possible period, each of the Parties to the conflict shall give its Bureau the information referred to in the fourth, fifth and sixth paragraphs of this Article regarding any enemy person belonging to one of the categories referred to in Article 4, who has fallen into its power. Neutral or non-belligerent Powers shall take the same action with regard to persons belonging to such categories whom they have received within their territory.

The Bureau shall immediately forward such information by the most rapid means to the Powers concerned, through the intermediary of the Protecting Powers and likewise of the Central Agency provided for in Article 123.

This information shall make it possible quickly to advise the next of kin concerned. Subject to the provisions of Article 17, the information shall include, in so far as available to the Information Bureau, in respect of each prisoner of war, his surname, first names, rank, army, regimental, personal or serial number, place and full date of birth, indication of the Power on which he depends, first name of the father and maiden name of the mother, name and address of the person to be informed and the address to which correspondence for the prisoner may be sent.

The Information Bureau shall receive from the various departments concerned information regarding transfers, releases, repatriations, escapes, admissions to hospital, and deaths, and shall transmit such information in the manner described in the third paragraph above.

Likewise, information regarding the state of health of prisoners of war who are seriously ill or seriously wounded shall be supplied regularly, every week if possible.

The Information Bureau shall also be responsible for replying to all enquiries sent to it concerning prisoners of war, including those who have died in captivity; it will make any enquiries necessary to obtain the information which is asked for if this is not in its possession.

All written communications made by the Bureau shall be authenticated by a signature or a seal.

The Information Bureau shall furthermore be charged with collecting all personal valuables, including sums in currencies other than that of the Detaining Power and documents of importance to the next of kin, left by prisoners of war who have been repatriated or released, or who have escaped or died, and shall forward the said valuables to the Powers concerned. Such articles shall be sent by the Bureau in sealed packets which shall be accompanied by statements giving clear and full particulars of the identity of the person to whom the articles belonged, and by a complete list of the contents of the parcel. Other personal effects of such prisoners of war shall be transmitted under arrangements agreed upon between the Parties to the conflict concerned.

#### **ARTICLE 123**

A Central Prisoners of War Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency.

The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of war or to the Power on which they depend. It shall receive from the Parties to the conflict all facilities for effecting such transmissions.

The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.

The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross, or of the relief societies provided for in Article 125.

#### **ARTICLE 124**

The national Information Bureaux and the Central Information Agency shall enjoy free postage for mail, likewise all the exemptions provided for in Article 74, and further, so far as possible, exemption from telegraphic charges or, at least, greatly reduced rates.

#### **ARTICLE 125**

Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organization assisting prisoners of war, shall receive from the said Powers, for themselves and their duly accredited agents, all necessary facilities for visiting the prisoners, for distributing relief supplies and material, from any source, intended for religious, educational or recreative purposes, and for assisting them in organizing their leisure time within the camps. Such societies or organizations may be constituted in the territory of the Detaining Power or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its

supervision, on condition, however, that such limitation shall not hinder the effective operation of adequate relief to all prisoners of war.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times.

As soon as relief supplies or material intended for the above-mentioned purposes are handed over to prisoners of war, or very shortly afterwards, receipts for each consignment, signed by the prisoners' representative, shall be forwarded to the relief society or organization making the shipment. At the same time, receipts for these consignments shall be supplied by the administrative authorities responsible for guarding the prisoners.

## **PART VI. EXECUTION OF THE CONVENTION**

### **Section I. General Provisions**

#### **ARTICLE 126**

Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter.

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

The Detaining Power and the Power on which the said prisoners of war depend may agree, if necessary, that compatriots of these prisoners of war be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited.

#### **ARTICLE 127**

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.

#### **ARTICLE 128**

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

#### **ARTICLE 129**

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

#### **ARTICLE 130**

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

#### **ARTICLE 131**

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

#### **ARTICLE 132**

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.



If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

## **Section II. Final Provisions**

### **ARTICLE 133**

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

### **ARTICLE 134**

The present Convention replaces the Convention of July 27, 1929, in relations between the High Contracting Parties.

### **ARTICLE 135**

In the relations between the Powers which are bound by the Hague Convention respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and which are parties to the present Convention, this last Convention shall be complementary to Chapter II of the Regulations annexed to the above-mentioned Conventions of the Hague.

### **ARTICLE 136**

The present Convention, which bears the date of this day, is open to signature until February 12, 1950, in the name of the Powers represented at the Conference which opened at Geneva on April 21, 1949; furthermore, by Powers not represented at that Conference, but which are parties to the Convention of July 27, 1929.

### **ARTICLE 137**

The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

### **ARTICLE 138**

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

**ARTICLE 139**

From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

**ARTICLE 140**

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

**ARTICLE 141**

The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

**ARTICLE 142**

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

**ARTICLE 143**

The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

**IN WITNESS WHEREOF** the undersigned, having deposited their respective full powers, have signed the present Convention.

**DONE** at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the signatory and acceding States.

## **Annex I.**

### **Model Agreement Concerning Direct Repatriation and Accommodation in Neutral Countries of Wounded and Sick Prisoners of War.**

*(see Article 110)*

#### **I. Principles for Direct Repatriation and Accommodation in Neutral Countries**

##### **A. DIRECT REPATRIATION**

The following shall be repatriated direct:

- (1) All prisoners of war suffering from the following disabilities as the result of trauma: loss of a limb, paralysis, articular or other disabilities, when this disability is at least the loss of a hand or a foot, or the equivalent of the loss of a hand or a foot.

Without prejudice to a more generous interpretation, the following shall be considered as equivalent to the loss of a hand or a foot:

- (a) Loss of a hand or of all the fingers, or of the thumb and forefinger of one hand; loss of a foot, or of all the toes and metatarsals of one foot.
  - (b) Ankylosis, loss of osseous tissue, cicatricial contracture preventing the functioning of one of the large articulations or of all the digital joints of one hand.
  - (c) Pseudarthrosis of the long bones.
  - (d) Deformities due to fracture or other injury which seriously interfere with function and weight-bearing power.
- (2) All wounded prisoners of war whose condition has become chronic, to the extent that prognosis appears to exclude recovery--in spite of treatment--within one year from the date of the injury, as, for example, in case of:
  - (a) Projectile in the heart, even if the Mixed Medical Commission should fail, at the time of their examination, to detect any serious disorders.
  - (b) Metallic splinter in the brain or the lungs, even if the Mixed Medical Commission cannot, at the time of examination, detect any local or general reaction.
  - (c) Osteomyelitis, when recovery cannot be foreseen in the course of the year following the injury, and which seems likely to result in ankylosis of a joint, or other impairments equivalent to the loss of a hand or a foot.
  - (d) Perforating and suppurating injury to the large joints.
  - (e) Injury to the skull, with loss or shifting of bony tissue.
  - (f) Injury or burning of the face with loss of tissue and functional lesions.
  - (g) Injury to the spinal cord.

- (h) Lesion of the peripheral nerves, the sequelae of which are equivalent to the loss of a hand or foot, and the cure of which requires more than a year from the date of injury, for example: injury to the brachial or lumbosacral plexus median or sciatic nerves, likewise combined injury to the radial and cubital nerves or to the lateral popliteal nerve (N. peroneus communis) and medial popliteal nerve (N. tibialis); etc. The separate injury of the radial (musculo-spiral), cubital, lateral or medial popliteal nerves shall not, however, warrant repatriation except in case of contractures or of serious neurotrophic disturbance.
  - (i) Injury to the urinary system, with incapacitating results.
- (3) All sick prisoners of war whose condition has become chronic to the extent that prognosis seems to exclude recovery – in, spite of treatment – within one year from the inception of the disease, as, for example, in case of:
- (a) Progressive tuberculosis of any organ which, according to medical prognosis, cannot be cured or at least considerably improved by treatment in a neutral country.
  - (b) Exudate pleurisy.
  - (c) Serious diseases of the respiratory organs of non-tubercular etiology, presumed incurable, for example: serious pulmonary emphysema, with or without bronchitis; chronic asthma\*; chronic bronchitis\* lasting more than one year in captivity; bronchiectasis\*; etc.
  - (d) Serious chronic affections of the circulatory system, for example: valvular lesions and myocarditis\*, which have shown signs of circulatory failure during captivity, even though the Mixed Medical Commission cannot detect any such signs at the time of examination; affections of the pericardium and the vessels (Buerger's disease, aneurisms of the large vessels); etc.
  - (e) Serious chronic affections of the digestive organs, for example: gastric or duodenal ulcer; sequelae of gastric operations performed in captivity; chronic gastritis, enteritis or colitis, having lasted more than one year and seriously affecting the general condition; cirrhosis of the liver; chronic cholecystopathy\*; etc.
  - (f) Serious chronic affections of the genito-urinary organs, for example: chronic diseases of the kidney with consequent disorders; nephrectomy because of a tubercular kidney; chronic pyelitis or chronic cystitis; hydronephrosis or pyonephrosis; chronic grave gynaecological conditions; normal pregnancy and obstetrical disorder, where it is impossible to accommodate in a neutral country; etc.
  - (g) Serious chronic diseases of the central and peripheral nervous system, for example: all obvious psychoses and psychoneuroses, such as serious hysteria, serious captivity psychoneurosis, etc., duly verified by a specialist\*;

\* The decision of the Mixed Medical Commission shall be based to a great extent on the records kept by camp physicians and surgeons of the same nationality as the prisoners of war, or on an examination by medical specialists of the Detaining Power.

any epilepsy duly verified by the camp physician\*; cerebral arteriosclerosis; chronic neuritis lasting more than one year; etc.

- (h) Serious chronic diseases of the neuro-vegetative system, with considerable diminution of mental or physical fitness, noticeable loss of weight and general asthenia.
- (i) Blindness of both eyes, or of one eye when the vision of the other is less than 1 in spite of the use of corrective glasses; diminution of visual acuity in cases where it is impossible to restore it by correction to an acuity of 1/2 in at least one eye\*; other grave ocular affections, for example: glaucoma, iritis, choroiditis; trachoma; etc.
- (k) Auditive disorders, such as total unilateral deafness, if the other ear does not discern the ordinary spoken word at a distance of one metre\*; etc.
- (l) Serious affections of metabolism, for example: diabetes mellitus requiring insulin treatment; etc.
- (m) Serious disorders of the endocrine glands, for example: thyrotoxicosis; hypothyrosis; Addison's disease; Simmonds' cachexia; tetany; etc.
- (n) Grave and chronic disorders of the blood-forming organs.
- (o) Serious cases of chronic intoxication, for example: lead poisoning, mercury poisoning, morphinism, cocainism, alcoholism; gas or radiation poisoning; etc.
- (p) Chronic affections of locomotion, with obvious functional disorders, for example: arthritis deformans; primary and secondary progressive chronic polyarthritis; rheumatism with serious clinical symptoms; etc.
- (q) Serious chronic skin diseases, not amenable to treatment.
- (r) Any malignant growth.
- (s) Serious chronic infectious diseases, persisting for one year after their inception, for example: malaria with decided organic impairment, amoebic or bacillary dysentery with grave disorders; tertiary visceral syphilis resistant to treatment; leprosy; etc.
- (t) Serious avitaminosis or serious inanition.

## **B. ACCOMMODATION IN NEUTRAL COUNTRIES**

The following shall be eligible for accommodation in a neutral country:

- (1) All wounded prisoners of war who are not likely to recover in captivity, but who might be cured or whose condition might be considerably improved by accommodation in a neutral country.

\* The decision of the Mixed Medical Commission shall be based to a great extent on the records kept by camp physicians and surgeons of the same nationality as the prisoners of war, or on an examination by medical specialists of the Detaining Power.

- (2) Prisoners of war suffering from any form of tuberculosis, of whatever organ, and whose treatment in a neutral country would be likely to lead to recovery or at least to considerable improvement, with the exception of primary tuberculosis cured before captivity.
- (3) Prisoners of war suffering from affections requiring treatment of the respiratory, circulatory, digestive, nervous, sensory, genito-urinary, cutaneous, locomotive organs, etc., if such treatment would clearly have better results in a neutral country than in captivity.
- (4) Prisoners of war who have undergone a nephrectomy in captivity for a non-tubercular renal affection; cases of osteomyelitis, on the way to recovery or latent; diabetes mellitus not requiring insulin treatment; etc.
- (5) Prisoners of war suffering from war or captivity neuroses. Cases of captivity neurosis which are not cured after three months of accommodation in a neutral country, or which after that length of time are not clearly on the way to complete cure, shall be repatriated.
- (6) All prisoners of war suffering from chronic intoxication (gases, metals, alkaloids, etc.), for whom the prospects of cure in a neutral country are especially favourable.
- (7) All women prisoners of war who are pregnant or mothers with infants and small children.

The following cases shall not be eligible for accommodation in a neutral country:

- (1) All duly verified chronic psychoses.
- (2) All organic or functional nervous affections considered to be incurable.
- (3) All contagious diseases during the period in which they are transmissible, with the exception of tuberculosis.

## **II. General Observations**

- (1) The conditions given shall, in a general way, be interpreted and applied in as broad a spirit as possible. Neuropathic and psychopathic conditions caused by war or captivity, as well as cases of tuberculosis in all stages, shall above all benefit by such liberal interpretation. Prisoners of war who have sustained several wounds, none of which, considered by itself, justifies repatriation, shall be examined in the same spirit, with due regard for the psychic traumatism due to the number of their wounds.
- (2) All unquestionable cases giving the right to direct repatriation (amputation, total blindness or deafness, open pulmonary tuberculosis, mental disorder, malignant growth, etc.) shall be examined and repatriated as soon as possible by the camp physicians or by military medical commissions appointed by the Detaining Power.

- (3) Injuries and diseases which existed before the war and which have not become worse, as well as war injuries which have not prevented subsequent military service, shall not entitle to direct repatriation.
- (4) The provisions of this Annex shall be interpreted and applied in a similar manner in all countries party to the conflict. The Powers and authorities concerned shall grant to Mixed Medical Commissions all the facilities necessary for the accomplishment of their task.
- (5) The examples quoted under (1) above represent only typical cases. Cases which do not correspond exactly to these provisions shall be judged in the spirit of the provisions of Article 110 of the present Convention, and of the principles embodied in the present Agreement.

**Annex II. Regulations Concerning Mixed Medical Commissions**

*(see Article 112)*

**ARTICLE 1**

The Mixed Medical Commissions provided for in Article 112 of the Convention shall be composed of three members, two of whom shall belong to a neutral country, the third being appointed by the Detaining Power. One of the neutral members shall take the chair.

**ARTICLE 2**

The two neutral members shall be appointed by the International Committee of the Red Cross, acting in agreement with the Protecting Power, at the request of the Detaining Power. They may be domiciled either in their country of origin, in any other neutral country, or in the territory of the Detaining Power.

**ARTICLE 3**

The neutral members shall be approved by the Parties to the conflict concerned, who shall notify their approval to the International Committee of the Red Cross and to the Protecting Power. Upon such notification, the neutral members shall be considered as effectively appointed.

**ARTICLE 4**

Deputy members shall also be appointed in sufficient number to replace the regular members in case of need. They shall be appointed at the same time as the regular members or, at least, as soon as possible.

**ARTICLE 5**

If for any reason the International Committee of the Red Cross cannot arrange for the appointment of the neutral members, this shall be done by the Power protecting the interests of the prisoners of war to be examined.

**ARTICLE 6**

So far as possible, one of the two neutral members shall be a surgeon and the other a physician.

**ARTICLE 7**

The neutral members shall be entirely independent of the Parties to the conflict, which shall grant them all facilities in the accomplishment of their duties.

**ARTICLE 8**

By agreement with the Detaining Power, the International Committee of the Red Cross, when making the appointments provided for in Articles 2 and 4 of the present Regulations, shall settle the terms of service of the nominees.



**ARTICLE 9**

The Mixed Medical Commissions shall begin their work as soon as possible after the neutral members have been approved, and in any case within a period of three months from the date of such approval.

**ARTICLE 10**

The Mixed Medical Commissions shall examine all the prisoners designated in Article 113 of the Convention. They shall propose repatriation, rejection, or reference to a later examination. Their decisions shall be made by a majority vote.

**ARTICLE 11**

The decisions made by the Mixed Medical Commissions in each specific case shall be communicated, during the month following their visit, to the Detaining Power, the Protecting Power and the International Committee of the Red Cross. The Mixed Medical Commissions shall also inform each prisoner of war examined of the decision made, and shall issue to those whose repatriation has been proposed, certificates similar to the model appended to the present Convention.

**ARTICLE 12**

The Detaining Power shall be required to carry out the decisions of the Mixed Medical Commissions within three months of the time when it receives due notification of such decisions.

**ARTICLE 13**

If there is no neutral physician in a country where the services of a Mixed Medical Commission seem to be required, and if it is for any reason impossible to appoint neutral doctors who are resident in another country, the Detaining Power, acting in agreement with the Protecting Power, shall set up a Medical Commission which shall undertake the same duties as a Mixed Medical Commission, subject to the provisions of Articles 1, 2, 3, 4, 5 and 8 of the present Regulations.

**ARTICLE 14**

Mixed Medical Commissions shall function permanently and shall visit each camp at intervals of not more than six months.

**Annex III. Regulations Concerning Collective Relief**

*(See Article 73)*

**ARTICLE 1**

Prisoners' representatives shall be allowed to distribute collective relief shipments for which they are responsible, to all prisoners of war administered by their camp, including those who are in hospitals, or in prisons or other penal establishments.

**ARTICLE 2**

The distribution of collective relief shipments shall be effected in accordance with the instructions of the donors and with a plan drawn up by the prisoners' representatives. The issue of medical stores shall, however, be made for preference in agreement with the senior medical officers, and the latter may, in hospitals and infirmaries, waive the said instructions, if the needs of their patients so demand. Within the limits thus defined, the distribution shall always be carried out equitably.

**ARTICLE 3**

The said prisoners' representatives or their assistants shall be allowed to go to the points of arrival of relief supplies near their camps, so as to enable the prisoners' representatives or their assistants to verify the quality as well as the quantity of the goods received, and to make out detailed reports thereon for the donors.

**ARTICLE 4**

Prisoners' representatives shall be given the facilities necessary for verifying whether the distribution of collective relief in all subdivisions and annexes of their camps has been carried out in accordance with their instructions.

**ARTICLE 5**

Prisoners' representatives shall be allowed to fill up, and cause to be filled up by the prisoners' representatives of labour detachments or by the senior medical officers of infirmaries and hospitals, forms or questionnaires intended for the donors, relating to collective relief supplies (distribution, requirements, quantities, etc.). Such forms and questionnaires, duly completed, shall be forwarded to the donors without delay.

**ARTICLE 6**

In order to secure the regular issue of collective relief to the prisoners of war in their camp, and to meet any needs that may arise from the arrival of new contingents of prisoners, prisoners' representatives shall be allowed to build up and maintain adequate reserve stocks of collective relief. For this purpose, they shall have suitable warehouses at their disposal; each warehouse shall be provided with two locks, the prisoners' representative holding the keys of one lock and the camp commander the keys of the other.

**ARTICLE 7**

When collective consignments of clothing are available, each prisoner of war shall retain in his possession at least one complete set of clothes. If a prisoner has more than

one set of clothes, the prisoners' representative shall be permitted to withdraw excess clothing from those with the largest number of sets, or particular articles in excess of one, if this is necessary in order to supply prisoners who are less well provided. He shall not, however, withdraw second sets of underclothing, socks or footwear, unless this is the only means of providing for prisoners of war with none.

#### **ARTICLE 8**

The High Contracting Parties, and the Detaining Powers in particular, shall authorize, as far as possible and subject to the regulations governing the supply of the population, all purchases of goods made in their territories for the distribution of collective relief to prisoners of war. They shall similarly facilitate the transfer of funds and other financial measures of a technical or administrative nature taken for the purpose of making such purchases.

#### **ARTICLE 9**

The foregoing provisions shall not constitute an obstacle to the right of prisoners of war to receive collective relief before their arrival in a camp or in the course of transfer, nor to the possibility of representatives of the Protecting Power, the International Committee of the Red Cross, or any other body giving assistance to prisoners which may be responsible for the forwarding of such supplies, ensuring the distribution thereof to the addressees by any other means that they may deem useful.

Annex IV.

(A) Identity Card

(See Article 4)

<div>NOTICE</div> <div>This identity card is issued to persons who accompany the Armed Forces of ..... but are not part of them. The card must be carried at all times by the person to whom it is issued. If the bearer is taken prisoner, he shall at once hand the card to the Detaining Authorities, to assist in his identification.</div>		<div>Finger-prints (optional)</div> <div>(Left forefinger)</div> <div>(Right forefinger)</div>		<div>Any other mark of identification:</div> <div></div> <div></div>
<div>Official seal imprint</div>	<div>Blood type</div>	<div>Religion</div>		
<div>Hair</div>	<div>Eyes</div>	<div>Weight</div>	<div>Height</div>	
<div>Photograph of the bearer</div> <div>(Name of the country and military authority issuing this card)</div> <div>IDENTITY CARD</div> <div>FOR A PERSON WHO ACCOMPANIES THE ARMED FORCES</div> <div>Name .....</div> <div>First names .....</div> <div>Date and place of birth .....</div> <div>Accompanies the Armed Forces as .....</div> <div>Date of issue</div> <div>Signature of bearer</div>				

Remarks. — This card should be made out for preference in two or three languages, one of which is in international use. Actual size of the card: 13 by 10 centimetres. It should be folded along the dotted line.

**Annex IV**

**(B) Capture Card**

(See Article 70)

1. Front	<p><u>PRISONER OF WAR MAIL</u></p> <p>CAPTURE CARD FOR PRISONER OF WAR</p>		<p>Postage free</p>
	<p>IMPORTANT</p> <p>This card must be completed by each prisoner immediately after being taken prisoner and each time his address is changed (by reason of transfer to a hospital or to another camp).</p> <p>This card is distinct from the special card which each prisoner is allowed to send to his relatives.</p>	<p>CENTRAL PRISONERS OF WAR AGENCY</p> <p>International Committee of the Red Cross</p> <p>GENEVA (Switzerland)</p>	
2. Reverse side	<p>Write legibly and in block letters</p>		
	<p>1. Power on which the prisoner depends .....</p>		
	2. Name	3. First names (in full)	4. First name of father
	<p>5. Date of birth..... 6. Place of birth.....</p>		
	<p>7. Rank.....</p>		
	<p>8. Service number.....</p>		
	<p>9. Address of next of kin.....</p>		
	<p>*10. Taken prisoner on: (or) Coming from (Camp No., hospital, etc.) .....</p>		
	<p>*11. a) Good health—b) Not wounded—c) Recovered—d) Convalescent— e) Sick—f) Slightly wounded—g) Seriously wounded.</p>		
	<p>12. My present address is: Prisoner No ..... Name of camp.....</p>		
<p>13. Date..... 14. Signature.....</p>			
<p>* Strike out what is not applicable—Do not add any remarks— See explanations overleaf.</p>			

Remarks. — This form should be made out in two or three languages, particularly in the prisoner's own language and in that of the Detaining Power. Actual size of the form: 15 by 10.5 centimetres.

## Annex IV

### (C) Correspondence Card and Letter

(See Article 71)

## 1. Card

[illegible]

*Remarks.* — This form should be made out in two or three languages, particularly in the prisoner's own language and in that of the Detaining Power. Actual size of the form: 15 by 10 centimetres.

Annex IV

(C) Correspondence Card and Letter

(See Article 71)

2. Letter

PRISONER OF WAR MAIL

Postage free

To.....

.....

Place.....

Street.....

Country.....

Department or Province

.....

.....

Country where posted.....

Name of camp.....

Prisoner of War No. ....

Date and place of birth.....

Name and first names.....

Sender:

Remarks. — This form should be made out in two or three languages, particularly in the prisoner's own language and in that of the Detaining Power. It should be folded along the dotted line, the tab being inserted in the slit (marked by a line of asterisks); it then has the appearance of an envelope. Overleaf, it is lined like the postcard above (Annex IV C1); this space can contain about 250 words which the prisoner is free to write. Actual size of the folded form: 29 by 15 centimetres.

Annex IV

(D) Notification of Death

(See Article 120)

(Title of responsible authority)	NOTIFICATION OF DEATH
	Power on which the prisoner depended .....
Name and first names .....	
First name of father	.....
Place and date of birth	.....
Place and date of death	.....
Rank and service number (as given on identity disc)	.....
Address of next of kin	.....
Where and when taken prisoner	.....
Cause and circumstances of death	.....
Place of burial	.....
Is the grave marked and can it be found later by the relatives ?	.....
Are the personal effects of the deceased in the keeping of the Detaining Power or are they being forwarded together with this notification ?	.....
If forwarded, through what agency ?	.....
Can the person who cared for the deceased during sickness or during his last moments (doctor, nurse, minister of religion, fellow prisoner) give here or on an attached sheet a short account of the circumstances of the death and burial ?	.....
(Date, seal and signature of responsible authority)	Signature and address of two witnesses
.....	.....

Remarks. — This form should be made out in two or three languages, particularly in the prisoner's own language and in that of the Detaining Power. Actual size of the form: 21 by 30 centimetres.



**Annex IV****(E) Repatriation Certificate***(See Annex II, Article 11)*

## REPATRIATION CERTIFICATE

Date:

Camp:

Hospital:

Surname:

First names:

Date of birth:

Rank:

Army number:

P. W. number:

Injury-Disease:

Decision of the Commission:

Chairman of the  
Mixed Medical Commission:

A = direct repatriation

B = accommodation in a neutral country

NC = re-examination by next Commission

**Annex V****Model Regulations Concerning Payments Sent by Prisoners to their Own Country**

*(See Article 63)*

- (1) The notification referred to in the third paragraph of Article 63 will show:
  - (a) number as specified in Article 17, rank, surname and first names of the prisoner of war who is the payer;
  - (b) the name and address of the payee in the country of origin;
  - (c) the amount to be so paid in the currency of the country in which he is detained.
- (2) The notification will be signed by the prisoner of war, or his witnessed mark made upon it if he cannot write, and shall be countersigned by the prisoners' representative.
- (3) The camp commander will add to this notification a certificate that the prisoner of war concerned has a credit balance of not less than the amount registered as payable.
- (4) The notification may be made up in lists, each sheet of such lists being witnessed by the prisoners' representative and certified by the camp commander.

**Document No. 5, The Fourth Geneva Convention**

[Source: Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949; available at [www.icrc.org](http://www.icrc.org)]

**Convention (IV) relative to the Protection of Civilian Persons in Time of War**

**Geneva, 12 August 1949**

**Preamble**

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of establishing a Convention for the Protection of Civilian Persons in Time of War, have agreed as follows:

**PART I. GENERAL PROVISIONS****ARTICLE 1**

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

**ARTICLE 2**

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

**ARTICLE 3**

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

#### **ARTICLE 4**

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention.

#### **ARTICLE 5**

Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

#### **ARTICLE 6**

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.

#### **ARTICLE 7**

In addition to the agreements expressly provided for in Articles 11, 14, 15, 17, 36, 108, 109, 132, 133 and 149, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, not restrict the rights which it confers upon them.

Protected persons shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

#### **ARTICLE 8**

Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

**ARTICLE 9**

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

**ARTICLE 10**

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief.

**ARTICLE 11**

The High Contracting Parties may at any time agree to entrust to an international organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When persons protected by the present Convention do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article.

The provisions of this Article shall extend and be adapted to cases of nationals of a neutral State who are in occupied territory or who find themselves in the territory of a belligerent State in which the State of which they are nationals has not normal diplomatic representation.

#### **ARTICLE 12**

In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for protected persons, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

### **PART II. GENERAL PROTECTION OF POPULATIONS AGAINST CERTAIN CONSEQUENCES OF WAR**

#### **ARTICLE 13**

The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

#### **ARTICLE 14**

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital and safety zones and localities.

**ARTICLE 15**

Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

- (a) wounded and sick combatants or non-combatants;
- (b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.

**ARTICLE 16**

The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

**ARTICLE 17**

The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

**ARTICLE 18**

Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.

States which are Parties to a conflict shall provide all civilian hospitals with certificates showing that they are civilian hospitals and that the buildings which they occupy are not used for any purpose which would deprive these hospitals of protection in accordance with Article 19.

Civilian hospitals shall be marked by means of the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, but only if so authorized by the State.

The Parties to the conflict shall, in so far as military considerations permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly visible to the enemy land, air and naval forces in order to obviate the possibility of any hostile action.



In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives.

#### **ARTICLE 19**

The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.

The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.

#### **ARTICLE 20**

Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases shall be respected and protected.

In occupied territory and in zones of military operations, the above personnel shall be recognizable by means of an identity card certifying their status, bearing the photograph of the holder and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armlet which they shall wear on the left arm while carrying out their duties. This armlet shall be issued by the State and shall bear the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Other personnel who are engaged in the operation and administration of civilian hospitals shall be entitled to respect and protection and to wear the armlet, as provided in and under the conditions prescribed in this Article, while they are employed on such duties. The identity card shall state the duties on which they are employed.

The management of each hospital shall at all times hold at the disposal of the competent national or occupying authorities an up-to-date list of such personnel.

#### **ARTICLE 21**

Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

**ARTICLE 22**

Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the Parties to the conflict concerned.

They may be marked with the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Unless agreed otherwise, flights over enemy or enemy occupied territory are prohibited.

Such aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

**ARTICLE 23**

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

**ARTICLE 24**

The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.

They shall, furthermore, endeavour to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means.

#### **ARTICLE 25**

All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them. This correspondence shall be forwarded speedily and without undue delay.

If, as a result of circumstances, it becomes difficult or impossible to exchange family correspondence by the ordinary post, the Parties to the conflict concerned shall apply to a neutral intermediary, such as the Central Agency provided for in Article 140, and shall decide in consultation with it how to ensure the fulfilment of their obligations under the best possible conditions, in particular with the cooperation of the National Red Cross (Red Crescent, Red Lion and Sun) Societies.

If the Parties to the conflict deem it necessary to restrict family correspondence, such restrictions shall be confined to the compulsory use of standard forms containing twenty-five freely chosen words, and to the limitation of the number of these forms despatched to one each month.

#### **ARTICLE 26**

Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

### **PART III. STATUS AND TREATMENT OF PROTECTED PERSONS**

#### **Section I. Provisions common to the territories of the parties to the conflict and to occupied territories**

#### **ARTICLE 27**

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the

conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

#### **ARTICLE 28**

The presence of a protected person may not be used to render certain points or areas immune from military operations.

#### **ARTICLE 29**

The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.

#### **ARTICLE 30**

Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.

These several organizations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.

Apart from the visits of the delegates of the Protecting Powers and of the International Committee of the Red Cross, provided for by Article 143, the Detaining or Occupying Powers shall facilitate, as much as possible, visits to protected persons by the representatives of other organizations whose object is to give spiritual aid or material relief to such persons.

#### **ARTICLE 31**

No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.

#### **ARTICLE 32**

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

#### **ARTICLE 33**

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

Pillage is prohibited.

Reprisals against protected persons and their property are prohibited.

**ARTICLE 34**

The taking of hostages is prohibited.

**Section II. Aliens in the territory of a party to the conflict**

**ARTICLE 35**

All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. Those persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use.

If any such person is refused permission to leave the territory, he shall be entitled to have refusal reconsidered, as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.

Upon request, representatives of the Protecting Power shall, unless reasons of security prevent it, or the persons concerned object, be furnished with the reasons for refusal of any request for permission to leave the territory and be given, as expeditiously as possible, the names of all persons who have been denied permission to leave.

**ARTICLE 36**

Departures permitted under the foregoing Article shall be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food. All costs in connection therewith, from the point of exit in the territory of the Detaining Power, shall be borne by the country of destination, or, in the case of accommodation in a neutral country, by the Power whose nationals are benefited. The practical details of such movements may, if necessary, be settled by special agreements between the Powers concerned.

The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

**ARTICLE 37**

Protected persons who are confined pending proceedings or serving a sentence involving loss of liberty, shall during their confinement be humanely treated.

As soon as they are released, they may ask to leave the territory in conformity with the foregoing Articles.

**ARTICLE 38**

With the exception of special measures authorized by the present Convention, in particularly by Article 27 and 41 thereof, the situation of protected persons shall

continue to be regulated, in principle, by the provisions concerning aliens in time of peace. In any case, the following rights shall be granted to them:

- (1) they shall be enabled to receive the individual or collective relief that may be sent to them.
- (2) they shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned.
- (3) they shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith.
- (4) if they reside in an area particularly exposed to the dangers of war, they shall be authorized to move from that area to the same extent as the nationals of the State concerned.
- (5) children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.

#### **ARTICLE 39**

Protected persons who, as a result of the war, have lost their gainful employment, shall be granted the opportunity to find paid employment. That opportunity shall, subject to security considerations and to the provisions of Article 40, be equal to that enjoyed by the nationals of the Power in whose territory they are.

Where a Party to the conflict applies to a protected person methods of control which result in his being unable to support himself, and especially if such a person is prevented for reasons of security from finding paid employment on reasonable conditions, the said Party shall ensure his support and that of his dependents.

Protected persons may in any case receive allowances from their home country, the Protecting Power, or the relief societies referred to in Article 30.

#### **ARTICLE 40**

Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are.

If protected persons are of enemy nationality, they may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations.

In the cases mentioned in the two preceding paragraphs, protected persons compelled to work shall have the benefit of the same working conditions and of the same safeguards as national workers in particular as regards wages, hours of labour, clothing and equipment, previous training and compensation for occupational accidents and diseases.

If the above provisions are infringed, protected persons shall be allowed to exercise their right of complaint in accordance with Article 30.

**ARTICLE 41**

Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.

In applying the provisions of Article 39, second paragraph, to the cases of persons required to leave their usual places of residence by virtue of a decision placing them in assigned residence elsewhere, the Detaining Power shall be guided as closely as possible by the standards of welfare set forth in Part III, Section IV of this Convention.

**ARTICLE 42**

The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

**ARTICLE 43**

Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

**ARTICLE 44**

In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government.

**ARTICLE 45**

Protected persons shall not be transferred to a Power which is not a party to the Convention.

This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities.

Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of

the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.

In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.

#### **ARTICLE 46**

In so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities.

Restrictive measures affecting their property shall be cancelled, in accordance with the law of the Detaining Power, as soon as possible after the close of hostilities.

### **Section III. Occupied territories**

#### **ARTICLE 47**

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

#### **ARTICLE 48**

Protected persons who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave the territory subject to the provisions of Article 35, and decisions thereon shall be taken according to the procedure which the Occupying Power shall establish in accordance with the said Article.

#### **ARTICLE 49**

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the



bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

#### **ARTICLE 50**

The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.

The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may not, in any case, change their personal status, nor enlist them in formations or organizations subordinate to it.

Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

A special section of the Bureau set up in accordance with Article 136 shall be responsible for taking all necessary steps to identify children whose identity is in doubt. Particulars of their parents or other near relatives should always be recorded if available.

The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years.

#### **ARTICLE 51**

The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.

The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering,

clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour.

The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article.

In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character.

#### **ARTICLE 52**

No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.

#### **ARTICLE 53**

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

#### **ARTICLE 54**

The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.

This prohibition does not prejudice the application of the second paragraph of Article 51. It does not affect the right of the Occupying Power to remove public officials from their posts.

#### **ARTICLE 55**

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.

The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.

#### **ARTICLE 56**

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.

If new hospitals are set up in occupied territory and if the competent organs of the occupied State are not operating there, the occupying authorities shall, if necessary, grant them the recognition provided for in Article 18. In similar circumstances, the occupying authorities shall also grant recognition to hospital personnel and transport vehicles under the provisions of Articles 20 and 21.

In adopting measures of health and hygiene and in their implementation, the Occupying Power shall take into consideration the moral and ethical susceptibilities of the population of the occupied territory.

#### **ARTICLE 57**

The Occupying Power may requisition civilian hospitals of hospitals only temporarily and only in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.

The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.

#### **ARTICLE 58**

The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities.

The Occupying Power shall also accept consignments of books and articles required for religious needs and shall facilitate their distribution in occupied territory.

**ARTICLE 59**

If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.

**ARTICLE 60**

Relief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55, 56 and 59. The Occupying Power shall in no way whatsoever divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power.

**ARTICLE 61**

The distribution of the relief consignments referred to in the foregoing Articles shall be carried out with the cooperation and under the supervision of the Protecting Power. This duty may also be delegated, by agreement between the Occupying Power and the Protecting Power, to a neutral Power, to the International Committee of the Red Cross or to any other impartial humanitarian body.

Such consignments shall be exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory. The Occupying Power shall facilitate the rapid distribution of these consignments.

All Contracting Parties shall endeavour to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories.

**ARTICLE 62**

Subject to imperative reasons of security, protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them.

**ARTICLE 63**

Subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power:

- (a) recognized National Red Cross (Red Crescent, Red Lion and Sun) Societies shall be able to pursue their activities in accordance with Red Cross principles, as defined by the International Red Cross Conferences. Other relief societies shall be permitted to continue their humanitarian activities under similar conditions;
- (b) the Occupying Power may not require any changes in the personnel or structure of these societies, which would prejudice the aforesaid activities.

The same principles shall apply to the activities and personnel of special organizations of a non-military character, which already exist or which may be established, for the purpose of ensuring the living conditions of the civilian population by the maintenance of the essential public utility services, by the distribution of relief and by the organization of rescues.

#### **ARTICLE 64**

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

#### **ARTICLE 65**

The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.

#### **ARTICLE 66**

In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64 the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

#### **ARTICLE 67**

The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence. They shall take into consideration the fact the accused is not a national of the Occupying Power.

**ARTICLE 68**

Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected persons of liberty. The courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period.

The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty against a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.

In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence.

**ARTICLE 69**

In all cases the duration of the period during which a protected person accused of an offence is under arrest awaiting trial or punishment shall be deducted from any period of imprisonment of awarded.

**ARTICLE 70**

Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.

Nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

**ARTICLE 71**

No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial.

Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them, and shall be brought to trial as rapidly as possible. The Protecting Power shall be informed of all proceedings instituted by the Occupying Power against protected persons in respect of charges involving the death penalty or imprisonment for two years or more; it shall be enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the Protecting Power shall be entitled, on request, to be furnished with all particulars of these and of any other proceedings instituted by the Occupying Power against protected persons.

The notification to the Protecting Power, as provided for in the second paragraph above, shall be sent immediately, and shall in any case reach the Protecting Power three weeks before the date of the first hearing. Unless, at the opening of the trial, evidence is submitted that the provisions of this Article are fully complied with, the trial shall not proceed. The notification shall include the following particulars:

- (a) description of the accused;
- (b) place of residence or detention;
- (c) specification of the charge or charges (with mention of the penal provisions under which it is brought);
- (d) designation of the court which will hear the case;
- (e) place and date of the first hearing.

#### **ARTICLE 72**

Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

Failing a choice by the accused, the Protecting Power may provide him with an advocate or counsel. When an accused person has to meet a serious charge and the Protecting Power is not functioning, the Occupying Power, subject to the consent of the accused, shall provide an advocate or counsel.

Accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have the right at any time to object to the interpreter and to ask for his replacement.

#### **ARTICLE 73**

A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

The penal procedure provided in the present Section shall apply, as far as it is applicable, to appeals. Where the laws applied by the Court make no provision for

appeals, the convicted person shall have the right to petition against the finding and sentence to the competent authority of the Occupying Power.

#### **ARTICLE 74**

Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held *in camera* in the interests of the security of the Occupying Power, which shall then notify the Protecting Power. A notification in respect of the date and place of trial shall be sent to the Protecting Power.

Any judgement involving a sentence of death, or imprisonment for two years or more, shall be communicated, with the relevant grounds, as rapidly as possible to the Protecting Power. The notification shall contain a reference to the notification made under Article 71 and, in the case of sentences of imprisonment, the name of the place where the sentence is to be served. A record of judgements other than those referred to above shall be kept by the court and shall be open to inspection by representatives of the Protecting Power. Any period allowed for appeal in the case of sentences involving the death penalty, or imprisonment of two years or more, shall not run until notification of judgement has been received by the Protecting Power.

#### **ARTICLE 75**

In no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve.

No death sentence shall be carried out before the expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final judgment confirming such death sentence, or of an order denying pardon or reprieve.

The six months period of suspension of the death sentence herein prescribed may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces, provided always that the Protecting Power is notified of such reduction and is given reasonable time and opportunity to make representations to the competent occupying authorities in respect of such death sentences.

#### **ARTICLE 76**

Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country.

They shall receive the medical attention required by their state of health.

They shall also have the right to receive any spiritual assistance which they may require.

Women shall be confined in separate quarters and shall be under the direct supervision of women.

Proper regard shall be paid to the special treatment due to minors.



Protected persons who are detained shall have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of Article 143.

Such persons shall have the right to receive at least one relief parcel monthly.

#### **ARTICLE 77**

Protected persons who have been accused of offences or convicted by the courts in occupied territory, shall be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory.

#### **ARTICLE 78**

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

### **Section IV. Regulations for the treatment of internees**

#### **Chapter I. General Provisions**

#### **ARTICLE 79**

The Parties to the conflict shall not intern protected persons, except in accordance with the provisions of Articles 41, 42, 43, 68 and 78.

#### **ARTICLE 80**

Internees shall retain their full civil capacity and shall exercise such attendant rights as may be compatible with their status.

#### **ARTICLE 81**

Parties to the conflict who intern protected persons shall be bound to provide free of charge for their maintenance, and to grant them also the medical attention required by their state of health.

No deduction from the allowances, salaries or credits due to the internees shall be made for the repayment of these costs.

The Detaining Power shall provide for the support of those dependent on the internees, if such dependents are without adequate means of support or are unable to earn a living.

**ARTICLE 82**

The Detaining Power shall, as far as possible, accommodate the internees according to their nationality, language and customs. Internees who are nationals of the same country shall not be separated merely because they have different languages.

Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health or for the purposes of enforcement of the provisions of Chapter IX of the present Section. Internees may request that their children who are left at liberty without parental care shall be interned with them.

Wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life.

**Chapter II. Places of Internment****ARTICLE 83**

The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war.

The Detaining Power shall give the enemy Powers, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of places of internment.

Whenever military considerations permit, internment camps shall be indicated by the letters IC, placed so as to be clearly visible in the daytime from the air. The Powers concerned may, however, agree upon any other system of marking. No place other than an internment camp shall be marked as such.

**ARTICLE 84**

Internees shall be accommodated and administered separately from prisoners of war and from persons deprived of liberty for any other reason.

**ARTICLE 85**

The Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigours of the climate and the effects of the war. In no case shall permanent places of internment be situated in unhealthy areas or in districts, the climate of which is injurious to the internees. In all cases where the district, in which a protected person is temporarily interned, is in an unhealthy area or has a climate which is harmful to his health, he shall be removed to a more suitable place of internment as rapidly as circumstances permit.

The premises shall be fully protected from dampness, adequately heated and lighted, in particular between dusk and lights out. The sleeping quarters shall be sufficiently

spacious and well ventilated, and the internees shall have suitable bedding and sufficient blankets, account being taken of the climate, and the age, sex, and state of health of the internees.

Internees shall have for their use, day and night, sanitary conveniences which conform to the rules of hygiene, and are constantly maintained in a state of cleanliness. They shall be provided with sufficient water and soap for their daily personal toilet and for washing their personal laundry; installations and facilities necessary for this purpose shall be granted to them. Showers or baths shall also be available. The necessary time shall be set aside for washing and for cleaning.

Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory.

#### **ARTICLE 86**

The Detaining Power shall place at the disposal of interned persons, of whatever denomination, premises suitable for the holding of their religious services.

#### **ARTICLE 87**

Canteens shall be installed in every place of internment, except where other suitable facilities are available. Their purpose shall be to enable internees to make purchases, at prices not higher than local market prices, of foodstuffs and articles of everyday use, including soap and tobacco, such as would increase their personal well-being and comfort.

Profits made by canteens shall be credited to a welfare fund to be set up for each place of internment, and administered for the benefit of the internees attached to such place of internment. The Internee Committee provided for in Article 102 shall have the right to check the management of the canteen and of the said fund.

When a place of internment is closed down, the balance of the welfare fund shall be transferred to the welfare fund of a place of internment for internees of the same nationality, or, if such a place does not exist, to a central welfare fund which shall be administered for the benefit of all internees remaining in the custody of the Detaining Power. In case of a general release, the said profits shall be kept by the Detaining Power, subject to any agreement to the contrary between the Powers concerned.

#### **ARTICLE 88**

In all places of internment exposed to air raids and other hazards of war, shelters adequate in number and structure to ensure the necessary protection shall be installed. In case of alarms, the measures internees shall be free to enter such shelters as quickly as possible, excepting those who remain for the protection of their quarters against the aforesaid hazards. Any protective measures taken in favour of the population shall also apply to them.

All due precautions must be taken in places of internment against the danger of fire.

### **Chapter III. Food and Clothing**

#### **ARTICLE 89**

Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies. Account shall also be taken of the customary diet of the internees.

Internees shall also be given the means by which they can prepare for themselves any additional food in their possession.

Sufficient drinking water shall be supplied to internees. The use of tobacco shall be permitted.

Internees who work shall receive additional rations in proportion to the kind of labour which they perform.

Expectant and nursing mothers and children under fifteen years of age, shall be given additional food, in proportion to their physiological needs.

#### **ARTICLE 90**

When taken into custody, internees shall be given all facilities to provide themselves with the necessary clothing, footwear and change of underwear, and later on, to procure further supplies if required. Should any internees not have sufficient clothing, account being taken of the climate, and be unable to procure any, it shall be provided free of charge to them by the Detaining Power.

The clothing supplied by the Detaining Power to internees and the outward markings placed on their own clothes shall not be ignominious nor expose them to ridicule.

Workers shall receive suitable working outfits, including protective clothing, whenever the nature of their work so requires.

### **Chapter IV. Hygiene and Medical Attention**

#### **ARTICLE 91**

Every place of internment shall have an adequate infirmary, under the direction of a qualified doctor, where internees may have the attention they require, as well as an appropriate diet. Isolation wards shall be set aside for cases of contagious or mental diseases.

Maternity cases and internees suffering from serious diseases, or whose condition requires special treatment, a surgical operation or hospital care, must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population.

Internees shall, for preference, have the attention of medical personnel of their own nationality.

Internees may not be prevented from presenting themselves to the medical authorities for examination. The medical authorities of the Detaining Power shall, upon request,

issue to every internee who has undergone treatment an official certificate showing the nature of his illness or injury, and the duration and nature of the treatment given. A duplicate of this certificate shall be forwarded to the Central Agency provided for in Article 140.

Treatment, including the provision of any apparatus necessary for the maintenance of internees in good health, particularly dentures and other artificial appliances and spectacles, shall be free of charge to the internee.

#### **ARTICLE 92**

Medical inspections of internees shall be made at least once a month. Their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of internees, and to detect contagious diseases, especially tuberculosis, malaria, and venereal diseases. Such inspections shall include, in particular, the checking of weight of each internee and, at least once a year, radioscopic examination.

### **Chapter V. Religious, Intellectual and Physical Activities**

#### **ARTICLE 93**

Internees shall enjoy complete latitude in the exercise of their religious duties, including attendance at the services of their faith, on condition that they comply with the disciplinary routine prescribed by the detaining authorities.

Ministers of religion who are interned shall be allowed to minister freely to the members of their community. For this purpose the Detaining Power shall ensure their equitable allocation amongst the various places of internment in which there are internees speaking the same language and belonging to the same religion. Should such ministers be too few in number, the Detaining Power shall provide them with the necessary facilities, including means of transport, for moving from one place to another, and they shall be authorized to visit any internees who are in hospital. Ministers of religion shall be at liberty to correspond on matters concerning their ministry with the religious authorities in the country of detention and, as far as possible, with the international religious organizations of their faith. Such correspondence shall not be considered as forming a part of the quota mentioned in Article 107. It shall, however, be subject to the provisions of Article 112.

When internees do not have at their disposal the assistance of ministers of their faith, or should these latter be too few in number, the local religious authorities of the same faith may appoint, in agreement with the Detaining Power, a minister of the internees' faith or, if such a course is feasible from a denominational point of view, a minister of similar religion or a qualified layman. The latter shall enjoy the facilities granted to the ministry he has assumed. Persons so appointed shall comply with all regulations laid down by the Detaining Power in the interests of discipline and security.

#### **ARTICLE 94**

The Detaining Power shall encourage intellectual, educational and recreational pursuits, sports and games amongst internees, whilst leaving them free to take part

in them or not. It shall take all practicable measures to ensure the exercise thereof, in particular by providing suitable premises.

All possible facilities shall be granted to internees to continue their studies or to take up new subjects. The education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside.

Internees shall be given opportunities for physical exercise, sports and outdoor games. For this purpose, sufficient open spaces shall be set aside in all places of internment. Special playgrounds shall be reserved for children and young people.

#### **ARTICLE 95**

The Detaining Power shall not employ internees as workers, unless they so desire. Employment which, if undertaken under compulsion by a protected person not in internment, would involve a breach of Articles 40 or 51 of the present Convention, and employment on work which is of a degrading or humiliating character are in any case prohibited.

After a working period of six weeks, internees shall be free to give up work at any moment, subject to eight days' notice.

These provisions constitute no obstacle to the right of the Detaining Power to employ interned doctors, dentists and other medical personnel in their professional capacity on behalf of their fellow internees, or to employ internees for administrative and maintenance work in places of internment and to detail such persons for work in the kitchens or for other domestic tasks, or to require such persons to undertake duties connected with the protection of internees against aerial bombardment or other war risks. No internee may, however, be required to perform tasks for which he is, in the opinion of a medical officer, physically unsuited.

The Detaining Power shall take entire responsibility for all working conditions, for medical attention, for the payment of wages, and for ensuring that all employed internees receive compensation for occupational accidents and diseases. The standards prescribed for the said working conditions and for compensation shall be in accordance with the national laws and regulations, and with the existing practice; they shall in no case be inferior to those obtaining for work of the same nature in the same district. Wages for work done shall be determined on an equitable basis by special agreements between the internees, the Detaining Power, and, if the case arises, employers other than the Detaining Power to provide for free maintenance of internees and for the medical attention which their state of health may require. Internees permanently detailed for categories of work mentioned in the third paragraph of this Article, shall be paid fair wages by the Detaining Power. The working conditions and the scale of compensation for occupational accidents and diseases to internees, thus detailed, shall not be inferior to those applicable to work of the same nature in the same district.

**ARTICLE 96**

All labour detachments shall remain part of and dependent upon a place of internment. The competent authorities of the Detaining Power and the commandant of a place of internment shall be responsible for the observance in a labour detachment of the provisions of the present Convention. The commandant shall keep an up-to-date list of the labour detachments subordinate to him and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross and of other humanitarian organizations who may visit the places of internment.

**Chapter VI. Personal Property and Financial Resources****ARTICLE 97**

Internees shall be permitted to retain articles of personal use. Monies, cheques, bonds, etc., and valuables in their possession may not be taken from them except in accordance with established procedure. Detailed receipts shall be given therefor.

The amounts shall be paid into the account of every internee as provided for in Article 98. Such amounts may not be converted into any other currency unless legislation in force in the territory in which the owner is interned so requires or the internee gives his consent.

Articles which have above all a personal or sentimental value may not be taken away.

A woman internee shall not be searched except by a woman.

On release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their accounts kept in accordance with Article 98, with the exception of any articles or amounts withheld by the Detaining Power by virtue of its legislation in force. If the property of an internee is so withheld, the owner shall receive a detailed receipt.

Family or identity documents in the possession of internees may not be taken away without a receipt being given. At no time shall internees be left without identity documents. If they have none, they shall be issued with special documents drawn up by the detaining authorities, which will serve as their identity papers until the end of their internment.

Internees may keep on their persons a certain amount of money, in cash or in the shape of purchase coupons, to enable them to make purchases.

**ARTICLE 98**

All internees shall receive regular allowances, sufficient to enable them to purchase goods and articles, such as tobacco, toilet requisites, etc. Such allowances may take the form of credits or purchase coupons.

Furthermore, internees may receive allowances from the Power to which they owe allegiance, the Protecting Powers, the organizations which may assist them, or their families, as well as the income on their property in accordance with the law of the Detaining Power. The amount of allowances granted by the Power to which they owe

allegiance shall be the same for each category of internees (infirm, sick, pregnant women, etc.) but may not be allocated by that Power or distributed by the Detaining Power on the basis of discriminations between internees which are prohibited by Article 27 of the present Convention.

The Detaining Power shall open a regular account for every internee, to which shall be credited the allowances named in the present Article, the wages earned and the remittances received, together with such sums taken from him as may be available under the legislation in force in the territory in which he is interned. Internees shall be granted all facilities consistent with the legislation in force in such territory to make remittances to their families and to other dependants. They may draw from their accounts the amounts necessary for their personal expenses, within the limits fixed by the Detaining Power. They shall at all times be afforded reasonable facilities for consulting and obtaining copies of their accounts. A statement of accounts shall be furnished to the Protecting Power, on request, and shall accompany the internee in case of transfer.

## **Chapter VII. Administration and Discipline**

### **ARTICLE 99**

Every place of internment shall be put under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power. The officer in charge of the place of internment must have in his possession a copy of the present Convention in the official language, or one of the official languages, of his country and shall be responsible for its application. The staff in control of internees shall be instructed in the provisions of the present Convention and of the administrative measures adopted to ensure its application.

The text of the present Convention and the texts of special agreements concluded under the said Convention shall be posted inside the place of internment, in a language which the internees understand, or shall be in the possession of the Internee Committee.

Regulations, orders, notices and publications of every kind shall be communicated to the internees and posted inside the places of internment, in a language which they understand.

Every order and command addressed to internees individually must, likewise, be given in a language which they understand.

### **ARTICLE 100**

The disciplinary regime in places of internment shall be consistent with humanitarian principles, and shall in no circumstances include regulations imposing on internees any physical exertion dangerous to their health or involving physical or moral victimization. Identification by tattooing or imprinting signs or markings on the body, is prohibited.

In particular, prolonged standing and roll-calls, punishment drill, military drill and manoeuvres, or the reduction of food rations, are prohibited.



**ARTICLE 101**

Internees shall have the right to present to the authorities in whose power they are, any petition with regard to the conditions of internment to which they are subjected.

They shall also have the right to apply without restriction through the Internee Committee or, if they consider it necessary, direct to the representatives of the Protecting Power, in order to indicate to them any points on which they may have complaints to make with regard to the conditions of internment.

Such petitions and complaints shall be transmitted forthwith and without alteration, and even if the latter are recognized to be unfounded, they may not occasion any punishment.

Periodic reports on the situation in places of internment and as to the needs of the internees may be sent by the Internee Committees to the representatives of the Protecting Powers.

**ARTICLE 102**

In every place of internment, the internees shall freely elect by secret ballot every six months, the members of a Committee empowered to represent them before the Detaining and the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. The members of the Committee shall be eligible for re-election.

Internees so elected shall enter upon their duties after their election has been approved by the detaining authorities. The reasons for any refusals or dismissals shall be communicated to the Protecting Powers concerned.

**ARTICLE 103**

The Internee Committees shall further the physical, spiritual and intellectual well-being of the internees.

In case the internees decide, in particular, to organize a system of mutual assistance amongst themselves, this organization would be within the competence of the Committees in addition to the special duties entrusted to them under other provisions of the present Convention.

**ARTICLE 104**

Members of Internee Committees shall not be required to perform any other work, if the accomplishment of their duties is rendered more difficult thereby.

Members of Internee Committees may appoint from amongst the internees such assistants as they may require. All material facilities shall be granted to them, particularly a certain freedom of movement necessary for the accomplishment of their duties (visits to labour detachments, receipt of supplies, etc.).

All facilities shall likewise be accorded to members of Internee Committees for communication by post and telegraph with the detaining authorities, the Protecting Powers, the International Committee of the Red Cross and their delegates, and with the organizations which give assistance to internees. Committee members in labour

detachments shall enjoy similar facilities for communication with their Internee Committee in the principal place of internment. Such communications shall not be limited, nor considered as forming a part of the quota mentioned in Article 107.

Members of Internee Committees who are transferred shall be allowed a reasonable time to acquaint their successors with current affairs.

## **Chaper VIII. Relations with the Exterior**

### **ARTICLE 105**

Immediately upon interning protected persons, the Detaining Powers shall inform them, the Power to which they owe allegiance and their Protecting Power of the measures taken for executing the provisions of the present Chapter. The Detaining Powers shall likewise inform the Parties concerned of any subsequent modifications of such measures.

### **ARTICLE 106**

As soon as he is interned, or at the latest not more than one week after his arrival in a place of internment, and likewise in cases of sickness or transfer to another place of internment or to a hospital, every internee shall be enabled to send direct to his family, on the one hand, and to the Central Agency provided for by Article 140, on the other, an internment card similar, if possible, to the model annexed to the present Convention, informing his relatives of his detention, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any way.

### **ARTICLE 107**

Internees shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each internee, the said number shall not be less than two letters and four cards monthly; these shall be drawn up so as to conform as closely as possible to the models annexed to the present Convention. If limitations must be placed on the correspondence addressed to internees, they may be ordered only by the Power to which such internees owe allegiance, possibly at the request of the Detaining Power. Such letters and cards must be conveyed with reasonable despatch; they may not be delayed or retained for disciplinary reasons.

Internees who have been a long time without news, or who find it impossible to receive news from their relatives, or to give them news by the ordinary postal route, as well as those who are at a considerable distance from their homes, shall be allowed to send telegrams, the charges being paid by them in the currency at their disposal. They shall likewise benefit by this provision in cases which are recognized to be urgent.

As a rule, internees' mail shall be written in their own language. The Parties to the conflict may authorize correspondence in other languages.

### **ARTICLE 108**

Internees shall be allowed to receive, by post or by any other means, individual parcels or collective shipments containing in particular foodstuffs, clothing, medical supplies, as well as books and objects of a devotional, educational or recreational character

which may meet their needs. Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

Should military necessity require the quantity of such shipments to be limited, due notice thereof shall be given to the Protecting Power and to the International Committee of the Red Cross, or to any other organization giving assistance to the internees and responsible for the forwarding of such shipments.

The conditions for the sending of individual parcels and collective shipments shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the internees of relief supplies. Parcels of clothing and foodstuffs may not include books. Medical relief supplies shall, as a rule, be sent in collective parcels.

#### **ARTICLE 109**

In the absence of special agreements between Parties to the conflict regarding the conditions for the receipt and distribution of collective relief shipments, the regulations concerning collective relief which are annexed to the present Convention shall be applied.

The special agreements provided for above shall in no case restrict the right of Internee Committees to take possession of collective relief shipments intended for internees, to undertake their distribution and to dispose of them in the interests of the recipients.

Nor shall such agreements restrict the right of representatives of the Protecting Powers, the International Committee of the Red Cross, or any other organization giving assistance to internees and responsible for the forwarding of collective shipments, to supervise their distribution to the recipients.

#### **ARTICLE 110**

All relief shipments for internees shall be exempt from import, customs and other dues.

All matter sent by mail, including relief parcels sent by parcel post and remittances of money, addressed from other countries to internees or despatched by them through the post office, either direct or through the Information Bureaux provided for in Article 136 and the Central Information Agency provided for in Article 140, shall be exempt from all postal dues both in the countries of origin and destination and in intermediate countries. To this end, in particular, the exemption provided by the Universal Postal Convention of 1947 and by the agreements of the Universal Postal Union in favour of civilians of enemy nationality detained in camps or civilian prisons, shall be extended to the other interned persons protected by the present Convention. The countries not signatory to the above-mentioned agreements shall be bound to grant freedom from charges in the same circumstances.

The cost of transporting relief shipments which are intended for internees and which, by reason of their weight or any other cause, cannot be sent through the post office, shall be borne by the Detaining Power in all the territories under its control. Other

Powers which are Parties to the present Convention shall bear the cost of transport in their respective territories.

Costs connected with the transport of such shipments, which are not covered by the above paragraphs, shall be charged to the senders.

The High Contracting Parties shall endeavour to reduce, so far as possible, the charges for telegrams sent by internees, or addressed to them.

#### **ARTICLE 111**

Should military operations prevent the Powers concerned from fulfilling their obligation to ensure the conveyance of the mail and relief shipments provided for in Articles 106, 107, 108 and 113, the Protecting Powers concerned, the International Committee of the Red Cross or any other organization duly approved by the Parties to the conflict may undertake the conveyance of such shipments by suitable means (rail, motor vehicles, vessels or aircraft, etc.). For this purpose, the High Contracting Parties shall endeavour to supply them with such transport, and to allow its circulation, especially by granting the necessary safe-conducts.

Such transport may also be used to convey:

- (a) correspondence, lists and reports exchanged between the Central Information Agency referred to in Article 140 and the National Bureaux referred to in Article 136;
- (b) correspondence and reports relating to internees which the Protecting Powers, the International Committee of the Red Cross or any other organization assisting the internees exchange either with their own delegates or with the Parties to the conflict.

These provisions in no way detract from the right of any Party to the conflict to arrange other means of transport if it should so prefer, nor preclude the granting of safe-conducts, under mutually agreed conditions, to such means of transport.

The costs occasioned by the use of such means of transport shall be borne, in proportion to the importance of the shipments, by the Parties to the conflict whose nationals are benefited thereby.

#### **ARTICLE 112**

The censoring of correspondence addressed to internees or despatched by them shall be done as quickly as possible.

The examination of consignments intended for internees shall not be carried out under conditions that will expose the goods contained in them to deterioration. It shall be done in the presence of the addressee, or of a fellow-internee duly delegated by him. The delivery to internees of individual or collective consignments shall not be delayed under the pretext of difficulties of censorship.

Any prohibition of correspondence ordered by the Parties to the conflict either for military or political reasons, shall be only temporary and its duration shall be as short as possible.

**ARTICLE 113**

The Detaining Powers shall provide all reasonable execution facilities for the transmission, through the Protecting Power or the Central Agency provided for in Article 140, or as otherwise required, of wills, powers of attorney, letters of authority, or any other documents intended for internees or despatched by them.

In all cases the Detaining Powers shall facilitate the execution and authentication in due legal form of such documents on behalf of internees, in particular by allowing them to consult a lawyer.

**ARTICLE 114**

The Detaining Power shall afford internees all facilities to enable them to manage their property, provided this is not incompatible with the conditions of internment and the law which is applicable. For this purpose, the said Power may give them permission to leave the place of internment in urgent cases and if circumstances allow.

**ARTICLE 115**

In all cases where an internee is a party to proceedings in any court, the Detaining Power shall, if he so requests, cause the court to be informed of his detention and shall, within legal limits, ensure that all necessary steps are taken to prevent him from being in any way prejudiced, by reason of his internment, as regards the preparation and conduct of his case or as regards the execution of any judgment of the court.

**ARTICLE 116**

Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible.

As far as is possible, internees shall be permitted to visit their homes in urgent cases, particularly in cases of death or serious illness of relatives.

**Chapter IX. Penal and Disciplinary Sanctions****ARTICLE 117**

Subject to the provisions of the present Chapter, the laws in force in the territory in which they are detained will continue to apply to internees who commit offences during internment.

If general laws, regulations or orders declare acts committed by internees to be punishable, whereas the same acts are not punishable when committed by persons who are not internees, such acts shall entail disciplinary punishments only.

No internee may be punished more than once for the same act, or on the same count.

**ARTICLE 118**

The courts or authorities shall in passing sentence take as far as possible into account the fact that the defendant is not a national of the Detaining Power. They shall be free to reduce the penalty prescribed for the offence with which the internee is charged and shall not be obliged, to this end, to apply the minimum sentence prescribed.

Imprisonment in premises without daylight, and, in general, all forms of cruelty without exception are forbidden.

Internees who have served disciplinary or judicial sentences shall not be treated differently from other internees.

The duration of preventive detention undergone by an internee shall be deducted from any disciplinary or judicial penalty involving confinement to which he may be sentenced.

Internee Committees shall be informed of all judicial proceedings instituted against internees whom they represent, and of their result.

#### **ARTICLE 119**

The disciplinary punishments applicable to internees shall be the following:

- (1) A fine which shall not exceed 50 per cent of the wages which the internee would otherwise receive under the provisions of Article 95 during a period of not more than thirty days.
- (2) Discontinuance of privileges granted over and above the treatment provided for by the present Convention
- (3) Fatigue duties, not exceeding two hours daily, in connection with the maintenance of the place of internment.
- (4) Confinement.

In no case shall disciplinary penalties be inhuman, brutal or dangerous for the health of internees. Account shall be taken of the internee's age, sex and state of health.

The duration of any single punishment shall in no case exceed a maximum of thirty consecutive days, even if the internee is answerable for several breaches of discipline when his case is dealt with, whether such breaches are connected or not.

#### **ARTICLE 120**

Internees who are recaptured after having escaped or when attempting to escape, shall be liable only to disciplinary punishment in respect of this act, even if it is a repeated offence.

Article 118, paragraph 3, notwithstanding, internees punished as a result of escape or attempt to escape, may be subjected to special surveillance, on condition that such surveillance does not affect the state of their health, that it is exercised in a place of internment and that it does not entail the abolition of any of the safeguards granted by the present Convention.

Internees who aid and abet an escape or attempt to escape, shall be liable on this count to disciplinary punishment only.

#### **ARTICLE 121**

Escape, or attempt to escape, even if it is a repeated offence, shall not be deemed an aggravating circumstance in cases where an internee is prosecuted for offences committed during his escape.

The Parties to the conflict shall ensure that the competent authorities exercise leniency in deciding whether punishment inflicted for an offence shall be of a disciplinary or judicial nature, especially in respect of acts committed in connection with an escape, whether successful or not.

#### **ARTICLE 122**

Acts which constitute offences against discipline shall be investigated immediately. This rule shall be applied, in particular, in cases of escape or attempt to escape. Recaptured internees shall be handed over to the competent authorities as soon as possible.

In cases of offences against discipline, confinement awaiting trial shall be reduced to an absolute minimum for all internees, and shall not exceed fourteen days. Its duration shall in any case be deducted from any sentence of confinement.

The provisions of Articles 124 and 125 shall apply to internees who are in confinement awaiting trial for offences against discipline.

#### **ARTICLE 123**

Without prejudice to the competence of courts and higher authorities, disciplinary punishment may be ordered only by the commandant of the place of internment, or by a responsible officer or official who replaces him, or to whom he has delegated his disciplinary powers.

Before any disciplinary punishment is awarded, the accused internee shall be given precise information regarding the offences of which he is accused, and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter. The decision shall be announced in the presence of the accused and of a member of the Internee Committee.

The period elapsing between the time of award of a disciplinary punishment and its execution shall not exceed one month.

When an internee is awarded a further disciplinary punishment, a period of at least three days shall elapse between the execution of any two of the punishments, if the duration of one of these is ten days or more.

A record of disciplinary punishments shall be maintained by the commandant of the place of internment and shall be open to inspection by representatives of the Protecting Power.

#### **ARTICLE 124**

Internees shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.

The premises in which disciplinary punishments are undergone shall conform to sanitary requirements: they shall in particular be provided with adequate bedding. Internees undergoing punishment shall be enabled to keep themselves in a state of cleanliness.

Women internees undergoing disciplinary punishment shall be confined in separate quarters from male internees and shall be under the immediate supervision of women.

#### **ARTICLE 125**

Internees awarded disciplinary punishment shall be allowed to exercise and to stay in the open air at least two hours daily.

They shall be allowed, if they so request, to be present at the daily medical inspections. They shall receive the attention which their state of health requires and, if necessary, shall be removed to the infirmary of the place of internment or to a hospital.

They shall have permission to read and write, likewise to send and receive letters. Parcels and remittances of money, however, may be withheld from them until the completion of their punishment; such consignments shall meanwhile be entrusted to the Internee Committee, who will hand over to the infirmary the perishable goods contained in the parcels.

No internee given a disciplinary punishment may be deprived of the benefit of the provisions of Articles 107 and 143 of the present Convention.

#### **ARTICLE 126**

The provisions of Articles 71 to 76 inclusive shall apply, by analogy, to proceedings against internees who are in the national territory of the Detaining Power.

### **Chapter X. Transfers of Internees**

#### **ARTICLE 127**

The transfer of internees shall always be effected humanely. As a general rule, it shall be carried out by rail or other means of transport, and under conditions at least equal to those obtaining for the forces of the Detaining Power in their changes of station. If, as an exceptional measure, such removals have to be effected on foot, they may not take place unless the internees are in a fit state of health, and may not in any case expose them to excessive fatigue.

The Detaining Power shall supply internees during transfer with drinking water and food sufficient in quantity, quality and variety to maintain them in good health, and also with the necessary clothing, adequate shelter and the necessary medical attention. The Detaining Power shall take all suitable precautions to ensure their safety during transfer, and shall establish before their departure a complete list of all internees transferred.

Sick, wounded or infirm internees and maternity cases shall not be transferred if the journey would be seriously detrimental to them, unless their safety imperatively so demands.

If the combat zone draws close to a place of internment, the internees in the said place shall not be transferred unless their removal can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining on the spot than by being transferred.



When making decisions regarding the transfer of internees, the Detaining Power shall take their interests into account and, in particular, shall not do anything to increase the difficulties of repatriating them or returning them to their own homes.

#### **ARTICLE 128**

In the event of transfer, internees shall be officially advised of their departure and of their new postal address. Such notification shall be given in time for them to pack their luggage and inform their next of kin.

They shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited if the conditions of transfer so require, but in no case to less than twenty-five kilograms per internee.

Mail and parcels addressed to their former place of internment shall be forwarded to them without delay.

The commandant of the place of internment shall take, in agreement with the Internee Committee, any measures needed to ensure the transport of the internees' community property and of the luggage the internees are unable to take with them in consequence of restrictions imposed by virtue of the second paragraph.

### **Chapter XI. Deaths**

#### **ARTICLE 129**

The wills of internees shall be received for safe-keeping by the responsible authorities; and if the event of the death of an internee his will shall be transmitted without delay to a person whom he has previously designated.

Deaths of internees shall be certified in every case by a doctor, and a death certificate shall be made out, showing the causes of death and the conditions under which it occurred.

An official record of the death, duly registered, shall be drawn up in accordance with the procedure relating thereto in force in the territory where the place of internment is situated, and a duly certified copy of such record shall be transmitted without delay to the Protecting Power as well as to the Central Agency referred to in Article 140.

#### **ARTICLE 130**

The detaining authorities shall ensure that internees who die while interned are honourably buried, if possible according to the rites of the religion to which they belonged and that their graves are respected, properly maintained, and marked in such a way that they can always be recognized.

Deceased internees shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his expressed wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased. The ashes shall

be retained for safe-keeping by the detaining authorities and shall be transferred as soon as possible to the next of kin on their request.

As soon as circumstances permit, and not later than the close of hostilities, the Detaining Power shall forward lists of graves of deceased internees to the Powers on whom deceased internees depended, through the Information Bureaux provided for in Article 136. Such lists shall include all particulars necessary for the identification of the deceased internees, as well as the exact location of their graves.

#### **ARTICLE 131**

Every death or serious injury of an internee, caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power.

A communication on this subject shall be sent immediately to the Protecting Power. The evidence of any witnesses shall be taken, and a report including such evidence shall be prepared and forwarded to the said Protecting Power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all necessary steps to ensure the prosecution of the person or persons responsible.

### **Chapter XII. Release, Repatriation and Accommodation in Neutral Countries**

#### **ARTICLE 132**

Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

#### **ARTICLE 133**

Internment shall cease as soon as possible after the close of hostilities.

Internees in the territory of a Party to the conflict against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained until the close of such proceedings and, if circumstances require, until the completion of the penalty. The same shall apply to internees who have been previously sentenced to a punishment depriving them of liberty.

By agreement between the Detaining Power and the Powers concerned, committees may be set up after the close of hostilities, or of the occupation of territories, to search for dispersed internees.

**ARTICLE 134**

The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.

**ARTICLE 135**

The Detaining Power shall bear the expense of returning released internees to the places where they were residing when interned, or, if it took them into custody while they were in transit or on the high seas, the cost of completing their journey or of their return to their point of departure.

Where a Detaining Power refuses permission to reside in its territory to a released internee who previously had his permanent domicile therein, such Detaining Power shall pay the cost of the said internee's repatriation. If, however, the internee elects to return to his country on his own responsibility or in obedience to the Government of the Power to which he owes allegiance, the Detaining Power need not pay the expenses of his journey beyond the point of his departure from its territory. The Detaining Power need not pay the cost of repatriation of an internee who was interned at his own request.

If internees are transferred in accordance with Article 45, the transferring and receiving Powers shall agree on the portion of the above costs to be borne by each.

The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

**Section V. Information Bureaux and Central Agency****ARTICLE 136**

Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall establish an official Information Bureau responsible for receiving and transmitting information in respect of the protected persons who are in its power.

Each of the Parties to the conflict shall, within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned. It shall, furthermore, require its various departments concerned with such matters to provide the aforesaid Bureau promptly with information concerning all changes pertaining to these protected persons, as, for example, transfers, releases, repatriations, escapes, admittances to hospitals, births and deaths.

**ARTICLE 137**

Each national Bureau shall immediately forward information concerning protected persons by the most rapid means to the Powers in whose territory they resided, through the intermediary of the Protecting Powers and likewise through the Central Agency provided for in Article 140. The Bureaux shall also reply to all enquiries which may be received regarding protected persons.

Information Bureaux shall transmit information concerning a protected person unless its transmission might be detrimental to the person concerned or to his or her relatives. Even in such a case, the information may not be withheld from the Central Agency which, upon being notified of the circumstances, will take the necessary precautions indicated in Article 140.

All communications in writing made by any Bureau shall be authenticated by a signature or a seal.

#### **ARTICLE 138**

The information received by the national Bureau and transmitted by it shall be of such a character as to make it possible to identify the protected person exactly and to advise his next of kin quickly. The information in respect of each person shall include at least his surname, first names, place and date of birth, nationality last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to the individual, the address at which correspondence may be sent to him and the name and address of the person to be informed.

Likewise, information regarding the state of health of internees who are seriously ill or seriously wounded shall be supplied regularly and if possible every week.

#### **ARTICLE 139**

Each national Information Bureau shall, furthermore, be responsible for collecting all personal valuables left by protected persons mentioned in Article 136, in particular those who have been repatriated or released, or who have escaped or died; it shall forward the said valuables to those concerned, either direct, or, if necessary, through the Central Agency. Such articles shall be sent by the Bureau in sealed packets which shall be accompanied by statements giving clear and full identity particulars of the person to whom the articles belonged, and by a complete list of the contents of the parcel. Detailed records shall be maintained of the receipt and despatch of all such valuables.

#### **ARTICLE 140**

A Central Information Agency for protected persons, in particular for internees, shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency, which may be the same as that provided for in Article 123 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

The function of the Agency shall be to collect all information of the type set forth in Article 136 which it may obtain through official or private channels and to transmit it as rapidly as possible to the countries of origin or of residence of the persons concerned, except in cases where such transmissions might be detrimental to the persons whom the said information concerns, or to their relatives. It shall receive from the Parties to the conflict all reasonable facilities for effecting such transmissions.

The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.

The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross and of the relief Societies described in Article 142.

#### **ARTICLE 141**

The national Information Bureaux and the Central Information Agency shall enjoy free postage for all mail, likewise the exemptions provided for in Article 110, and further, so far as possible, exemption from telegraphic charges or, at least, greatly reduced rates.

### **PART IV. EXECUTION OF THE CONVENTION**

#### **Section I. General provisions**

#### **ARTICLE 142**

Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organizations assisting the protected persons, shall receive from these Powers, for themselves or their duly accredited agents, all facilities for visiting the protected persons, for distributing relief supplies and material from any source, intended for educational, recreational or religious purposes, or for assisting them in organizing their leisure time within the places of internment. Such societies or organizations may be constituted in the territory of the Detaining Power, or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the supply of effective and adequate relief to all protected persons.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times.

#### **ARTICLE 143**

Representatives or delegates of the Protecting Powers shall have permission to go to all places where protected persons are, particularly to places of internment, detention and work.

They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter.

Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. Their duration and frequency shall not be restricted.

Such representatives and delegates shall have full liberty to select the places they wish to visit. The Detaining or Occupying Power, the Protecting Power and when occasion arises the Power of origin of the persons to be visited, may agree that compatriots of the internees shall be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall also enjoy the above prerogatives. The appointment of such delegates shall be submitted to the approval of the Power governing the territories where they will carry out their duties.

#### **ARTICLE 144**

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.

Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions.

#### **ARTICLE 145**

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

#### **ARTICLE 146**

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

**ARTICLE 147**

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

**ARTICLE 148**

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

**ARTICLE 149**

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed. Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

**Section II. Final provisions****ARTICLE 150**

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

**ARTICLE 151**

The present Convention, which bears the date of this day, is open to signature until 12 February 1950, in the name of the Powers represented at the Conference which opened at Geneva on 21 April 1949.

**ARTICLE 152**

The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

**ARTICLE 153**

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

**ARTICLE 154**

In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29 July 1899, or that of 18 October 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.

**ARTICLE 155**

From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.

**ARTICLE 156**

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

**ARTICLE 157**

The situations provided for in Articles 2 and 3 shall have immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

**ARTICLE 158**

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall transmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release, repatriation and re-establishment of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages



established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

**ARTICLE 159**

The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

**IN WITNESS WHEREOF** the undersigned, having deposited their respective full powers, have signed the present Convention.

**DONE** at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the signatory and acceding States.

## **Annex I**

### **Draft Agreement Relating to Hospital and Safety Zones and Localities**

#### **ARTICLE 1**

Hospital and safety zones shall be strictly reserved for the persons mentioned in Article 23 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, and in Article 14 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, and for the personnel entrusted with the organization and administration of these zones and localities, and with the care of the persons therein assembled.

Nevertheless, persons whose permanent residence is within such zones shall have the right to stay there.

#### **ARTICLE 2**

No persons residing, in whatever capacity, in a hospital and safety zone shall perform any work, either within or without the zone, directly connected with military operations or the production of war material.

#### **ARTICLE 3**

The Power establishing a hospital and safety zone shall take all necessary measures to prohibit access to all persons who have no right of residence or entry therein.

#### **ARTICLE 4**

Hospital and safety zones shall fulfil the following conditions:

- (a) they shall comprise only a small part of the territory governed by the Power which has established them
- (b) they shall be thinly populated in relation to the possibilities of accommodation
- (c) they shall be far removed and free from all military objectives, or large industrial or administrative establishments
- (d) they shall not be situated in areas which, according to every probability, may become important for the conduct of the war.

#### **ARTICLE 5**

Hospital and safety zones shall be subject to the following obligations:

- (a) the lines of communication and means of transport which they possess shall not be used for the transport of military personnel or material, even in transit
- (b) they shall in no case be defended by military means.

#### **ARTICLE 6**

Hospital and safety zones shall be marked by means of oblique red bands on a white ground, placed on the buildings and outer precincts.

Zones reserved exclusively for the wounded and sick may be marked by means of the Red Cross (Red Crescent, Red Lion and Sun) emblem on a white ground.

They may be similarly marked at night by means of appropriate illumination.

#### **ARTICLE 7**

The Powers shall communicate to all the High Contracting Parties in peacetime or on the outbreak of hostilities, a list of the hospital and safety zones in the territories governed by them. They shall also give notice of any new zones set up during hostilities.

As soon as the adverse party has received the above-mentioned notification, the zone shall be regularly established.

If, however, the adverse party considers that the conditions of the present agreement have not been fulfilled, it may refuse to recognize the zone by giving immediate notice thereof to the Party responsible for the said zone, or may make its recognition of such zone dependent upon the institution of the control provided for in Article 8.

#### **ARTICLE 8**

Any Power having recognized one or several hospital and safety zones instituted by the adverse Party shall be entitled to demand control by one or more Special Commissions, for the purpose of ascertaining if the zones fulfil the conditions and obligations stipulated in the present agreement.

For this purpose, members of the Special Commissions shall at all times have free access to the various zones and may even reside there permanently. They shall be given all facilities for their duties of inspection.

#### **ARTICLE 9**

Should the Special Commissions note any facts which they consider contrary to the stipulations of the present agreement, they shall at once draw the attention of the Power governing the said zone to these facts, and shall fix a time limit of five days within which the matter should be rectified. They shall duly notify the Power which has recognized the zone.

If, when the time limit has expired, the Power governing the zone has not complied with the warning, the adverse Party may declare that it is no longer bound by the present agreement in respect of the said zone.

#### **ARTICLE 10**

Any Power setting up one or more hospital and safety zones, and the adverse Parties to whom their existence has been notified, shall nominate or have nominated by the Protecting Powers or by other neutral Powers, persons eligible to be members of the Special Commissions mentioned in Articles 8 and 9.

#### **ARTICLE 11**

In no circumstances may hospital and safety zones be the object of attack. They shall be protected and respected at all times by the Parties to the conflict.

**ARTICLE 12**

In the case of occupation of a territory, the hospital and safety zones therein shall continue to be respected and utilized as such.

Their purpose may, however, be modified by the Occupying Power, on condition that all measures are taken to ensure the safety of the persons accommodated.

**ARTICLE 13**

The present agreement shall also apply to localities which the Powers may utilize for the same purposes as hospital and safety zones.

**Annex II****Draft Regulations concerning Collective Relief****ARTICLE 1**

The Internee Committees shall be allowed to distribute collective relief shipments for which they are responsible to all internees who are dependent for administration on the said Committee's place of internment, including those internees who are in hospitals, or in prison or other penitentiary establishments.

**ARTICLE 2**

The distribution of collective relief shipments shall be effected in accordance with the instructions of the donors and with a plan drawn up by the Internee Committees. The issue of medical stores shall, however, be made for preference in agreement with the senior medical officers, and the latter may, in hospitals and infirmaries, waive the said instructions, if the needs of their patients so demand. Within the limits thus defined, the distribution shall always be carried out equitably.

**ARTICLE 3**

Members of Internee Committees shall be allowed to go to the railway stations or other points of arrival of relief supplies near their places of internment so as to enable them to verify the quantity as well as the quality of the goods received and to make out detailed reports thereon for the donors.

**ARTICLE 4**

Internee Committees shall be given the facilities necessary for verifying whether the distribution of collective relief in all subdivisions and annexes of their places of internment has been carried out in accordance with their instructions.

**ARTICLE 5**

Internee Committees shall be allowed to complete, and to cause to be completed by members of the Internee Committees in labour detachments or by the senior medical officers of infirmaries and hospitals, forms or questionnaires intended for the donors, relating to collective relief supplies (distribution, requirements, quantities, etc.). Such forms and questionnaires, duly completed, shall be forwarded to the donors without delay.

**ARTICLE 6**

In order to secure the regular distribution of collective relief supplies to the internees in their place of internment, and to meet any needs that may arise through the arrival of fresh parties of internees, the Internee Committees shall be allowed to create and maintain sufficient reserve stocks of collective relief. For this purpose, they shall have suitable warehouses at their disposal; each warehouse shall be provided with two locks, the Internee Committee holding the keys of one lock, and the commandant of the place of internment the keys of the other.

**ARTICLE 7**

The High Contracting Parties, and the Detaining Powers in particular, shall, so far as is in any way possible and subject to the regulations governing the food supply of the population, authorize purchases of goods to be made in their territories for the distribution of collective relief to the internees. They shall likewise facilitate the transfer of funds and other financial measures of a technical or administrative nature taken for the purpose of making such purchases.

**ARTICLE 8**

The foregoing provisions shall not constitute an obstacle to the right of internees to receive collective relief before their arrival in a place of internment or in the course of their transfer, nor to the possibility of representatives of the Protecting Power, or of the International Committee of the Red Cross or any other humanitarian organization giving assistance to internees and responsible for forwarding such supplies, ensuring the distribution thereof to the recipients by any other means they may deem suitable.

Annex III

I. Internment Card

1. Front

CIVILIAN INTERNEE MAIL

Postage free

POST CARD

IMPORTANT

This card must be completed by each internee immediately on being interned and each time his address is altered by reason of transfer to another place of internment or to a hospital.

This card is not the same as the special card which each internee is allowed to send to his relatives.

CENTRAL INFORMATION AGENCY  
FOR PROTECTED PERSONS

International Committee  
of the Red Cross

GENEVA  
(Switzerland)

2. Reverse side

Write legibly and in block letters — 1. Nationality .....

2. Surname

3. First names (*in full*)

4. First name of father

5. Date of birth.....

6. Place of birth.....

7. Occupation.....

8. Address before detention .....

9. Address of next of kin.....

.....

10. Interned on: \* .....

(or)

Coming from (hospital, etc.) on: .....

11. State of health \* .....

12. Present address .....

13. Date..... 14. Signature .....

.....

\* Strike out what is not applicable—Do not add any remarks—

See explanations on other side of card.

(Size of internment card — 10 x 15 cm)

II. Letter

CIVILIAN INTERNEE SERVICE

Postage free

To

Street and number

Place of destination *(in block capitals)*

Province or Department

Country *(in block capitals)*

Sender:

Surname and first names

Date and place of birth

Internment address

(Size of letter — 29 x 15 cm)



III. Correspondence Card

1. Front

Sender:

Surname and first names

Date and place of birth

Internment address

CIVILIAN INTERNEE MAIL

POST CARD

To

Street and number

Place of destination *(in block capitals)*

Province or Department

Country *(in block capitals)*

Postage free

2. Reverse side

Write on the dotted lines only and as legibly as possible

(Size of correspondence card — 10 x15 cm)

**Document No. 6, The First Protocol Additional to the Geneva Conventions**

[Source: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; available at [www.icrc.org](http://www.icrc.org)]

**Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)****8 June 1977****PREAMBLE**

*The High Contracting Parties,*

*Proclaiming* their earnest wish to see peace prevail among peoples,

*Recalling* that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

*Believing* it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

*Expressing* their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,

*Reaffirming* further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict,

*Have agreed* on the following:

**PART I. GENERAL PROVISIONS****ARTICLE 1. General principles and scope of application**

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.
2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.
3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

## **ARTICLE 2. Definitions**

For the purposes of this Protocol

- (a) "First Convention", "Second Convention", "Third Convention" and "Fourth Convention" mean, respectively, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; "the Conventions" means the four Geneva Conventions of 12 August 1949 for the protection of war victims;
- (b) "Rules of international law applicable in armed conflict" means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict;
- (c) "Protecting Power" means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol;
- (d) "Substitute" means an organization acting in place of a Protecting Power in accordance with Article 5.

## **ARTICLE 3. Beginning and end of application**

Without prejudice to the provisions which are applicable at all times:

- (a) the Conventions and this Protocol shall apply from the beginning of any situation referred to in Article 1 of this Protocol.
- (b) the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release repatriation or re-establishment.

**ARTICLE 4. Legal status of the Parties to the conflict**

The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

**ARTICLE 5. Appointment of Protecting Powers and of their substitute**

1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including *inter alia* the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.
2. From the beginning of a situation referred to in Article 1, each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party.
3. If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may *inter alia* ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists.
4. If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol.
5. In accordance with Article 4, the designation and acceptance of Protecting Powers for the purpose of applying the Conventions and this Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.
6. The maintenance of diplomatic relations between Parties to the conflict or the entrusting of the protection of a Party's interests and those of its nationals to a

third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of Protecting Powers for the purpose of applying the Conventions and this Protocol.

7. Any subsequent mention in this Protocol of a Protecting Power includes also a substitute.

#### **ARTICLE 6. Qualified persons**

1. The High Contracting Parties shall, also in peacetime, endeavour, with the assistance of the national Red Cross (Red Crescent, Red Lion and Sun) Societies, to train qualified personnel to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers.
2. The recruitment and training of such personnel are within domestic jurisdiction.
3. The International Committee of the Red Cross shall hold at the disposal of the High Contracting Parties the lists of persons so trained which the High Contracting Parties may have established and may have transmitted to it for that purpose.
4. The conditions governing the employment of such personnel outside the national territory shall, in each case, be the subject of special agreements between the Parties concerned.

#### **ARTICLE 7. Meetings**

The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon, the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol.

## **PART II. WOUNDED, SICK AND SHIPWRECKED**

### **Section I : General Protection**

#### **ARTICLE 8. Terminology**

For the purposes of this Protocol:

- a) "wounded" and "sick" mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility;
- b) "shipwrecked" means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol;

- c) “medical personnel” means those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under e) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term includes:
- i) medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;
  - ii) medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;
  - iii) medical personnel or medical units or medical transports described in Article 9, paragraph 2.
- d) “religious personnel” means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:
- i) to the armed forces of a Party to the conflict;
  - ii) to medical units or medical transports of a Party to the conflict;
  - iii) to medical units or medical transports described in Article 9, Paragraph 2;  
or
  - iv) to civil defence organizations of a Party to the conflict.
- The attachment of religious personnel may be either permanent or temporary, and the relevant provisions mentioned under k) apply to them;
- e) “medical units” means establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment – including first-aid treatment – of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary;
- f) “medical transportation” means the conveyance by land, water or air of the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol;
- g) “medical transports” means any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a Party to the conflict;
- h) “medical vehicles” means any medical transports by land;
- i) “medical ships and craft” means any medical transports by water;

- j) "Medical aircraft" means any medical transports by air;
- k) "Permanent medical personnel", "permanent medical units" and "permanent medical transports" mean those assigned exclusively to medical purposes for an indeterminate period. "Temporary medical personnel" "temporary medical-units" and "temporary medical transports" mean those devoted exclusively to medical purposes for limited periods during the whole of such periods. Unless otherwise specified, the terms "medical personnel", "medical units" and "medical transports" cover both permanent and temporary categories;
- l) "Distinctive emblem" means the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground when used for the protection of medical units and transports, or medical and religious personnel, equipment or supplies;
- m) "Distinctive signal" means any signal or message specified for the identification exclusively of medical units or transports in Chapter III of Annex I to this Protocol.

#### **ARTICLE 9. Field of application**

1. This Part, the provisions of which are intended to ameliorate the condition of the wounded, sick and shipwrecked, shall apply to all those affected by a situation referred to in Article 1, without any adverse distinction founded on race, colour, sex, language, religion or belief political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.
2. The relevant provisions of Articles 27 and 32 of the First Convention shall apply to permanent medical units and transports (other than hospital ships, to which Article 25 of the Second Convention applies) and their personnel made available to a Party to the conflict for humanitarian purposes:
  - (a) by a neutral or other State which is not a Party to that conflict;
  - (b) by a recognized and authorized aid society of such a State;
  - (c) by an impartial international humanitarian organization.

#### **ARTICLE 10. Protection and care**

1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.
2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

#### **ARTICLE 11. Protection of persons**

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons

described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

2. It is, in particular, prohibited to carry out on such persons, even with their consent:
  - (a) physical mutilations;
  - (b) medical or scientific experiments;
  - (c) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the conditions provided for in paragraph 1.
3. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.
4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.
5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.
6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

#### **ARTICLE 12. Protection of medical units**

1. Medical units shall be respected and protected at all times and shall not be the object of attack.
2. Paragraph 1 shall apply to civilian medical units, provided that they:
  - (a) belong to one of the Parties to the conflict;
  - (b) are recognized and authorized by the competent authority of one of the Parties to the conflict; or
  - (c) are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention.



3. The Parties to the conflict are invited to notify each other of the location of their fixed medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1.
4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.

**ARTICLE 13. Discontinuance of protection of civilian medical units**

1. The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.
2. The following shall not be considered as acts harmful to the enemy:
  - (a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;
  - (b) that the unit is guarded by a picket or by sentries or by an escort;
  - (c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
  - (d) that members of the armed forces or other combatants are in the unit for medical reasons.

**ARTICLE 14. Limitations on requisition of civilian medical units**

1. The Occupying Power has the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied.
2. The Occupying Power shall not, therefore, requisition civilian medical units, their equipment, their *matériel* or the services of their personnel, so long as these resources are necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment.
3. Provided that the general rule in paragraph 2 continues to be observed, the Occupying Power may requisition the said resources, subject to the following particular conditions:
  - (a) that the resources are necessary for the adequate and immediate medical treatment of the wounded and sick members of the armed forces of the Occupying Power or of prisoners of war;
  - (b) that the requisition continues only while such necessity exists; and
  - (c) that immediate arrangements are made to ensure that the medical needs of the civilian population, as well as those of any wounded and sick under treatment who are affected by the requisition, continue to be satisfied.

**ARTICLE 15. Protection of civilian medical and religious personnel**

1. Civilian medical personnel shall be respected and protected.
2. If needed, all available help shall be afforded to civilian medical personnel in an area where civilian medical services are disrupted by reason of combat activity.
3. The Occupying Power shall afford civilian medical personnel in occupied territories every assistance to enable them to perform, to the best of their ability, their humanitarian functions. The Occupying Power may not require that, in the performance of those functions, such personnel shall give priority to the treatment of any person except on medical grounds. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.
4. Civilian medical personnel shall have access to any place where their services are essential, subject to such supervisory and safety measures as the relevant Party to the conflict may deem necessary.
5. Civilian religious personnel shall be respected and protected. The provisions of the Conventions and of this Protocol concerning the protection and identification of medical personnel shall apply equally to such persons.

**ARTICLE 16. General protection of medical duties**

1. Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.
2. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or to other medical rules designed for the benefit of the wounded and sick or to the provisions of the Conventions or of this Protocol, or to refrain from performing acts or from carrying out work required by those rules and provisions.
3. No person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party except as required by the law of the latter Party, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families. Regulations for the compulsory notification of communicable diseases shall, however, be respected.

**ARTICLE 17. Role of the civilian population and of aid societies**

1. The civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them. The civilian population and aid societies, such as national Red Cross (Red Crescent, Red Lion and Sun) Societies, shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas. No one shall be harmed, prosecuted, convicted or punished for such humanitarian acts.
2. The Parties to the conflict may appeal to the civilian population and the aid societies referred to in paragraph 1 to collect and care for the wounded, sick and

shipwrecked, and to search for the dead and report their location; they shall grant both protection and the necessary facilities to those who respond to this appeal. If the adverse Party gains or regains control of the area, that Party also shall afford the same protection and facilities for as long as they are needed.

#### **ARTICLE 18. Identification**

1. Each Party to the conflict shall endeavour to ensure that medical and religious personnel and medical units and transports are identifiable.
2. Each Party to the conflict shall also endeavour to adopt and to implement methods and procedures which will make it possible to recognize medical units and transports which use the distinctive emblem and distinctive signals.
3. In occupied territory and in areas where fighting is taking place or is likely to take place, civilian medical personnel and civilian religious personnel should be recognizable by the distinctive emblem and an identity card certifying their status.
4. With the consent of the competent authority, medical units and transports shall be marked by the distinctive emblem. The ships and craft referred to in Article 22 of this Protocol shall be marked in accordance with the provisions of the Second Convention.
5. In addition to the distinctive emblem, a Party to the conflict may, as provided in Chapter III of Annex I to this Protocol, authorize the use of distinctive signals to identify medical units and transports. Exceptionally, in the special cases covered in that Chapter, medical transports may use distinctive signals without displaying the distinctive emblem.
6. The application of the provisions of paragraphs 1 to 5 of this article is governed by Chapters I to III of Annex I to this Protocol. Signals designated in Chapter III of the Annex for the exclusive use of medical units and transports shall not, except as provided therein, be used for any purpose other than to identify the medical units and transports specified in that Chapter.
7. This article does not authorize any wider use of the distinctive emblem in peacetime than is prescribed in Article 44 of the First Convention.
8. The provisions of the Conventions and of this Protocol relating to supervision of the use of the distinctive emblem and to the prevention and repression of any misuse thereof shall be applicable to distinctive signals.

#### **ARTICLE 19. Neutral and other States not Parties to the conflict**

Neutral and other States not Parties to the conflict shall apply the relevant provisions of this Protocol to persons protected by this Part who may be received or interned within their territory, and to any dead of the Parties to that conflict whom they may find.

#### **ARTICLE 20. Prohibition of reprisals**

Reprisals against the persons and objects protected by this Part are prohibited.

## **Section II. Medical Transportation**

### **ARTICLE 21. Medical vehicles**

Medical vehicles shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol.

### **ARTICLE 22. Hospital ships and coastal rescue craft**

1. The provisions of the Conventions relating to:

- (a) vessels described in Articles 22, 24, 25 and 27 of the Second Convention,
- (b) their lifeboats and small craft,
- (c) their personnel and crews, and
- (d) the wounded; sick and shipwrecked on board.

shall also apply where these vessels carry civilian wounded, sick and shipwrecked who do not belong to any of the categories mentioned in Article 13 of the Second Convention. Such civilians shall not, however, be subject to surrender to any Party which is not their own, or to capture at sea. If they find themselves in the power of a Party to the conflict other than their own they shall be covered by the Fourth Convention and by this Protocol.

2. The protection provided by the Conventions to vessels described in Article 25 of the Second Convention shall extend to hospital ships made available for humanitarian purposes to a Party to the conflict:

- (a) by a neutral or other State which is not a Party to that conflict; or
- (b) by an impartial international humanitarian organization,

provided that, in either case, the requirements set out in that Article are complied with.

3. Small craft described in Article 27 of the Second Convention shall be protected, even if the notification envisaged by that Article has not been made. The Parties to the conflict are, nevertheless, invited to inform each other of any details of such craft which will facilitate their identification and recognition.

### **ARTICLE 23. Other medical ships and craft**

- 1. Medical ships and craft other than those referred to in Article 22 of this Protocol and Article 38 of the Second Convention shall, whether at sea or in other waters, be respected and protected in the same way as mobile medical units under the Conventions and this Protocol. Since this protection can only be effective if they can be identified and recognized as medical ships or craft, such vessels should be marked with the distinctive emblem and as far as possible comply with the second paragraph of Article 43 of the Second Convention.
- 2. The ships and craft referred to in paragraph 1 shall remain subject to the laws of war. Any warship on the surface able immediately to enforce its command may

order them to stop, order them off, or make them take a certain course, and they shall obey every such command. Such ships and craft may not in any other way be diverted from their medical mission so long as they are needed for the wounded, sick and shipwrecked on board.

3. The protection provided in paragraph 1 shall cease only under the conditions set out in Articles 34 and 35 of the Second Convention. A clear refusal to obey a command given in accordance with paragraph 2 shall be an act harmful to the enemy under Article 34 of the Second Convention.
4. A Party to the conflict may notify any adverse Party as far in advance of sailing as possible of the name, description, expected time of sailing, course and estimated speed of the medical ship or craft, particularly in the case of ships of over 2,000 gross tons, and may provide any other information which would facilitate identification and recognition. The adverse Party shall acknowledge receipt of such information.
5. The provisions of Article 37 of the Second Convention shall apply to medical and religious personnel in such ships and craft.
6. The provisions of the Second Convention shall apply to the wounded, sick and shipwrecked belonging to the categories referred to in Article 13 of the Second Convention and in Article 44 of this Protocol who may be on board such medical ships and craft. Wounded, sick and shipwrecked civilians who do not belong to any or the categories mentioned in Article 13 of the Second Convention shall not be subject, at sea, either to surrender to any Party which is not their own, or to removal from such ships or craft; if they find themselves in the power of a Party to the conflict other than their own, they shall be covered by the Fourth Convention and by this Protocol.

#### **ARTICLE 24. Protection of medical Aircraft**

Medical aircraft shall be respected and protected, subject to the provisions of this Part.

#### **ARTICLE 25. Medical aircraft in areas not controlled by an adverse Party**

In and over land areas physically controlled by friendly forces, or in and over sea areas not physically controlled by an adverse Party, the respect and protection of medical aircraft of a Party to the conflict is not dependent on any agreement with an adverse Party. For greater safety, however, a Party to the conflict operating its medical aircraft in these areas may notify the adverse Party, as provided in Article 29, in particular when such aircraft are making flights bringing them within range of surface-to-air weapons systems of the adverse Party.

#### **ARTICLE 26. Medical aircraft in contact or similar zones**

1. In and over those parts of the contact zone which are physically controlled by friendly forces and in and over those areas the physical control of which is not clearly established, protection for medical aircraft can be fully effective only by prior agreement between the competent military authorities of the Parties to the conflict, as provided for in Article 29. Although, in the absence of such an agreement, medical aircraft operate at their own risk, they shall nevertheless be respected after they have been recognized as such.

2. “Contact zone” means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground.

**ARTICLE 27. Medical aircraft in areas controlled by an adverse Party**

1. The medical aircraft of a Party to the conflict shall continue to be protected while flying over land or sea areas physically controlled by an adverse Party, provided that prior agreement to such flights has been obtained from the competent authority of that adverse Party.
2. A medical aircraft which flies over an area physically controlled by an adverse Party without, or in deviation from the terms of, an agreement provided for in paragraph 1, either through navigational error or because of an emergency affecting the safety of the flight, shall make every effort to identify itself and to inform the adverse Party of the circumstances. As soon as such medical aircraft has been recognized by the adverse Party, that Party shall make all reasonable efforts to give the order to land or to alight on water, referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

**ARTICLE 28. Restrictions on operations of medical aircraft**

1. The Parties to the conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse Party. The presence of medical aircraft shall not be used in an attempt to render military objectives immune from attack.
2. Medical aircraft shall not be used to collect or transmit intelligence data and shall not carry any equipment intended for such purposes. They are prohibited from carrying any persons or cargo not included within the definition in Article 8 (6). The carrying on board of the personal effects of the occupants or of equipment intended solely to facilitate navigation, communication or identification shall not be considered as prohibited,
3. Medical aircraft shall not carry any armament except small arms and ammunition taken from the wounded, sick and shipwrecked on board and not yet handed to the proper service, and such light individual weapons as may be necessary to enable the medical personnel on board to defend themselves and the wounded, sick and shipwrecked in their charge.
4. While carrying out the flights referred to in Articles 26 and 27, medical aircraft shall not, except by prior agreement with the adverse Party, be used to search for the wounded, sick and shipwrecked.

**ARTICLE 29. Notifications and agreements concerning medical aircraft**

1. Notifications under Article 25, or requests for prior agreement under Articles 26, 27, 28, paragraph 4, or 31 shall state the proposed number of medical aircraft, their flight plans and means of identification, and shall be understood to mean that every flight will be carried out in compliance with Article 28.

2. A Party which receives a notification given under Article 25 shall at once acknowledge receipt of such notification.
3. A Party which receives a request for prior agreement under Articles 25, 27, 28, paragraph 4, or 31 shall, as rapidly as possible, notify the requesting Party:
  - (a) that the request is agreed to;
  - (b) that the request is denied; or
  - (c) of reasonable alternative proposals to the request. It may also propose prohibition or restriction of other flights in the area during the time involved. If the Party which submitted the request accepts the alternative proposals, it shall notify the other Party of such acceptance.
4. The Parties shall take the necessary measures to ensure that notifications and agreements can be made rapidly.
5. The Parties shall also take the necessary measures to disseminate rapidly the substance of any such notifications and agreements to the military units concerned and shall instruct those units regarding the means of identification that will be used by the medical aircraft in question.

**ARTICLE 30. Landing and inspection of medical aircraft**

1. Medical aircraft flying over areas which are physically controlled by an adverse Party, or over areas the physical control of which is not clearly established, may be ordered to land or to alight on water, as appropriate, to permit inspection in accordance with the following paragraphs. Medical aircraft shall obey any such order.
2. If such an aircraft lands or alights on water, whether ordered to do so or for other reasons, it may be subjected to inspection solely to determine the matters referred to in paragraphs 3 and 4. Any such inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick to be removed from the aircraft unless their removal is essential for the inspection. That Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or by the removal.
3. If the inspection discloses that the aircraft:
  - (a) is a medical aircraft within the meaning of Article 8, sub-paragraph j),
  - (b) is not in violation of the conditions prescribed in Article 28, and
  - (c) has not flown without or in breach of a prior agreement where such agreement is required,the aircraft and those of its occupants who belong to the adverse Party or to a neutral or other State not a Party to the conflict shall be authorized to continue the flight without delay.
4. If the inspection discloses that the aircraft:
  - (a) is not a medical aircraft within the meaning of Article 8, sub-paragraph j),

- (b) is in violation of the conditions prescribed in Article 28, or
- (c) has flown without or in breach of a prior agreement where such agreement is required,

the aircraft may be seized. Its occupants shall be treated in conformity with the relevant provisions of the Conventions and of this Protocol. Any aircraft seized which had been assigned as a permanent medical aircraft may be used thereafter only as a medical aircraft.

**ARTICLE 31. Neutral or other States not Parties to the conflict**

1. Except by prior agreement, medical aircraft shall not fly over or land in the territory of a neutral or other State not a Party to the conflict. However, with such an agreement, they shall be respected throughout their flight and also for the duration of any calls in the territory. Nevertheless they shall obey any summons to land or to alight on water, as appropriate.
2. Should a medical aircraft, in the absence of an agreement or in deviation from the terms of an agreement, fly over the territory of a neutral or other State not a Party to the conflict, either through navigational error or because of an emergency affecting the safety of the flight, it shall make every effort to give notice of the flight and to identify itself. As soon as such medical aircraft is recognized, that State shall make all reasonable efforts to give the order to land or to alight on water referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.
3. If a medical aircraft, either by agreement or in the circumstances mentioned in paragraph 2, lands or alights on water in the territory of a neutral or other State not Party to the conflict, whether ordered to do so or for other reasons, the aircraft shall be subject to inspection for the purposes of determining whether it is in fact a medical aircraft. The inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick of the Party operating the aircraft to be removed from it unless their removal is essential for the inspection. The inspecting Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or the removal. If the inspection discloses that the aircraft is in fact a medical aircraft, the aircraft with its occupants, other than those who must be detained in accordance with the rules of international law applicable in armed conflict, shall be allowed to resume its flight, and reasonable facilities shall be given for the continuation of the flight. If the inspection discloses that the aircraft is not a medical aircraft, it shall be seized and the occupants treated in accordance with paragraph 4.
4. The wounded, sick and shipwrecked disembarked, otherwise than temporarily, from a medical aircraft with the consent of the local authorities in the territory of a neutral or other State not a Party to the conflict shall, unless agreed otherwise between that State and the Parties to the conflict, be detained by that State where so required by the rules of international law applicable in armed conflict, in such a manner that



they cannot again take part in the hostilities. The cost of hospital treatment and internment shall be borne by the State to which those persons belong.

5. Neutral or other States not Parties to the conflict shall apply any conditions and restrictions on the passage of medical aircraft over, or on the landing of medical aircraft in, their territory equally to all Parties to the conflict.

### **Section III. Missing and Dead Persons**

#### **ARTICLE 32. General principle**

In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.

#### **ARTICLE 33. Missing persons**

1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.
2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:
  - (a) record the information specified in Article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;
  - (b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.
3. Information concerning persons reported missing pursuant to paragraph 1 and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.
4. The Parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse Party while carrying out these missions in areas controlled by the adverse Party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties.

**ARTICLE 34. Remains of deceased**

1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.
2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:
  - (a) to facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;
  - (b) to protect and maintain such gravesites permanently;
  - (c) to facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin.
3. In the absence of the agreements provided for in paragraph 2 (b) or (c) and if the home country or such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves.
4. A High Contracting Party in whose territory the grave sites referred to in this Article are situated shall be permitted to exhume the remains only:
  - (a) in accordance with paragraphs 2 (c) and 3, or
  - (b) where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country or its intention to exhume the remains together with details of the intended place of reinterment.

### **PART III. METHODS AND MEANS OF WARFARE COMBATANT AND PRISONERS-OF-WAR STATUS**

#### **Section I. Methods and Means of Warfare**

##### **ARTICLE 35. Basic rules**

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

##### **ARTICLE 36. New weapons**

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

##### **ARTICLE 37. Prohibition of Perfidy**

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
  - (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
  - (b) the feigning of an incapacitation by wounds or sickness;
  - (c) the feigning of civilian, non-combatant status; and
  - (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.
2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

##### **ARTICLE 38. Recognized emblems**

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately

in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.

2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

#### **ARTICLE 39. Emblems of nationality**

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.
2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.
3. Nothing in this Article or in Article 37, paragraph 1 (d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

#### **ARTICLE 40. Quarter**

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

#### **ARTICLE 41. Safeguard of an enemy *hors de combat***

1. A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack.
2. A person is *hors de combat* if:
  - (a) he is in the power of an adverse Party;
  - (b) he clearly expresses an intention to surrender; or
  - (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

#### **ARTICLE 42. Occupants of aircraft**

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.
2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.

3. Airborne troops are not protected by this Article.

## **Section II. Combatants and Prisoners of War**

### **ARTICLE 43. Armed forces**

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

### **ARTICLE 44. Combatants and prisoners of war**

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.
3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
  - (a) during each military engagement, and
  - (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded

to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities .
6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.
7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.
8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

#### **ARTICLE 45. Protection of persons who have taken part in hostilities**

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.
2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held *in camera* in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.
3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

**ARTICLE 46. Spies**

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.
2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.
3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.
4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

**ARTICLE 47. Mercenaries**

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
  - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
  - (b) does, in fact, take a direct part in the hostilities;
  - (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
  - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
  - (e) is not a member of the armed forces of a Party to the conflict; and
  - (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

## **PART IV. CIVILIAN POPULATION**

### **Section I. General Protection Against Effects of Hostilities**

#### **Chapter I. Basic rule and field of application**

##### **ARTICLE 48. Basic rule**

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

##### **ARTICLE 49. Definition of attacks and scope of application**

1. "Attacks" means acts of violence against the adversary, whether in offence or in defence.
2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.
3. The provisions of this section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.
4. The provisions of this section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

#### **Chapter II. Civilians and civilian population**

##### **ARTICLE 50. Definition of civilians and civilian population**

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

##### **ARTICLE 51. Protection of the civilian population**

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection,



the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
  - (a) those which are not directed at a specific military objective;
  - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
  - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
5. Among others, the following types of attacks are to be considered as indiscriminate:
  - (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
  - (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
6. Attacks against the civilian population or civilians by way of reprisals are prohibited.
7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.
8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

### Chapter III. Civilian objects

#### ARTICLE 52. General protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

#### ARTICLE 53. Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (b) to use such objects in support of the military effort;
- (c) to make such objects the object of reprisals.

#### ARTICLE 54. Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.
3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
  - (a) as sustenance solely for the members of its armed forces; or
  - (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

4. These objects shall not be made the object of reprisals.
5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

**ARTICLE 55. Protection of the natural environment**

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.

**ARTICLE 56. Protection of works and installations containing dangerous forces**

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.
2. The special protection against attack provided by paragraph 1 shall cease:
  - (a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
  - (b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
  - (c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.
3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection Ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.
4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.
6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.
7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol [Article 17 of Amended Annex]. The absence of such marking in no way relieves any Party to the conflict of its obligations under this Article.

#### **Chapter IV. Precautionary measures**

##### **ARTICLE 57. Precautions in attack**

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
  - (a) those who plan or decide upon an attack shall:
    - (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
    - (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects;
    - (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
  - (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
  - (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.
5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

#### **ARTICLE 58. Precautions against the effects of attacks**

The Parties to the conflict shall, to the maximum extent feasible:

- (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- (b) avoid locating military objectives within or near densely populated areas;
- (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

### **Chapter V. Localities and zones under special protection**

#### **ARTICLE 59. Non-defended localities**

1. It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.
2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party.

Such a locality shall fulfil the following conditions:

- (a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
  - (b) no hostile use shall be made of fixed military installations or establishments;
  - (c) no acts of hostility shall be committed by the authorities or by the population; and
  - (d) no activities in support of military operations shall be undertaken.
3. The presence, in this locality, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 2.

4. The declaration made under paragraph 2 shall be addressed to the adverse Party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The Party to the conflict to which the declaration is addressed shall acknowledge its receipt and shall treat the locality as a non-defended locality unless the conditions laid down in paragraph 2 are not in fact fulfilled, in which event it shall immediately so inform the Party making the declaration. Even if the conditions laid down in paragraph 2 are not fulfilled, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.
5. The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in paragraph 2. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality; if necessary, it may lay down the methods of supervision.
6. The Party which is in control of a locality governed by such an agreement shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.
7. A locality loses its status as a non-defended locality when it ceases to fulfil the conditions laid down in paragraph 2 or in the agreement referred to in paragraph 5. In such an eventuality, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

#### **ARTICLE 60. Demilitarized zones**

1. It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement.
2. The agreement shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organization, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision.
3. The subject of such an agreement shall normally be any zone which fulfils the following conditions:
  - (a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
  - (b) no hostile use shall be made of fixed military installations or establishments;
  - (c) no acts of hostility shall be committed by the authorities or by the population; and
  - (d) any activity linked to the military effort must have ceased.

The Parties to the conflict shall agree upon the interpretation to be given to the condition laid down in subparagraph (d) and upon persons to be admitted to the demilitarized zone other than those mentioned in paragraph 4.

4. The presence, in this zone, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 3.
5. The Party which is in control of such a zone shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.
6. If the fighting draws near to a demilitarized zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status.
7. If one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 or 6, the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarized zone. In such an eventuality, the zone loses its status but shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

## **Chapter VI. Civil defence**

### **ARTICLE 61. Definitions and scope**

For the purpose of this Protocol:

- (a) "civil defence" means the performance of some or all of the undermentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival. These tasks are:
  - i) warning;
  - ii) evacuation;
  - iii) management of shelters;
  - iv) management of blackout measures;
  - v) rescue;
  - vi) medical services, including first aid, and religious assistance;
  - vii) fire-fighting;
  - viii) detection and marking of danger areas;
  - ix) decontamination and similar protective measures;
  - x) provision of emergency accommodation and supplies;
  - xi) emergency assistance in the restoration and maintenance of order in distressed areas;

- xii) emergency repair of indispensable public utilities;
  - xiii) emergency disposal of the dead;
  - xiv) assistance in the preservation of objects essential for survival;
  - xv) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization;
- (b) “civil defence organizations” means those establishments and other units which are organized or authorized by the competent authorities of a Party to the conflict to perform any of the tasks mentioned under sub-paragraph (a), and which are assigned and devoted exclusively to such tasks;
- (c) “personnel” of civil defence organizations means those persons assigned by a Party to the conflict exclusively to the performance of the tasks mentioned under sub-paragraph (a), including personnel assigned by the competent authority of that Party exclusively to the administration of these organizations;
- (d) “*matériel*” of civil defence organizations means equipment, supplies and transports used by these organizations for the performance of the tasks mentioned under sub-paragraph (a).

#### **ARTICLE 62. General protection**

1. Civilian civil defence organizations and their personnel shall be respected and protected, subject to the provisions of this Protocol, particularly the provisions of this section. They shall be entitled to perform their civil defence tasks except in case of imperative military necessity.
2. The provisions of paragraph 1 shall also apply to civilians who, although not members of civilian civil defence organizations, respond to an appeal from the competent authorities and perform civil defence tasks under their control.
3. Buildings and *matériel* used for civil defence purposes and shelters provided for the civilian population are covered by Article 52. Objects used for civil defence purposes may not be destroyed or diverted from their proper use except by the Party to which they belong.

#### **ARTICLE 63. Civil defence in occupied territories**

1. In occupied territories, civilian civil defence organizations shall receive from the authorities the facilities necessary for the performance of their tasks. In no Circumstances shall their personnel be compelled to perform activities which would interfere with the proper performance of these tasks. The Occupying Power shall not change the structure or personnel of such organizations in any way which might jeopardize the efficient performance of their mission. These organizations shall not be required to give priority to the nationals or interests of that Power.
2. The Occupying Power shall not compel, coerce or induce civilian civil defence organizations to perform their tasks in any manner prejudicial to the interests of the civilian population.
3. The Occupying Power may disarm civil defence personnel for reasons of security.



4. The Occupying Power shall neither divert from their proper use nor requisition buildings or *matériel* belonging to or used by civil defence organizations if such diversion or requisition would be harmful to the civilian population.
5. Provided that the general rule in paragraph 4 continues to be observed, the Occupying Power may requisition or divert these resources, subject to the following particular conditions:
  - (a) that the buildings or *matériel* are necessary for other needs of the civilian population; and
  - (b) that the requisition or diversion continues only while such necessity exists.
6. The Occupying Power shall neither divert nor requisition shelters provided for the use of the civilian population or needed by such population.

**ARTICLE 64. Civilian civil defence organizations of neutral or other States not Parties to the conflict and international co-ordinating organizations**

1. Articles 62, 63, 65 and 66 shall also apply to the personnel and matériel of civilian civil defence organizations of neutral or other States not Parties to the conflict which perform civil defence tasks mentioned in Article 61 in the territory of a Party to the conflict, with the consent and under the control of that Party. Notification of such assistance shall be given as soon as possible to any adverse Party concerned. In no circumstances shall this activity be deemed to be an interference in the conflict. This activity should, however, be performed with due regard to the security interests of the Parties to the conflict concerned.
2. The Parties to the conflict receiving the assistance referred to in paragraph 1 and the High Contracting Parties granting it should facilitate international co-ordination of such civil defence actions when appropriate. In such cases the relevant international organizations are covered by the provisions of this Chapter.
3. In occupied territories, the Occupying Power may only exclude or restrict the activities of civilian civil defence organizations of neutral or other States not Parties to the conflict and of international co-ordinating organizations if it can ensure the adequate performance of civil defence tasks from its own resources or those of the occupied territory.

**ARTICLE 65. Cessation of protection**

1. The protection to which civilian civil defence organizations, their personnel, buildings, shelters and *matériel* are entitled shall not cease unless they commit or are used to commit, outside their proper tasks, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.
2. The following shall not be considered as acts harmful to the enemy:
  - (a) that civil defence tasks are carried out under the direction or control of military authorities;

- (b) that civilian civil defence personnel co-operate with military personnel in the performance of civil defence tasks, or that some military personnel are attached to civilian civil defence organizations;
  - (c) that the performance of civil defence tasks may incidentally benefit military victims, particularly those who are *hors de combat*.
3. It shall also not be considered as an act harmful to the enemy that civilian civil defence personnel bear light individual weapons for the purpose of maintaining order or for self-defence. However, in areas where land fighting is taking place or is likely to take place, the Parties to the conflict shall undertake the appropriate measures to limit these weapons to handguns, such as pistols or revolvers, in order to assist in distinguishing between civil defence personnel and combatants. Although civil defence personnel bear other light individual weapons in such areas, they shall nevertheless be respected and protected as soon as they have been recognized as such.
  4. The formation of civilian civil defence organizations along military lines, and compulsory service in them, shall also not deprive them of the protection conferred by this Chapter.

#### **ARTICLE 66. Identification**

1. Each Party to the conflict shall endeavour to ensure that its civil defence organizations, their personnel, buildings and *matériel* are identifiable while they are exclusively devoted to the performance of civil defence tasks. Shelters provided for the civilian population should be similarly identifiable.
2. Each Party to the conflict shall also endeavour to adopt and implement methods and procedures which will make it possible to recognize civilian shelters as well as civil defence personnel, buildings and *matériel* on which the international distinctive sign of civil defence is displayed.
3. In occupied territories and in areas where fighting is taking place or is likely to take place, civilian civil defence personnel should be recognizable by the international distinctive sign of civil defence and by an identity card certifying their status.
4. The international distinctive sign of civil defence is an equilateral blue triangle on an orange ground when used for the protection of civil defence organizations, their personnel, buildings and *matériel* and for civilian shelters.
5. In addition to the distinctive sign, Parties to the conflict may agree upon the use of distinctive signals for civil defence identification purposes.
6. The application of the provisions of paragraphs 1 to 4 is governed by Chapter V of Annex I to this Protocol.
7. In time of peace, the sign described in paragraph 4 may, with the consent of the competent national authorities, be used for civil defence identification purposes.

8. The High Contracting Parties and the Parties to the conflict shall take the measures necessary to supervise the display of the international distinctive sign of civil defence and to prevent and repress any misuse thereof.
9. The identification of civil defence medical and religious personnel, medical units and medical transports is also governed by Article 18.

**ARTICLE 67. Members of the armed forces and military units  
assigned to civil defence organizations**

1. Members of the armed forces and military units assigned to civil defence organizations shall be respected and protected, provided that:
  - (a) such personnel and such units are permanently assigned and exclusively devoted to the performance of any of the tasks mentioned in Article 61;
  - (b) if so assigned, such personnel do not perform any other military duties during the conflict;
  - (c) such personnel are clearly distinguishable from the other members of the armed forces by prominently displaying the international distinctive sign of civil defence, which shall be as large as appropriate, and such personnel are provided with the identity card referred to in Chapter V of Annex I to this Protocol certifying their status;
  - (d) such personnel and such units are equipped only with light individual weapons for the purpose of maintaining order or for self-defence. The provisions of Article 65, paragraph 3 shall also apply in this case;
  - (e) such personnel do not participate directly in hostilities, and do not commit, or are not used to commit, outside their civil defence tasks, acts harmful to the adverse Party
  - (f) such personnel and such units perform their civil defence tasks only within the national territory of their Party.

The non-observance of the conditions stated in (e) above by any member of the armed forces who is bound by the conditions prescribed in (a) and (b) above is prohibited.

2. Military personnel serving within civil defence organizations shall, if they fall into the power of an adverse Party, be prisoners of war. In occupied territory they may, but only in the interest of the civilian population of that territory, be employed on civil defence tasks in so far as the need arises, provided however that, if such work is dangerous, they volunteer for such tasks.
3. The buildings and major items of equipment and transports of military units assigned to civil defence organizations shall be clearly marked with the international distinctive sign of civil defence. This distinctive sign shall be as large as appropriate.
4. The *matériel* and buildings of military units permanently assigned to civil defence organizations and exclusively devoted to the performance of civil defence tasks shall, if they fall into the hands of an adverse Party, remain subject to the laws of

war. They may not be diverted from their civil defence purpose so long as they are required for the performance of civil defence tasks, except in case of imperative military necessity, unless previous arrangements have been made for adequate provision for the needs of the civilian population.

## **Section II. Relief in Favour of the Civilian Population**

### **ARTICLE 68. Field of application**

The provisions of this Section apply to the civilian population as defined in this Protocol and are supplementary to Articles 23, 55, 59, 60, 61 and 62 and other relevant provisions of the Fourth Convention.

### **ARTICLE 69. Basic needs in occupied territories**

1. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.
2. Relief actions for the benefit of the civilian population of occupied territories are governed by Articles 59, 60, 61, 62, 108, 109, 110 and 111 of the Fourth Convention, and by Article 71 of this Protocol, and shall be implemented without delay.

### **ARTICLE 70. Relief actions**

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.
2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.
3. The Parties to the conflict and each High Contracting Party which allow the passage of relief consignments, equipment and personnel in accordance with paragraph 2:
  - (a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;

- (b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;
  - (c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.
4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.
  5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief actions referred to in paragraph 1.

#### **ARTICLE 71. Personnel participating in relief actions**

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.
2. Such personnel shall be respected and protected.
3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.
4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

### **Section III. Treatment of Persons in the Power of a Party to the Conflict**

#### **Chapter I. Field of application and protection of persons and objects**

##### **ARTICLE 72. Field of application**

The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.

##### **ARTICLE 73. Refugees and stateless persons**

Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction.

**ARTICLE 74. Reunion of dispersed families**

The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task in accordance with the provisions of the Conventions and of this Protocol and in conformity with their respective security regulations.

**ARTICLE 75. Fundamental guarantees**

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
  - (a) violence to the life, health, or physical or mental well-being of persons, in particular:
    - (i) murder;
    - (ii) torture of all kinds, whether physical or mental;
    - (iii) corporal punishment; and
    - (iv) mutilation;
  - (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
  - (c) the taking of hostages;
  - (d) collective punishments; and
  - (e) threats to commit any of the foregoing acts.
3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

- (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
  - (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
  - (c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
  - (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
  - (e) anyone charged with an offence shall have the right to be tried in his presence;
  - (f) no one shall be compelled to testify against himself or to confess guilt;
  - (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
  - (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
  - (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.
5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.
6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.
7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

- (a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
  - (b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.
8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1

## **Chapter II. Measures in favour of women and children**

### **ARTICLE 76. Protection of women**

1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.
2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.
3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

### **ARTICLE 77. Protection of children**

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.
2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest.
3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.
4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.



5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

#### **ARTICLE 78. Evacuation of children**

1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.
2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.
3. With a view to facilitating the return to their families and country of children evacuated pursuant to this Article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross. Each card shall bear, whenever possible, and whenever it involves no risk of harm to the child, the following information:
  - (a) surname(s) of the child;
  - (b) the child's first name(s);
  - (c) the child's sex;
  - (d) the place and date of birth (or, if that date is not known, the approximate age);
  - (e) the father's full name;
  - (f) the mother's full name and her maiden name;
  - (g) the child's next-of-kin;
  - (h) the child's nationality;
  - (i) the child's native language, and any other languages he speaks;
  - (j) the address of the child's family;
  - (k) any identification number for the child;
  - (l) the child's state of health;

- (m) the child's blood group;
- (n) any distinguishing features;
- (o) the date on which and the place where the child was found;
- (p) the date on which and the place from which the child left the country;
- (q) the child's religion, if any;
- (r) the child's present address in the receiving country;
- (s) should the child die before his return, the date, place and circumstances of death and place of interment.

### **Chapter III. Journalists**

#### **ARTICLE 79. Measures or protection for journalists**

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 (A) (4) of the Third Convention.
3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the Journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

## **PART V. EXECUTION OF THE CONVENTIONS AND OF THIS PROTOCOL**

### **Section I. General Provisions**

#### **ARTICLE 80. Measures for execution**

1. The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol.
2. The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution.

#### **ARTICLE 81. Activities of the Red Cross and other humanitarian organizations**

1. The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities, within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee

of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned.

2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the Fundamental Principles of the Red Cross as formulated by the International Conferences of the Red Cross.
3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organizations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Conventions and this Protocol and with the Fundamental Principles of the red Cross as formulated by the International Conferences of the Red Cross.
4. The High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar to those mentioned in paragraphs 2 and 3 available to the other humanitarian organizations referred to in the Conventions and this Protocol which are duly authorized by the respective Parties to the conflict and which perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol.

#### **ARTICLE 82. Legal advisers in armed forces**

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

#### **ARTICLE 83. Dissemination**

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.
2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

#### **ARTICLE 84. Rules of application**

The High Contracting Parties shall communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers, their official translations of this Protocol, as well as the laws and regulations which they may adopt to ensure its application.

## Section II. Repression of Breaches of the Conventions and of this Protocol

### ARTICLE 85. Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.
2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.
3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:
  - (a) making the civilian population or individual civilians the object of attack;
  - (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);
  - (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);
  - (d) making non-defended localities and demilitarized zones the object of attack;
  - (e) making a person the object of attack in the knowledge that he is *hors de combat*;
  - (f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.
4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:
  - (a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
  - (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
  - (c) practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

- (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
  - (e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.
5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

#### **ARTICLE 86. Failure to act**

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

#### **ARTICLE 87. Duty of commanders**

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

**ARTICLE 88. Mutual assistance in criminal matters**

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.
2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1 of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.
3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

**ARTICLE 89. Co-operation**

In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

**ARTICLE 90. International Fact-Finding Commission**

1. (a) An International Fact-Finding Commission (hereinafter referred to as "the Commission") consisting of 15 members of high moral standing and acknowledged impartiality shall be established.
- (b) When not less than 20 High Contracting Parties have agreed to accept the competence of the Commission pursuant to paragraph 2, the depositary shall then, and at intervals of five years thereafter, convene a meeting of representatives of those High Contracting Parties for the purpose of electing the members of the Commission. At the meeting, the representatives shall elect the members of the Commission by secret ballot from a list of persons to which each of those High Contracting Parties may nominate one person.
- (c) The members of the Commission shall serve in their personal capacity and shall hold office until the election of new members at the ensuing meeting.
- (d) At the election, the High Contracting Parties shall ensure that the persons to be elected to the Commission individually possess the qualifications required and that, in the Commission as a whole, equitable geographical representation is assured.
- (e) In the case of a casual vacancy, the Commission itself shall fill the vacancy, having due regard to the provisions of the preceding sub-paragraphs.
- (f) The depositary shall make available to the Commission the necessary administrative facilities for the performance of its functions.

2. (a) The High Contracting Parties may at the time of signing, ratifying or acceding to the Protocol, or at any other subsequent time, declare that they recognize *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission to inquire into allegations by such other Party, as authorized by this Article.
  - (b) The declarations referred to above shall be deposited with the depositary, which shall transmit copies thereof to the High Contracting Parties.
  - (c) The Commission shall be competent to:
    - (i) inquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;
    - (ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.
  - (d) In other situations, the Commission shall institute an inquiry at the request of a Party to the conflict only with the consent of the other Party or Parties concerned.
  - (e) Subject to the foregoing provisions of this paragraph, the provisions of Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 of the Third Convention and Article 149 of the Fourth Convention shall continue to apply to any alleged violation of the Conventions and shall extend to any alleged violation of this Protocol.
3. (a) Unless otherwise agreed by the Parties concerned, all inquiries shall be undertaken by a Chamber consisting of seven members appointed as follows:
    - (i) five members of the Commission, not nationals of any Party to the conflict, appointed by the President of the Commission on the basis of equitable representation of the geographical areas, after consultation with the Parties to the conflict;
    - (ii) two *ad hoc* members, not nationals of any Party to the conflict, one to be appointed by each side.
  - (b) Upon receipt of the request for an inquiry, the President of the Commission shall specify an appropriate time-limit for setting up a Chamber. If any *ad hoc* member has not been appointed within the time-limit, the President shall immediately appoint such additional member or members of the Commission as may be necessary to complete the membership of the Chamber.
4. (a) The Chamber set up under paragraph 3 to undertake an inquiry shall invite the Parties to the conflict to assist it and to present evidence. The Chamber may also seek such other evidence as it deems appropriate and may carry out an investigation of the situation *in loco*.
  - (b) All evidence shall be fully disclosed to the Parties, which shall have the right to comment on it to the Commission.

- (c) Each Party shall have the right to challenge such evidence.
- 5. (a) The Commission shall submit to the Parties a report on the findings of fact of the Chamber, with such recommendations as it may deem appropriate.
  - (b) If the Chamber is unable to secure sufficient evidence for factual and impartial findings, the Commission shall state the reasons for that inability.
  - (c) The Commission shall not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.
- 6. The Commission shall establish its own rules, including rules for the presidency or the Commission and the presidency of the Chamber. Those rules shall ensure that the functions of the President of the Commission are exercised at all times and that, in the case of an inquiry, they are exercised by a person who is not a national of a Party to the conflict.
- 7. The administrative expenses of the Commission shall be met by contributions from the High Contracting Parties which made declarations under paragraph 2, and by voluntary contributions. The Party or Parties to the conflict requesting an inquiry shall advance the necessary funds for expenses incurred by a Chamber and shall be reimbursed by the Party or Parties against which the allegations are made to the extent of 50 per cent of the costs of the Chamber. Where there are counter-allegations before the Chamber each side shall advance 50 per cent of the necessary funds.

#### **ARTICLE 91. Responsibility**

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

### **PART VI. FINAL RESOLUTIONS**

#### **ARTICLE 92. Signature**

This Protocol shall be open for signature by the Parties to the Conventions six months after the signing of the Final Act and will remain open for a period of twelve months.

#### **ARTICLE 93. Ratification**

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depositary of the Conventions.

#### **ARTICLE 94. Accession**

This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

#### **ARTICLE 95. Entry into force**

- 1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.



2. For each Party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.

#### **ARTICLE 96. Treaty relations upon entry into force of this Protocol**

1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.
2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.
3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:
  - (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
  - (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
  - (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

#### **ARTICLE 97. Amendment**

1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary, which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.
2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories or this Protocol.

#### **ARTICLE 98. Revision of Annex I**

1. Not later than four years after the entry into force of this Protocol and thereafter at intervals of not less than four years, the International Committee of the Red Cross shall consult the High Contracting Parties concerning Annex I to this Protocol and, if it considers it necessary, may propose a meeting of technical experts to review Annex I and to propose such amendments to it as may appear to be desirable. Unless, within six months of the communication of a proposal for such a meeting to the High Contracting Parties, one third of them object, the International Committee of the Red Cross shall convene the meeting, inviting also observers of

appropriate international organizations. Such a meeting shall also be convened by the International Committee of the Red Cross at any time at the request of one third of the High Contracting Parties.

2. The depositary shall convene a conference of the High Contracting Parties and the Parties to the Conventions to consider amendments proposed by the meeting of technical experts if, after that meeting, the International Committee of the Red Cross or one third of the High Contracting Parties so request.
3. Amendments to Annex I may be adopted at such a conference by a two-thirds majority of the High Contracting Parties present and voting.
4. The depositary shall communicate any amendment so adopted to the High Contracting Parties and to the Parties to the Conventions. The amendment shall be considered to have been accepted at the end of a period of one year after it has been so communicated, unless within that period a declaration of non-acceptance of the amendment has been communicated to the depositary by not less than one third of the High Contracting Parties.
5. An amendment considered to have been accepted in accordance with paragraph 4 shall enter into force three months after its acceptance for all High Contracting Parties other than those which have made a declaration of non-acceptance in accordance with that paragraph. Any Party making such a declaration may at any time withdraw it and the amendment shall then enter into force for that Party three months thereafter.
6. The depositary shall notify the High Contracting Parties and the Parties to the Conventions of the entry into force of any amendment, of the Parties bound thereby, of the date of its entry into force in relation to each Party, of declarations of non-acceptance made in accordance with paragraph 4, and of withdrawals of such declarations.

#### **ARTICLE 99. Denunciation**

1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect one year after receipt of the instrument of denunciation. If, however, on the expiry of that year the denouncing Party is engaged in one of the situations referred to in Article I, the denunciation shall not take effect before the end of the armed conflict or occupation and not, in any case, before operations connected with the final release, repatriation or re-establishment of the persons protected by the Convention or this Protocol have been terminated.
2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.
3. The denunciation shall have effect only in respect of the denouncing Party.
4. Any denunciation under paragraph 1 shall not affect the obligations already incurred, by reason of the armed conflict, under this Protocol by such denouncing Party in respect of any act committed before this denunciation becomes effective.

**ARTICLE 100. Notifications**

The depositary shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol, of:

- (a) signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 93 and 94;
- (b) the date of entry into force of this Protocol under Article 95;
- (c) communications and declarations received under Articles 84, 90 and 97;
- (d) declarations received under Article 96, paragraph 3, which shall be communicated by the quickest methods; and
- (e) denunciations under Article 99.

**ARTICLE 101. Registration**

1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.
2. The depositary shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to this Protocol.

**ARTICLE 102. Authentic texts**

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.

**ANNEX I****REGULATIONS CONCERNING IDENTIFICATION**

(as amended on 30 november 1993)

**ARTICLE 1. General provisions**

1. The regulations concerning identification in this Annex implement the relevant provisions of the Geneva Conventions and the Protocol; they are intended to facilitate the identification of personnel, material, units, transports and installations protected under the Geneva Conventions and the Protocol.
2. These rules do not in and of themselves establish the right to protection. This right is governed by the relevant articles in the Conventions and the Protocol.
3. The competent authorities may, subject to the relevant provisions of the Geneva Conventions and the Protocol, at all times regulate the use, display, illumination and detectability of the distinctive emblems and signals.
4. The High Contracting Parties and in particular the Parties to the conflict are invited at all times to agree upon additional or other signals, means or systems which enhance the possibility of identification and take full advantage of technological developments in this field.

**CHAPTER I – IDENTITY CARDS****ARTICLE 2. Identity card for permanent civilian medical and religious personnel**

1. The identity card for permanent civilian medical and religious personnel referred to in Article 18, paragraph 3, of the Protocol should:
  - (a) bear the distinctive emblem and be of such size that it can be carried in the pocket;
  - (b) be as durable as practicable;
  - (c) be worded in the national or official language and, in addition and when appropriate, in the local language of the region concerned;
  - (d) mention the name, the date of birth (or, if that date is not available, the age at the time of issue) and the identity number, if any, of the holder;
  - (e) state in what capacity the holder is entitled to the protection of the Conventions and of the Protocol;
  - (f) bear the photograph of the holder as well as his signature or his thumbprint, or both;
  - (g) bear the stamp and signature of the competent authority;
  - (h) state the date of issue and date of expiry of the card;
  - (i) indicate, whenever possible, the holder's blood group, on the reverse side of the card.

2. The identity card shall be uniform throughout the territory of each High Contracting Party and, as far as possible, of the same type for all Parties to the conflict. The Parties to the conflict may be guided by the single-language model shown in Figure 1. At the outbreak of hostilities, they shall transmit to each other a specimen of the model they are using, if such model differs from that shown in Figure 1. The identity card shall be made out, if possible, in duplicate, one copy being kept by the issuing authority, which should maintain control of the cards which it has issued.
3. In no circumstances may permanent civilian medical and religious personnel be deprived of their identity cards. In the event of the loss of a card, they shall be entitled to obtain a duplicate copy.

**ARTICLE 3. Identity card for temporary civilian medical and religious personnel**

1. The identity card for temporary civilian medical and religious personnel should, whenever possible, be similar to that provided for in Article 2 of these Regulations. The Parties to the conflict may be guided by the model shown in Figure 1.
2. When circumstances preclude the provision to temporary civilian medical and religious personnel of identity cards similar to those described in Article 2 of these Regulations, the said personnel may be provided with a certificate signed by the competent authority certifying that the person to whom it is issued is assigned to duty as temporary personnel and stating, if possible, the duration of such assignment and his right to wear the distinctive emblem. The certificate should mention the holder's name and date of birth (or if that is not available, his age at the time when the certificate was issued), his function and identity number, if any. It shall bear his signature or his thumbprint, or both.

Front	<div><div><div><div></div><div></div></div><div><div>(space reserved for the name of the country and authority issuing this card)</div><div>IDENTITY CARD</div><div>PERMANENT civilian medical personnel for TEMPORARY religious personnel</div></div><div><div>Name .....</div><div>Date of birth (or age) .....</div><div>Identity No. (if any) .....</div><div>The holder of this card is protected by the Geneva Conventions of 12 August 1949 and by the Protocol Additional to Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) in his capacity as .....</div><div>Date of issue..... No. of card .....</div><div>Date of expiry.....</div><div>Signature of issuing authority</div></div></div></div>		
Reverse side	Height.....	Eyes.....	Hair.....
Other distinguishing marks or information: ..... ..... .....			
PHOTO OF HOLDER			
Stamp		Signature of bearer or thumbprint or both	

Fig. 1: Model of identity card (format: 74 mm x 105 mm)

## CHAPTER II – THE DISTINCTIVE EMBLEM

### ARTICLE 4. Shape

The distinctive emblem (red on a white ground) shall be as large as appropriate under the circumstances. For the shapes of the cross, the crescent or the lion and sun\*, the High Contracting Parties may be guided by the models shown in Figure 2.



### ARTICLE 5. Use

1. The distinctive emblem shall, whenever possible, be displayed on a flat surface, on flags or in any other way appropriate to the lay of the land, so that it is visible from as many directions and from as far away as possible, and in particular from the air.
2. At night or when visibility is reduced, the distinctive emblem may be lighted or illuminated.
3. The distinctive emblem may be made of materials which make it recognizable by technical means of detecting. The red part should be painted on top of black primer paint in order to facilitate its identification, in particular by infrared instruments.
4. Medical and religious personnel carrying out their duties in the battle area shall, as far as possible, wear headgear and clothing bearing the distinctive emblem.

## CHAPTER III – DISTINCTIVE SIGNALS

### ARTICLE 6. Use

1. All distinctive signals specified in this Chapter may be used by medical units or transports.
2. These signals, at the exclusive disposal of medical units and transports, shall not be used for any other purpose, the use of the light signal being reserved (see paragraph 3 below).
3. In the absence of a special agreement between the Parties to the conflict reserving the use of flashing blue lights for the identification of medical vehicles, ships and craft, the use of such signals for other vehicles, ships and craft is not prohibited.

\* No State has used the emblem of the lion and sun since 1980.

4. Temporary medical aircraft which cannot, either for lack of time or because of their characteristics, be marked with the distinctive emblem, may use the distinctive signals authorized in this Chapter.

#### **ARTICLE 7. Light signal**

1. The light signal, consisting of a flashing blue light as defined in the Airworthiness Technical Manual of the International Civil Aviation Organization (ICAO) Doc. 9051, is established for the use of medical aircraft to signal their identity. No other aircraft shall use this signal. Medical aircraft using the flashing blue light should exhibit such lights as may be necessary to make the light signal visible from as many directions as possible.
2. In accordance with the provisions of Chapter XIV, para. 4 of the International Maritime Organization (IMO) International Code of Signals, vessels protected by the Geneva Conventions of 1949 and the Protocol should exhibit one or more flashing blue lights visible from any direction.
3. Medical vehicles should exhibit one or more flashing blue lights visible from as far away as possible. The High Contracting Parties and, in particular, the Parties to the conflict which use lights of other colours should give notification of this.
4. The recommended blue colour is obtained when its chromaticity is within the boundaries of the International Commission on Illumination (ICI) chromaticity diagram defined by the following equations:  
green boundary       $y = 0.065 + 0.805x$ ;  
white boundary       $y = 0.400 - x$ ;  
purple boundary       $x = 0.133 + 0.600y$ .

The recommended flashing rate of the blue light is between sixty and one hundred flashes per minute.

#### **ARTICLE 8. Radio signal**

1. The radio signal shall consist of the urgency signal and the distinctive signal as described in the International Telecommunication Union (ITU) Radio Regulations (RR Articles 40 and N 40).
2. The radio message preceded by the urgency and distinctive signals mentioned in paragraph 1 shall be transmitted in English at appropriate intervals on a frequency or frequencies specified for this purpose in the Radio Regulations, and shall convey the following data relating to the medical transports concerned:
  - (a) call sign or other recognized means of identification;
  - (b) position;
  - (c) number and type of vehicles;
  - (d) intended route;
  - (e) estimated time *en route* and of departure and arrival, as appropriate;



- (f) any other information, such as flight altitude, guarded radio frequencies, languages used and secondary surveillance radar modes and codes.
3. In order to facilitate the communications referred to in paragraphs 1 and 2, as well as the communications referred to in Articles 22, 23 and 25 to 31 of the Protocol, the High Contracting Parties, the Parties to a conflict, or one of the Parties to a conflict, acting in agreement or alone, may designate, in accordance with the Table of Frequency Allocations in the Radio Regulations annexed to the International Telecommunication Convention, and publish selected national frequencies to be used by them for such communications. The International Telecommunication Union shall be notified of these frequencies in accordance with procedures approved by a World Administrative Radio Conference.

#### **ARTICLE 9. Electronic identification**

1. The Secondary Surveillance Radar (SSR) system, as specified in Annex 10 to the Chicago Convention on International Civil Aviation of 7 December 1944, as amended from time to time, may be used to identify and to follow the course of medical aircraft. The SSR mode and code to be reserved for the exclusive use of medical aircraft shall be established by the High Contracting Parties, the Parties to a conflict, or one of the Parties to a conflict, acting in agreement or alone, in accordance with procedures to be recommended by the International Civil Aviation Organization.
2. Protected medical transports may, for their identification and location, use standard aeronautical radar transponders and/or maritime search and rescue radar transponders.

It should be possible for protected medical transports to be identified by other vessels or aircraft equipped with secondary surveillance radar by means of a code transmitted by a radar transponder, e.g. in mode 3/A, fitted on the medical transports.

The code transmitted by the medical transport transponder should be assigned to that transport by the competent authorities and notified to all the Parties to the conflict.

3. It should be possible for medical transports to be identified by submarines by the appropriate underwater acoustic signals transmitted by the medical transports.

The underwater acoustic signal shall consist of the call sign (or any other recognized means of identification of medical transport) of the ship preceded by the single group YYY transmitted in morse on an appropriate acoustic frequency, e.g. 5kHz.

Parties to a conflict wishing to use the underwater acoustic identification signal described above shall inform the Parties concerned of the signal as soon as possible, and shall, when notifying the use of their hospital ships, confirm the frequency to be employed.

4. Parties to a conflict may, by special agreement between them, establish for their use a similar electronic system for the identification of medical vehicles, and medical ships and craft.

## CHAPTER IV – COMMUNICATIONS

### ARTICLE 10. Radiocommunications

1. The urgency signal and the distinctive signal provided for in Article 8 may precede appropriate radiocommunications by medical units and transports in the application of the procedures carried out under Articles 22, 23 and 25 to 31 of the Protocol.
2. The medical transports referred to in Articles 40 (Section II, No. 3209) and N 40 (Section III, No. 3214) of the ITU Radio Regulations may also transmit their communications by satellite systems, in accordance with the provisions of Articles 37, N 37 and 59 of the ITU Radio Regulations for the Mobile-Satellite Services.

### ARTICLE 11. Use of international codes

Medical units and transports may also use the codes and signals laid down by the International telecommunication Union, the International Civil Aviation Organization and the International Maritime Organization. These codes and signals shall be used in accordance with the standards, practices and procedures established by these Organizations.

### ARTICLE 12. Other means of communication

When two-way radiocommunication is not possible, the signals provided for in the International Code of Signals adopted by the International Maritime Organization or in the appropriate Annex to the Chicago Convention on International Civil Aviation of 7 December 1944, as amended from time to time, may be used.

### ARTICLE 13. Flight plans

The agreements and notifications relating to flight plans provided for in Article 29 of the Protocol shall as far as possible be formulated in accordance with procedures laid down by the International Civil Aviation Organization.

### ARTICLE 14. Signals and procedures for the interception of medical aircraft

If an intercepting aircraft is used to verify the identity of a medical aircraft in flight or to require it to land in accordance with Articles 30 and 31 of the Protocol, the standard visual and radio interception procedures prescribed by Annex 2 to the Chicago Convention on International Civil Aviation of 7 December 1944, as amended from time to time, should be used by the intercepting and the medical aircraft.

## CHAPTER V – CIVIL DEFENCE

### ARTICLE 15. Identity card

1. The identity card of the civil defence personnel provided for in Article 66, paragraph 3, of the Protocol is governed by the relevant provisions of Article 2 of these Regulations.
2. The identity card for civil defence personnel may follow the model shown in Figure 3.

3. If civil defence personnel are permitted to carry light individual weapons, an entry to that effect should be made on the card mentioned.

Front

(space reserved for the name of the country and authority issuing this card)

IDENTITY CARD

for civil defence personnel

Name.....

Date of birth (or age) .....

Identity No. (if any).....

The holder of this card is protected by the Geneva Conventions of 12 August 1949 and by the Protocol Additional to Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) in his capacity as .....

Date of issue..... No. of card .....

Signature of issuing authority .....

Date of expiry.....

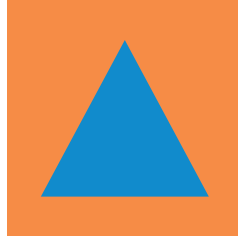
Reverse side

Height.....	Eyes.....	Hair.....
Other distinguishing marks or information: ..... ..... .....		
PHOTO OF HOLDER		
Stamp	Signature of bearer or thumbprint or both	

Fig. 3: Model of identity card for civil defence personnel  
(format: 74 mm x 105 mm)

**ARTICLE 16. International distinctive sign**

1. The international distinctive sign of civil defence provided for in Article 66, paragraph 4, of the Protocol is an equilateral blue triangle on an orange ground. A model is shown in Figure 4:

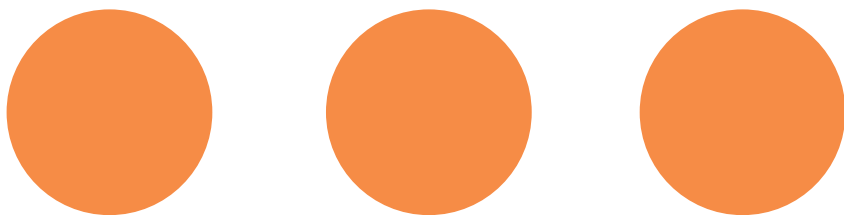


*Fig. 4: Blue triangle on an orange ground*

2. It is recommended that:
  - (a) if the blue triangle is on a flag or armlet or tabard, the ground to the triangle be the orange flag, armlet or tabard;
  - (b) one of the angles of the triangle be pointed vertically upwards;
  - (c) no angle of the triangle touch the edge of the orange ground.
3. The international distinctive sign shall be as large as appropriate under the circumstances. The distinctive sign shall, whenever possible, be displayed on flat surfaces or on flags visible from as many directions and from as far away as possible. Subject to the instructions of the competent authority, civil defence personnel shall, as far as possible, wear headgear and clothing bearing the international distinctive sign. At night or when visibility is reduced, the sign may be lighted or illuminated; it may also be made of materials rendering it recognizable by technical means of detection.

**CHAPTER VI – WORKS AND INSTALLATIONS CONTAINING DANGEROUS FORCES****ARTICLE 17. International special sign**

1. The international special sign for works and installations containing dangerous forces, as provided for in Article 56, paragraph 7, of the Protocol, shall be a group of three bright orange circles of equal size, placed on the same axis, the distance between each circle being one radius, in accordance with Figure 5 illustrated below.
2. The sign shall be as large as appropriate under the circumstances. When displayed over an extended surface it may be repeated as often as appropriate under the circumstances. It shall, whenever possible, be displayed on flat surfaces or on flags so as to be visible from as many directions and from as far away as possible.
3. On a flag, the distance between the outer limits of the sign and the adjacent sides of the flag shall be one radius of a circle. The flag shall be rectangular and shall have a white ground.
4. At night or when visibility is reduced, the sign may be lighted or illuminated. It may also be made of materials rendering it recognizable by technical means of detection.



*Fig. 5: International special sign for works and installations containing dangerous forces*

ANNEX II.

IDENTITY CARD FOR JOURNALISTS ON DANGEROUS PROFESSIONAL MISSIONS

FRONT

<p>NOTICE</p> <p>This identity card is issued to journalists on dangerous professional missions in areas of armed conflicts. The holder is entitled to be treated as a civilian under the Geneva Conventions of 12 August 1949, and their Additional Protocol I. The card must be carried at all times by the bearer. If he is detained, he shall at once hand it to the Detaining Authorities, to assist in his identification.</p>	<p>ملاحظة</p> <p>تصرف هذه البطاقة للمصحفين المكلفين بمهام خطيرة في مناطق النزاعات المسلحة. يحق لصاحبها أن يعامل معاملة الشخص المدني وفقاً لاتفاقيات جنيف المعروفة 12 آب/أغسطس 1949 وسلخها (بروتوكولها) الإضافي الأول. ويجب أن يحتفظ صاحب البطاقة بها دائماً وإذا اعتقل يجب أن يسلمها فوراً إلى سلطة الاعتقال لتساعد على تحديد هويته.</p>
<p>NOTA</p> <p>La presente tarjeta de identidad se expide a los periodistas en misión profesional peligrosa en zonas de conflictos armados. Su titular tiene derecho a ser tratado como persona civil conforme a los Convenios de Ginebra del 12 de agosto de 1949 y su Protocolo adicional I. El titular debe llevar la tarjeta consigo, en todo momento. En caso de ser detenido, la entregará inmediatamente a las autoridades que lo detengan a fin de facilitar su identificación.</p>	<p>NOTA</p> <p>La presente tarjeta de identidad se expide a los periodistas en misión profesional peligrosa en zonas de conflictos armados. Su titular tiene derecho a ser tratado como persona civil conforme a los Convenios de Ginebra del 12 de agosto de 1949 y su Protocolo adicional I. El titular debe llevar la tarjeta consigo, en todo momento. En caso de ser detenido, la entregará inmediatamente a las autoridades que lo detengan a fin de facilitar su identificación.</p>
<p>AVIS</p> <p>La présente carte d'identité est délivrée aux journalistes en mission professionnelle périlleuse dans des zones de conflit armé. Le porteur a le droit d'être traité comme une personne civile aux termes des Conventions de Genève du 12 août 1949 et de leur Protocole additionnel I. La carte doit être portée en tout temps par son titulaire. Si celui-ci est arrêté, il la remettra immédiatement aux autorités qui le détiennent afin qu'elles puissent l'identifier.</p>	<p>AVIS</p> <p>La présente carte d'identité est délivrée aux journalistes en mission professionnelle périlleuse dans des zones de conflit armé. Le porteur a le droit d'être traité comme une personne civile aux termes des Conventions de Genève du 12 août 1949 et de leur Protocole additionnel I. La carte doit être portée en tout temps par son titulaire. Si celui-ci est arrêté, il la remettra immédiatement aux autorités qui le détiennent afin qu'elles puissent l'identifier.</p>
<p>ПРИМЕЧАНИЕ</p> <p>Настоящее удостоверение выдается журналистам, находящимся в опасных профессиональных командировках в районах вооруженных конфликтов. Его обладатель имеет право на обращение с ним как с гражданским лицом в соответствии с Женевскими Конвенциями от 12 августа 1949 г. и Дополнительным Протоколом I к ним. Владелец настоящего удостоверения должен постоянно иметь его при себе. В случае задержания он немедленно вручает его задержавшим властям для содействия установлению его личности.</p>	<p>ПРИМЕЧАНИЕ</p> <p>Настоящее удостоверение выдается журналистам, находящимся в опасных профессиональных командировках в районах вооруженных конфликтов. Его обладатель имеет право на обращение с ним как с гражданским лицом в соответствии с Женевскими Конвенциями от 12 августа 1949 г. и Дополнительным Протоколом I к ним. Владелец настоящего удостоверения должен постоянно иметь его при себе. В случае задержания он немедленно вручает его задержавшим властям для содействия установлению его личности.</p>

IDENTITY CARD FOR JOURNALISTS ON  
DANGEROUS PROFESSIONAL MISSIONS

بطاقة الهوية الخاصة بالصحفيين  
المكلفين بمهام مهنية خطيرة

TARJETA DE IDENTIDAD DE PERIODISTA EN  
MISION PELIGROSA  
CARTE D'IDENTITÉ DE JOURNALISTE EN  
MISSION PÉRILLEUSE

УДОСТОВЕРЕНИЕ ЖУРНАЛИСТА,  
НАХОДЯЩЕГОСЯ В ОПАСНОЙ  
КОМАНДИРОВКЕ

(Name of country issuing this card)  
(اسم القطر المصدر لهذه البطاقة)  
(Nombre del país que expide esta tarjeta)  
(Nom du pays qui a délivré cette carte)  
(Название страны, выдавшей настоящее  
удостоверение)

REVERSE SIDE

Issued by (competent authority) صدرت عن (سلطة المختصة) Expedida por (autoridad competente) Delivrée par (autorité compétente) Выдано (компетентными властями)		Height الطول Estatura Taille Рост		Eyes العيون Ojos Yeux Глаза	
Place of bearer مكان صاحب البطاقة Lugar Lieu		Weight الوزن Peso Poids Bec		Hair الشعر Cabello Cheveux Волосы	
Mecro التاريخ Fecha Date Дата		Blood type نوعية الدم Grupo sanguineo Groupe sanguin Группа крови		Rh factor عامل الحدة Factor Rh Facteur Rh Rh-фактор	
Official seal (imprint) (الختم الرسمي) (Sello oficial) (Timbre de l'autorité délivrant la carte) (Официальная печать) (Signature of bearer) (توقيع صاحب البطاقة) (Firma del titular) (Signature du porteur) (Подпись владельца)		Religion (optional) الديانة (اختياري) Religion (optativo) Religion (facultatif) Религия (факультативно)			
Name الاسم Apellidos Nom		Fingerprints (optional) البصمات (اختياري) Huellas dactilares (optativo) Empreintes digitales (facultatif) Отпечатки пальцев (факультативно)		(Right forefinger) السبابة اليمنى (Dedo índice derecho) (Index droit) (Правый указательный палец)	
First names الأسماء Nombres Prénoms		(Left forefinger) السبابة اليسرى (Dedo índice izquierdo) (Index gauche) (Левый указательный палец)			
Place & date of birth مكان وتاريخ الميلاد Lugar y fecha de nacimiento Lieu & date de naissance Дата и место рождения Correspondent of		Special marks of identification العلامات المميزة للبطاقة Señas particulares Signes particuliers Особые приметы			
Correspondant de Корреспондент Specific occupation الصفة المهنية Categoría profesional Catégorie professionnelle					
Valid for ينتهي العمل بها في Válido por Durée de validité Действительно					

**Document No. 7, The Second Protocol Additional to the Geneva Conventions**

[Source: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977; available at [www.icrc.org](http://www.icrc.org)]

**Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)****8 June 1977****Preamble**

*The High Contracting Parties,*

*Recalling* that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character,

*Recalling* furthermore that international instruments relating to human rights offer a basic protection to the human person,

*Emphasizing* the need to ensure a better protection for the victims of those armed conflicts,

*Recalling* that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience,

*Have agreed on the following:*

**PART I. SCOPE OF THIS PROTOCOL****ARTICLE 1. Material field of application**

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.



**ARTICLE 2. Personal field of application**

1. This Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter referred to as "adverse distinction") to all persons affected by an armed conflict as defined in Article 1.
2. At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.

**ARTICLE 3. Non-intervention**

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

**PART II. HUMANE TREATMENT****ARTICLE 4. Fundamental guarantees**

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
  - (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
  - (b) collective punishments;
  - (c) taking of hostages;
  - (d) acts of terrorism;
  - (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault;

- (f) slavery and the slave trade in all their forms;
  - (g) pillage;
  - (h) threats to commit any or the foregoing acts.
3. Children shall be provided with the care and aid they require, and in particular:
- (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;
  - (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
  - (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
  - (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;
  - (e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

**ARTICLE 5. Persons whose liberty has been restricted**

1. In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained;
- (a) the wounded and the sick shall be treated in accordance with Article 7;
  - (b) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;
  - (c) they shall be allowed to receive individual or collective relief;
  - (d) they shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions;
  - (e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.
2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons:

- (a) except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women;
  - (b) they shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary;
  - (c) places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety;
  - (d) they shall have the benefit of medical examinations;
  - (e) their physical or mental health and integrity shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.
3. Persons who are not covered by paragraph 1 but whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely in accordance with Article 4 and with paragraphs 1 (a), (c) and (d), and 2 (b) of this Article.
4. If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.

#### **ARTICLE 6. Penal prosecutions**

1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.
2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.

In particular:

- (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
- (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
- (c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed;

- if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
- (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
  - (e) anyone charged with an offence shall have the right to be tried in his presence;
  - (f) no one shall be compelled to testify against himself or to confess guilt.
3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.
  4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.
  5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

### **PART III. WOUNDED, SICK AND SHIPWRECKED**

#### **ARTICLE 7. Protection and care**

1. All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.
2. In all circumstances they shall be treated humanely and shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

#### **ARTICLE 8. Search**

Whenever circumstances permit and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.

#### **ARTICLE 9. Protection of medical and religious personnel**

1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.
2. In the performance of their duties medical personnel may not be required to give priority to any person except on medical grounds.

**ARTICLE 10. General protection of medical duties**

1. Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.
2. Persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol.
3. The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.
4. Subject to national law, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.

**ARTICLE 11. Protection of medical units and transports**

1. Medical units and transports shall be respected and protected at all times and shall not be the object of attack.
2. The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given, setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

**ARTICLE 12. The distinctive emblem**

Under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

**PART IV. CIVILIAN POPULATION****ARTICLE 13. Protection of the civilian population**

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.

**ARTICLE 14. Protection of objects indispensable to the survival of the civilian population**

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless for that purpose, objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works.

**ARTICLE 15. Protection of works and installations containing dangerous forces**

Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

**ARTICLE 16. Protection of cultural objects and of places of worship**

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

**ARTICLE 17. Prohibition of forced movement of civilians**

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

**ARTICLE 18. Relief societies and relief actions**

1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.
2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

**PART V. FINAL PROVISIONS****ARTICLE 19. Dissemination**

This Protocol shall be disseminated as widely as possible.

**ARTICLE 20. Signature**

This Protocol shall be open for signature by the Parties to the Conventions six months after the signing of the Final Act and will remain open for a period of twelve months.

**ARTICLE 21. Ratification**

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depositary of the Conventions.

**ARTICLE 22. Accession**

This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

**ARTICLE 23. Entry into force**

1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.
2. For each Party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.

**ARTICLE 24. Amendment**

1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.
2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol.

**ARTICLE 25. Denunciation**

1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect six months after receipt of the instrument of denunciation. If, however, on the expiry of six months, the denouncing Party is engaged in the situation referred to in Article 1, the denunciation shall not take effect before the end of the armed conflict. Persons who have been deprived of liberty, or whose liberty has been restricted, for reasons related to the conflict shall nevertheless continue to benefit from the provisions of this Protocol until their final release.
2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.

**ARTICLE 26. Notifications**

The depositary shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol, of:

- (a) signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 21 and 22;

- (b) the date of entry into force of this Protocol under Article 23; and
- (c) communications and declarations received under Article 24.

**ARTICLE 27. Registration**

1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.
2. The depositary shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to this Protocol.

**ARTICLE 28. Authentic texts**

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.



**Document No. 8, The Third Protocol Additional to the Geneva Conventions**

[Source: Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005; available at [www.icrc.org](http://www.icrc.org)]

**Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)****8 December 2005****Preamble**

*The High Contracting Parties,*

*Reaffirming* the provisions of the Geneva Conventions of 12 August 1949 (in particular Articles 26, 38, 42 and 44 of the First Geneva Convention) and, where applicable, their Additional Protocols of 8 June 1977 (in particular Articles 18 and 38 of Additional Protocol I and Article 12 of Additional Protocol II), concerning the use of distinctive emblems,

*Desiring* to supplement the aforementioned provisions so as to enhance their protective value and universal character,

*Noting* that this Protocol is without prejudice to the recognized right of High Contracting Parties to continue to use the emblems they are using in conformity with their obligations under the Geneva Conventions and, where applicable, the Protocols additional thereto,

*Recalling* that the obligation to respect persons and objects protected by the Geneva Conventions and the Protocols additional thereto derives from their protected status under international law and is not dependent on use of the distinctive emblems, signs or signals,

*Stressing* that the distinctive emblems are not intended to have any religious, ethnic, racial, regional or political significance,

*Emphasizing* the importance of ensuring full respect for the obligations relating to the distinctive emblems recognized in the Geneva Conventions, and, where applicable, the Protocols additional thereto,

*Recalling* that Article 44 of the First Geneva Convention makes the distinction between the protective use and the indicative use of the distinctive emblems,

*Recalling* further that National Societies undertaking activities on the territory of another State must ensure that the emblems they intend to use within the framework of such activities may be used in the country where the activity takes place and in the country or countries of transit,

*Recognizing* the difficulties that certain States and National Societies may have with the use of the existing distinctive emblems,

*Noting* the determination of the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and the International Red Cross and Red Crescent Movement to retain their current names and emblems,

*Have agreed on the following:*

**ARTICLE 1. Respect for and scope of application of this Protocol**

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.
2. This Protocol reaffirms and supplements the provisions of the four Geneva Conventions of 12 August 1949 ("the Geneva Conventions") and, where applicable, of their two Additional Protocols of 8 June 1977 ("the 1977 Additional Protocols") relating to the distinctive emblems, namely the red cross, the red crescent and the red lion and sun, and shall apply in the same situations as those referred to in these provisions.

**ARTICLE 2. Distinctive emblems**

1. This Protocol recognizes an additional distinctive emblem in addition to, and for the same purposes as, the distinctive emblems of the Geneva Conventions. The distinctive emblems shall enjoy equal status.
2. This additional distinctive emblem, composed of a red frame in the shape of a square on edge on a white ground, shall conform to the illustration in the Annex to this Protocol. This distinctive emblem is referred to in this Protocol as the "third Protocol emblem".
3. The conditions for use of and respect for the third Protocol emblem are identical to those for the distinctive emblems established by the Geneva Conventions and, where applicable, the 1977 Additional Protocols.
4. The medical services and religious personnel of armed forces of High Contracting Parties may, without prejudice to their current emblems, make temporary use of any distinctive emblem referred to in paragraph 1 of this Article where this may enhance protection.

**ARTICLE 3. Indicative use of the third Protocol emblem**

1. National Societies of those High Contracting Parties which decide to use the third Protocol emblem may, in using the emblem in conformity with relevant national legislation, choose to incorporate within it, for indicative purposes:
  - a) a distinctive emblem recognized by the Geneva Conventions or a combination of these emblems; or
  - b) another emblem which has been in effective use by a High Contracting Party and was the subject of a communication to the other High Contracting Parties and the International Committee of the Red Cross through the depositary prior to the adoption of this Protocol.

Incorporation shall conform to the illustration in the Annex to this Protocol.

2. A National Society which chooses to incorporate within the third Protocol emblem another emblem in accordance with paragraph 1 above, may, in conformity with national legislation, use the designation of that emblem and display it within its national territory.
3. National Societies may, in accordance with national legislation and in exceptional circumstances and to facilitate their work, make temporary use of the distinctive emblem referred to in Article 2 of this Protocol.
4. This Article does not affect the legal status of the distinctive emblems recognized in the Geneva Conventions and in this Protocol, nor does it affect the legal status of any particular emblem when incorporated for indicative purposes in accordance with paragraph 1 of this Article.

**ARTICLE 4. International Committee of the Red Cross and  
International Federation of Red Cross and Red Crescent Societies**

The International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, and their duly authorized personnel, may use, in exceptional circumstances and to facilitate their work, the distinctive emblem referred to in Article 2 of this Protocol.

**ARTICLE 5. Missions under United Nations auspices**

The medical services and religious personnel participating in operations under the auspices of the United Nations may, with the agreement of participating States, use one of the distinctive emblems mentioned in Articles 1 and 2.

**ARTICLE 6. Prevention and repression of misuse**

1. The provisions of the Geneva Conventions and, where applicable, the 1977 Additional Protocols, governing prevention and repression of misuse of the distinctive emblems shall apply equally to the third Protocol emblem. In particular, the High Contracting Parties shall take measures necessary for the prevention and repression, at all times, of any misuse of the distinctive emblems mentioned in Articles 1 and 2 and their designations, including the perfidious use and the use of any sign or designation constituting an imitation thereof.
2. Notwithstanding paragraph 1 above, High Contracting Parties may permit prior users of the third Protocol emblem, or of any sign constituting an imitation thereof, to continue such use, provided that the said use shall not be such as would appear, in time of armed conflict, to confer the protection of the Geneva Conventions and, where applicable, the 1977 Additional Protocols, and provided that the rights to such use were acquired before the adoption of this Protocol.

**ARTICLE 7. Dissemination**

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that this instrument may become known to the armed forces and to the civilian population.

**ARTICLE 8. Signature**

This Protocol shall be open for signature by the Parties to the Geneva Conventions on the day of its adoption and will remain open for a period of twelve months.

**ARTICLE 9. Ratification**

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depositary of the Geneva Conventions and the 1977 Additional Protocols.

**ARTICLE 10. Accession**

This Protocol shall be open for accession by any Party to the Geneva Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

**ARTICLE 11. Entry into force**

1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.
2. For each Party to the Geneva Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.

**ARTICLE 12. Treaty relations upon entry into force of this Protocol**

1. When the Parties to the Geneva Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.
2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.

**ARTICLE 13. Amendment**

1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary, which shall decide, after consultation with all the High Contracting Parties, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, whether a conference should be convened to consider the proposed amendment.
2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Geneva Conventions, whether or not they are signatories of this Protocol.

**ARTICLE 14. Denunciation**

1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect one year after receipt of the instrument of denunciation. If, however, on the expiry of that year the denouncing Party is engaged in a situation of armed conflict or occupation, the denunciation shall not take effect before the end of the armed conflict or occupation.

2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.
3. The denunciation shall have effect only in respect of the denouncing Party.
4. Any denunciation under paragraph 1 shall not affect the obligations already incurred, by reason of the armed conflict or occupation, under this Protocol by such denouncing Party in respect of any act committed before this denunciation becomes effective.

#### **ARTICLE 15. Notifications**

The depositary shall inform the High Contracting Parties as well as the Parties to the Geneva Conventions, whether or not they are signatories of this Protocol, of:

- a) signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 8, 9 and 10;
- b) the date of entry into force of this Protocol under Article 11 within ten days of said entry into force;
- c) communications received under Article 13;
- d) denunciations under Article 14.

#### **ARTICLE 16. Registration**

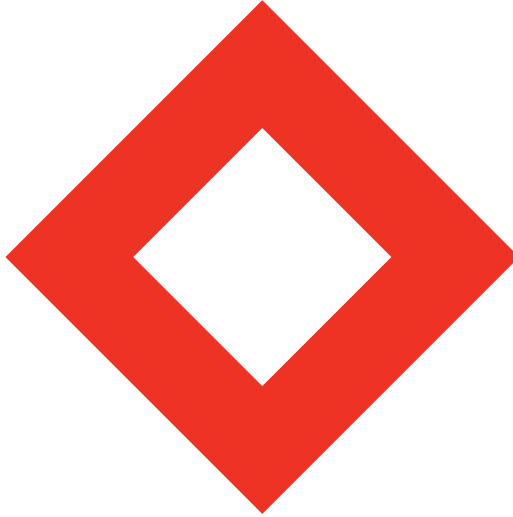
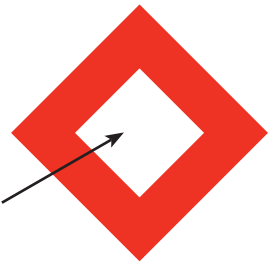
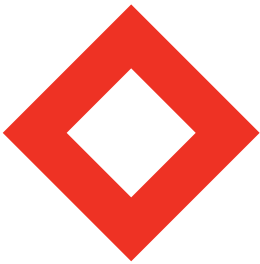
1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.
2. The depositary shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to this Protocol.

#### **ARTICLE 17. Authentic texts**

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Geneva Conventions.

**ANNEX****THIRD PROTOCOL EMBLEM**

(Article 2, paragraph 2 and Article 3, paragraph 1 of the Protocol)

**ARTICLE 1. Distinctive emblem****ARTICLE 2. Indicative use of the third Protocol emblem**

Incorporation  
in accordance  
with Art. 3

**Document No. 9, The Geneva Chemical Weapons Protocol**

[Source: Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925; available at [www.icrc.org](http://www.icrc.org)]

**Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925.**

The undersigned Plenipotentiaries, in the name of their respective Governments:

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilized world; and

Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

Declare:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.

The High Contracting Parties will exert every effort to induce other States to accede to the present Protocol. Such accession will be notified to the Government of the French Republic, and by the latter to all Signatory and Acceding Powers, and will take effect on the date of the notification by the Government of the French Republic.

The present Protocol of which the French and English texts are both authentic, shall be ratified as soon as possible. It shall bear today's date.

The ratifications of the present Protocol shall be addressed to the Government of the French Republic, which will at once notify the deposit of such ratification to each of the Signatory and Acceding Powers.

The instruments of ratification and accession to the present Protocol will remain deposited in the archives of the Government of the French Republic.

The present Protocol will come into force for each Signatory Power as from the date of deposit of its ratification, and, from that moment, each Power will be bound as regards other Powers which have already deposited their ratifications.

In witness whereof the Plenipotentiaries have signed the present Protocol.

Done at Geneva in a single copy, the seventeenth day of June, One Thousand Nine Hundred and Twenty-Five.

[Several States, among them France, Iraq, (the former) USSR and the UK have made a reservation when becoming Parties to the Protocol, along the lines of the following wording used by the UK:

"The [...] Protocol shall cease to be binding on [...] toward any power at enmity with [...] whose armed forces or whose allies, fail to respect the prohibitions laid down in the Protocol!"]



## Document No. 10, Conventions on the Protection of Cultural Property

**A. Convention for the Protection of Cultural Property in the Event of Armed Conflict**

[Source: Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954. Available on [www.icrc.org](http://www.icrc.org)]

**Convention for the Protection of Cultural Property in the Event of Armed Conflict**

**The Hague, 14 May 1954**

The High Contracting Parties,

*Recognizing* that cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction;

*Being convinced* that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

*Considering* that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection;

*Guided* by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of The Hague of 1899 and of 1907 and in the Washington Pact of 15 April 1935;

*Being of the opinion* that such protection cannot be effective unless both national and international measures have been taken to organize it in time of peace;

*Being determined* to take all possible steps to protect cultural property;

Have agreed upon the following provisions:

**CHAPTER I : GENERAL PROVISIONS REGARDING PROTECTION****ARTICLE 1. Definition of cultural property**

For the purposes of the present Convention, the term “cultural property” shall cover, irrespective of origin or ownership:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific

collections and important collections of books or archives or of reproductions of the property defined above;

- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
- (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments".

### **ARTICLE 2. Protection of cultural property**

For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.

### **ARTICLE 3. Safeguarding of cultural property**

The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.

### **ARTICLE 4. Respect for cultural property**

1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.
2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.
3. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall, refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.
4. They shall refrain from any act directed by way of reprisals against cultural property.
5. No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3.

### **ARTICLE 5. Occupation**

1. Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent

national authorities of the occupied country in safeguarding and preserving its cultural property.

2. Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent national authorities be unable to take such measures, the Occupying Power shall, as far as possible, and in close co-operation with such authorities, take the most necessary measures of preservation.
3. Any High Contracting Party whose government is considered their legitimate government by members of a resistance movement, shall, if possible, draw their attention to the obligation to comply with those provisions of the Conventions dealing with respect for cultural property.

#### **ARTICLE 6. Distinctive marking of cultural property**

In accordance with the provisions of Article 16, cultural property may bear a distinctive emblem so as to facilitate its recognition.

#### **ARTICLE 7. Military measures**

1. The High Contracting Parties undertake to introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples.
2. The High Contracting Parties undertake to plan or establish in peacetime, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it.

### **CHAPTER II: SPECIAL PROTECTION**

#### **ARTICLE 8. Granting of special protection**

1. There may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance, provided that they:
  - (a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;
  - (b) are not used for military purposes.
2. A refuge for movable cultural property may also be placed under special protection, whatever its location, if it is so constructed that, in all probability, it will not be damaged by bombs.

3. A centre containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military personnel or material, even in transit. The same shall apply whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material are carried on within the centre.
4. The guarding of cultural property mentioned in paragraph I above by armed custodians specially empowered to do so, or the presence, in the vicinity of such cultural property, of police forces normally responsible for the maintenance of public order, shall not be deemed to be used for military purposes.
5. If any cultural property mentioned in paragraph I of the present Article is situated near an important military objective as defined in the said paragraph, it may nevertheless be placed under special protection if the High Contracting Party asking for that protection undertakes, in the event of armed conflict, to make no use of the objective and particularly, in the case of a port, railway station or aerodrome, to divert all traffic therefrom. In that event, such diversion shall be prepared in time of peace.
6. Special protection is granted to cultural property by its entry in the "International Register of Cultural Property under Special Protection". This entry shall only be made, in accordance with the provisions of the present Convention and under the conditions provided for in the Regulations for the execution of the Convention.

#### **ARTICLE 9. Immunity of cultural property under special protection**

The High Contracting Parties undertake to ensure the immunity of cultural property under special protection by refraining, from the time of entry in the International Register, from any act of hostility directed against such property and, except for the cases provided for in paragraph 5 of Article 8, from any use of such property or its surroundings for military purposes.

#### **ARTICLE 10. Identification and control**

During an armed conflict, cultural property under special protection shall be marked with the distinctive emblem described in Article 16, and shall be open to international control as provided for in the Regulations for the execution of the Convention.

#### **ARTICLE 11. Withdrawal of immunity**

1. If one of the High Contracting Parties commits, in respect of any item of cultural property under special protection, a violation of the obligations under Article 9, the opposing Party shall, so long as this violation persists, be released from the obligation to ensure the immunity of the property concerned. Nevertheless, whenever possible, the latter Party shall first request the cessation of such violation within a reasonable time.
2. Apart from the case provided for in paragraph I of the present Article, immunity shall be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a

force the equivalent of a division in size or larger. Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity.

3. The Party withdrawing immunity shall, as soon as possible, so inform the Commissioner-General for cultural property provided for in the Regulations for the execution of the Convention, in writing, stating the reasons.

### **CHAPTER III: TRANSPORT OF CULTURAL PROPERTY**

#### **ARTICLE 12. Transport under special protection**

1. Transport exclusively engaged in the transfer of cultural property, whether within a territory or to another territory, may, at the request of the High Contracting Party concerned, take place under special protection in accordance with the conditions specified in the Regulations for the execution of the Convention.
2. Transport under special protection shall take place under the international supervision provided for in the aforesaid Regulations and shall display the distinctive emblem described in Article 16.
3. The High Contracting Parties shall refrain from any act of hostility directed against transport under special protection.

#### **ARTICLE 13. Transport in urgent cases**

1. If a High Contracting Party considers that the safety of certain cultural property requires its transfer and that the matter is of such urgency that the procedure laid down in Article 12 cannot be followed, especially at the beginning of an armed conflict, the transport may display the distinctive emblem described in Article 16, provided that an application for immunity referred to in Article 12 has not already been made and refused. As far as possible, notification of transfer should be made to the opposing Parties. Nevertheless, transport conveying cultural property to the territory of another country may not display the distinctive emblem unless immunity has been expressly granted to it.
2. The High Contracting Parties shall take, so far as possible, the necessary precautions to avoid acts of hostility directed against the transport described in paragraph 1 of the present Article and displaying the distinctive emblem.

#### **ARTICLE 14. Immunity from seizure, capture and prize**

1. Immunity from seizure, placing in prize, or capture shall be granted to:
  - (a) cultural property enjoying the protection provided for in Article 12 or that provided for in Article 13;
  - (b) the means of transport exclusively engaged in the transfer of such cultural property.
2. Nothing in the present Article shall limit the right of visit and search.

## **CHAPTER IV : PERSONNEL**

### **ARTICLE 15. Personnel**

As far as is consistent with the interests of security, personnel engaged in the protection of cultural property shall, in the interests of such property, be respected and, if they fall into the hands of the opposing Party, shall be allowed to continue to carry out duties whenever the cultural property for which they are responsible has also fallen into the hands of the opposing Party.

## **CHAPTER V: THE DISTINCTIVE EMBLEM**

### **ARTICLE 16. Emblem of the Convention**

1. The distinctive emblem of the Convention shall take the form of a shield, pointed below, per saltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle).
2. The emblem shall be used alone, or repeated three times in a triangular formation (one shield below), under the conditions provided for in Article 17.

### **ARTICLE 17. Use of the emblem**

1. The distinctive emblem repeated three times may be used only as a means of identification of:
  - (a) immovable cultural property under special protection;
  - (b) the transport of cultural property under the conditions provided for in Articles 12 and 13;
  - (c) improvised refuges, under the conditions provided for in the Regulations for the execution of the Convention.
2. The distinctive emblem may be used alone only as a means of identification of:
  - (a) cultural property not under special protection;
  - (b) the persons responsible for the duties of control in accordance with the Regulations for the execution of the Convention;
  - (c) the personnel engaged in the protection of cultural property;
  - (d) the identity cards mentioned in the Regulations for the execution of the Convention.
3. During an armed conflict, the use of the distinctive emblem in any other cases than those mentioned in the preceding paragraphs of the present Article, and the use for any purpose whatever of a sign resembling the distinctive emblem, shall be forbidden.

4. The distinctive emblem may not be placed on any immovable cultural property unless at the same time there is displayed an authorization duly dated and signed by the competent authority of the High Contracting Party.

## **CHAPTER VI: SCOPE OF APPLICATION OF THE CONVENTION**

### **ARTICLE 18. Application of the Convention**

1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.
2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
3. If one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations. They shall furthermore be bound by the Convention, in relation to the said Power, if the latter has declared that it accepts the provisions thereof and so long as it applies them.

### **ARTICLE 19. Conflicts not of an international character**

1. In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.
2. The parties to the Conflict shall endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
3. The United Nations Educational, Scientific and Cultural Organization may offer its services to the parties to the conflict.
4. The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

## **CHAPTER VII: EXECUTION OF THE CONVENTION**

### **ARTICLE 20. Regulations for the execution of the Convention**

The procedure by which the present Convention is to be applied is defined in the Regulations for its execution, which constitute an integral part thereof.

### **ARTICLE 21. Protecting Powers**

The present Convention and the Regulations for its execution shall be applied with the co-operation of the Protecting Powers responsible for safeguarding the interests of the Parties to the conflict.

**ARTICLE 22. Conciliation procedure**

1. The Protecting Powers shall lend their good offices in all cases where they may deem it useful in the interests of cultural property, particularly if there is disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention or the Regulations for its execution.
2. For this purpose, each of the Protecting Powers may, either at the invitation of one Party, of the Director-General of the United Nations Educational, Scientific and Cultural Organization, or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for the protection of cultural property, if considered appropriate on suitably chosen neutral territory. The Parties to the conflict shall be bound to give effect to the proposals for meeting made to them. The Protecting Powers shall propose for approval by the Parties to the conflict a person belonging to a neutral Power or a person presented by the Director-General of the United Nations Educational, Scientific and Cultural Organization, which person shall be invited to take part in such a meeting in the capacity of Chairman.

**ARTICLE 23. Assistance of UNESCO**

1. The High Contracting Parties may call upon the United Nations Educational, Scientific and Cultural Organization for technical assistance in organizing the protection of their cultural property, or in connexion with any other problem arising out of the application of the present Convention or the Regulations for its execution. The Organization shall accord such assistance within the limits fixed by its programme and by its resources.
2. The Organization is authorized to make, on its own initiative, proposals on this matter to the High Contracting Parties.

**ARTICLE 24. Special agreements**

1. The High Contracting Parties may conclude special agreements for all matters concerning which they deem it suitable to make separate provision.
2. No special agreement may be concluded which would diminish the protection afforded by the present Convention to cultural property and to the personnel engaged in its protection.

**ARTICLE 25. Dissemination of the Convention**

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the text of the present Convention and the Regulations for its execution as widely as possible in their respective countries. They undertake, in particular, to include the study thereof in their programmes of military and, if possible, civilian training, so that its principles are made known to the whole population, especially the armed forces and personnel engaged in the protection of cultural property.

**ARTICLE 26. Translations, reports**

1. The High Contracting Parties shall communicate to one another, through the Director-General of the United Nations Educational, Scientific and Cultural



Organization, the official translations of the present Convention and of the Regulations for its execution.

2. Furthermore, at least once every four years, they shall forward to the Director-General a report giving whatever information they think suitable concerning any measures being taken, prepared or contemplated by their respective administrations in fulfilment of the present Convention and of the Regulations for its execution.

#### **ARTICLE 27. Meetings**

1. The Director-General of the United Nations Educational, Scientific and Cultural Organization may, with the approval of the Executive Board, convene meetings of representatives of the High Contracting Parties. He must convene such a meeting if at least one-fifth of the High Contracting Parties so request.
2. Without prejudice to any other functions which have been conferred on it by the present Convention or the Regulations for its execution, the purpose of the meeting will be to study problems concerning the application of the Convention and of the Regulations for its execution, and to formulate recommendations in respect thereof.
3. The meeting may further undertake a revision of the Convention or the Regulations for its execution if the majority of the High Contracting Parties are represented, and in accordance with the provisions of Article 39.

#### **ARTICLE 28. Sanctions**

The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

### **FINAL PROVISIONS**

#### **ARTICLE 29. Languages**

1. The present Convention is drawn up in English, French, Russian and Spanish, the four texts being equally authoritative.
2. The United Nations Educational, Scientific and Cultural Organization shall arrange for translations of the Convention into the other official languages of its General Conference.

#### **ARTICLE 30. Signature**

The present Convention shall bear the date of 14 May 1954 and, until the date of 31 December 1954, shall remain open for signature by all States invited to the Conference which met at The Hague from 21 April 1954 to 14 May 1954.

#### **ARTICLE 31. Ratification**

1. The present Convention shall be subject to ratification by Signatory States in accordance with their respective constitutional procedures.

2. The instruments of ratification shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

#### **ARTICLE 32. Accession**

From the date of its entry into force, the present Convention shall be open for accession by all States mentioned in Article 30 which have not signed it, as well as any other State invited to accede by the Executive Board of the United Nations Educational, Scientific and Cultural Organization. Accession shall be effected by the deposit of an instrument of accession with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

#### **ARTICLE 33. Entry into force**

1. The present Convention shall enter into force three months after five instruments of ratification have been deposited.
2. Thereafter, it shall enter into force, for each High Contracting Party, three months after the deposit of its instrument of ratification or accession.
3. The situations referred to in Articles 18 and 19 shall give immediate effect to ratifications or accessions deposited by the Parties to the conflict either before or after the beginning of hostilities or occupation. In such cases the Director-General of the United Nations Educational, Scientific and Cultural Organization shall transmit the communications referred to in Article 38 by the speediest method.

#### **ARTICLE 34. Effective application**

1. Each State Party to the Convention on the date of its entry into force shall take all necessary measures to ensure its effective application within a period of six months after such entry into force.
2. This period shall be six months from the date of deposit of the instruments of ratification or accession for any State which deposits its instrument of ratification or accession after the date of the entry into force of the Convention.

#### **ARTICLE 35. Territorial extension of the Convention**

Any High Contracting Party may, at the time of ratification or accession, or at any time thereafter, declare by notification addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization, that the present Convention shall extend to all or any of the territories for whose international relations it is responsible. The said notification shall take effect three months after the date of its receipt.

#### **ARTICLE 36. Relation to previous Conventions**

1. In the relations between Powers which are bound by the Conventions of The Hague concerning the Laws and Customs of War on Land (IV) and concerning Naval Bombardment in Time of War (IX), whether those of 29 July 1899 or those of 18 October 1907, and which are Parties to the present Convention, this last Convention shall be supplementary to the aforementioned Convention (IX) and to the Regulations annexed to the aforementioned Convention (IV) and shall substitute for the emblem described in Article 5 of the aforementioned

Convention (IX) the emblem described in Article 16 of the Present Convention, in cases in which the present Convention and the Regulations for its execution provide for the use of this distinctive emblem.

2. In the relations between Powers which are bound by the Washington Pact of 15 April 1935 for the Protection of Artistic and Scientific Institutions and of Historic Monuments (Roerich Pact) and which are Parties to the present Convention, the latter Convention shall be supplementary to the Roerich Pact and shall substitute for the distinguishing flag described in Article III of the Pact the emblem defined in Article 16 of the present Convention, in cases in which the present Convention and the Regulations for its execution provide for the use of this distinctive emblem.

#### **ARTICLE 37. Denunciation**

1. Each High Contracting Party may denounce the present Convention, on its own behalf, or on behalf of any territory for whose international relations it is responsible.
2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.
3. The denunciation shall take effect one year after the receipt of the instrument of denunciation. However, if, on the expiry of this period, the denouncing Party is involved in an armed conflict, the denunciation shall not take effect until the end of hostilities, or until the operations of repatriating cultural property are completed, whichever is the later.

#### **ARTICLE 38. Notifications**

The Director-General of the United Nations Educational, Scientific and Cultural Organization shall inform the States referred to in Articles 30 and 32, as well as the United Nations, of the deposit of all the instruments of ratification, accession or acceptance provided for in Articles 31, 32 and 39 and of the notifications and denunciations provided for respectively in Articles 35, 37 and 39.

#### **ARTICLE 39. Revision of the Convention and of the Regulations for its execution**

1. Any High Contracting Party may propose amendments to the present Convention or the Regulations for its execution. The text of any proposed amendment shall be communicated to the Director-General of the United Nations Educational, Scientific and Cultural Organization who shall transmit it to each High Contracting Party with the request that such Party reply within four months stating whether it:
  - (a) desires that a Conference be convened to consider the proposed amendment;
  - (b) favours the acceptance of the proposed amendment without a Conference; or
  - (c) favours the rejection of the proposed amendment without a Conference.
2. The Director-General shall transmit the replies, received under paragraph 1 of the present Article, to all High Contracting Parties.

3. If all the High Contracting Parties which have, within the prescribed time-limit, stated their views to the Director-General of the United Nations Educational, Scientific and Cultural Organization, pursuant to paragraph 1 (b) of this Article, inform him that they favour acceptance of the amendment without a Conference, notification of their decision shall be made by the Director-General in accordance with Article 38. The amendment shall become effective for all the High Contracting Parties on the expiry of ninety days from the date of such notification.
4. The Director-General shall convene a Conference of the High Contracting Parties to consider the proposed amendment if requested to do so by more than one-third of the High Contracting Parties.
5. Amendments to the Convention or to the Regulations for its execution, dealt with under the provisions of the preceding paragraph, shall enter into force only after they have been unanimously adopted by the High Contracting Parties represented at the Conference and accepted by each of the High Contracting Parties.
6. Acceptance by the High Contracting Parties of amendments to the Convention or to the Regulations for its execution, which have been adopted by the Conference mentioned in paragraphs 4 and 5, shall be effected by the deposit of a formal instrument with the Director-General of the United Nations Educational, Scientific and Cultural Organization.
7. After the entry into force of amendments to the present Convention or to the Regulations for its execution, only the text of the Convention or of the Regulations for its execution thus amended shall remain open for ratification or accession.

#### **ARTICLE 40. Registration**

In accordance with Article 102 of the Charter of the United Nations, the present Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General of the United Nations Educational, Scientific and Cultural Organization.

In faith whereof the undersigned, duly authorized, have signed the present Convention.

Done at The Hague, this fourteenth day of May 1954, in a single copy which shall be deposited in the archives of the United Nations Educational, Scientific and Cultural Organization, and certified true copies of which shall be delivered to all the States referred to in Articles 30 and 32 as well as to the United Nations.

### **REGULATIONS FOR THE EXECUTION OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN EVENT OF ARMED CONFLICT**

#### **CHAPTER I: CONTROL**

##### **ARTICLE 1. International list of persons**

On the entry into force of the Convention, the Director-General of the United Nations Educational, Scientific and Cultural Organization shall compile an international list consisting of all persons nominated by the High Contracting Parties as qualified to

carry out the functions of Commissioner-General for Cultural Property. On the initiative of the Director-General of the United Nations Educational, Scientific and Cultural Organization, this list shall be periodically revised on the basis of requests formulated by the High Contracting Parties.

#### **ARTICLE 2. Organization of control**

As soon as any High Contracting Party is engaged in an armed conflict to which Article 18 of the Convention applies:

- (a) It shall appoint a representative for cultural property situated in its territory; if it is in occupation of another territory, it shall appoint a special representative for cultural property situated in that territory;
- (b) The Protecting Power acting for each of the Parties in conflict with such High Contracting Party shall appoint delegates accredited to the latter in conformity with Article 3 below;
- (c) A Commissioner-General for Cultural Property shall be appointed to such High Contracting Party in accordance with Article 4.

#### **ARTICLE 3. Appointment of delegates of Protecting Powers**

The Protecting Power shall appoint its delegates from among the members of its diplomatic or consular staff or, with the approval of the Party to which they will be accredited, from among other persons.

#### **ARTICLE 4. Appointment of Commissioner-General**

1. The Commissioner-General for Cultural Property shall be chosen from the international list of persons by joint agreement between the Party to which he will be accredited and the Protecting Powers acting on behalf of the opposing Parties.
2. Should the Parties fail to reach agreement within three weeks from the beginning of their discussions on this point, they shall request the President of the International Court of Justice to appoint the Commissioner-General, who shall not take up his duties until the Party to which he is accredited has approved his appointment.

#### **ARTICLE 5. Functions of delegates**

The delegates of the Protecting Powers shall take note of violations of the Convention, investigate, with the approval of the Party to which they are accredited, the circumstances in which they have occurred, make representations locally to secure their cessation and, if necessary, notify the Commissioner-General of such violations. They shall keep him informed of their activities.

#### **ARTICLE 6. Functions of the Commissioner-General**

1. The Commissioner-General for Cultural Property shall deal with all matters referred to him in connexion with the application of the Convention, in conjunction with the representative of the Party to which he is accredited and with the delegates concerned.

2. He shall have powers of decision and appointment in the cases specified in the present Regulations.
3. With the agreement of the Party to which he is accredited, he shall have the right to order an investigation or to conduct it himself.
4. He shall make any representations to the Parties to the conflict or to their Protecting Powers which he deems useful for the application of the Convention.
5. He shall draw up such reports as may be necessary on the application of the Convention and communicate them to the Parties concerned and to their Protecting Powers. He shall send copies to the Director-General of the United Nations Educational, Scientific and Cultural Organization, who may make use only of their technical contents.
6. If there is no protecting Power, the Commissioner-General shall exercise the functions of the Protecting Power as laid down in Articles 21 and 22 of the Convention.

#### **ARTICLE 7. Inspectors and experts**

1. Whenever the Commissioner-General for Cultural Property considers it necessary, either at the request of the delegates concerned or after consultation with them, he shall propose, for the approval of the Party to which he is accredited, an inspector of cultural property to be charged with a specific mission. An inspector shall be responsible only to the Commissioner-General.
2. The Commissioner-General, delegates and inspectors may have recourse to the services of experts, who will also be proposed for the approval of the Party mentioned in the preceding paragraph.

#### **ARTICLE 8. Discharge of the mission of control**

The Commissioners-General for Cultural Property, delegates of the Protecting Powers, inspectors and experts shall in no case exceed their mandates. In particular, they shall take account of the security needs of the High Contracting Party to which they are accredited and shall in all circumstances act in accordance with the requirements of the military situation as communicated to them by that High Contracting Party.

#### **ARTICLE 9. Substitutes for Protecting Powers**

If a Party to the conflict does not benefit or ceases to benefit from the activities of a Protecting Power, a neutral State may be asked to undertake those functions of a Protecting Power which concern the appointment of a Commissioner-General for Cultural Property in accordance with the procedure laid down in Article 4. The Commissioner-General thus appointed shall, if need be, entrust to inspectors the functions of delegates of Protecting Powers as specified in the present Regulations.

#### **ARTICLE 10. Expenses**

The remuneration and expenses of the Commissioner-General for Cultural Property, inspectors and experts shall be met by the Party to which they are accredited. Remuneration and expenses of delegates of the Protecting Powers shall be subject to agreement between those Powers and the States whose interests they are safeguarding.

## CHAPTER II: SPECIAL PROTECTION

### ARTICLE 11. Improvised refuges

1. If, during an armed conflict, any High Contracting Party is induced by unforeseen circumstances to set up an improvised refuge and desires that it should be placed under special protection, it shall communicate this fact forthwith to the Commissioner-General accredited to that Party.
2. If the Commissioner-General considers that such a measure is justified by the circumstances and by the importance of the cultural property sheltered in this improvised refuge, he may authorize the High Contracting Party to display on such refuge the distinctive emblem defined in Article 16 of the Convention. He shall communicate his decision without delay to the delegates of the Protecting Powers who are concerned, each of whom may, within a time-limit of 30 days, order the immediate withdrawal of the emblem.
3. As soon as such delegates have signified their agreement or if the time-limit of 30 days has passed without any of the delegates concerned having made an objection, and if, in the view of the Commissioner-General, the refuge fulfils the conditions laid down in Article 8 of the Convention, the Commissioner-General shall request the Director-General of the United Nations Educational, Scientific and Cultural Organization to enter the refuge in the Register of Cultural Property under Special Protection.

### ARTICLE 12. International register of cultural property under special protection

1. An "International Register of Cultural Property under Special Protection" shall be prepared.
2. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall maintain this Register. He shall furnish copies to the Secretary-General of the United Nations and to the High Contracting Parties.
3. The Register shall be divided into sections, each in the name of a High Contracting Party. Each section shall be sub-divided into three paragraphs, headed: Refuges, Centres containing Monuments, Other Immovable Cultural Property. The Director-General shall determine what details each section shall contain.

### ARTICLE 13. Requests for registration

1. Any High Contracting Party may submit to the Director-General of the United Nations Educational, Scientific and Cultural Organization an application for the entry in the Register of certain refuges, centres containing monuments or other immovable cultural property situated within its territory. Such application shall contain a description of the location of such property and shall certify that the property complies with the provisions of Article 8 of the Convention.
2. In the event of occupation, the Occupying Power shall be competent to make such application.

3. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall, without delay, send copies of applications for registration to each of the High Contracting Parties.

#### **ARTICLE 14. Objections**

1. Any High Contracting Party may, by letter addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization, lodge an objection to the registration of cultural property. This letter must be received by him within four months of the day on which he sent a copy of the application for registration.
2. Such objection shall state the reasons giving rise to it, the only valid grounds being that:
  - (a) the property is not cultural property;
  - (b) the property does not comply with the conditions mentioned in Article 8 of the Convention.
3. The Director-General shall send a copy of the letter of objection to the High Contracting Parties without delay. He shall, if necessary, seek the advice of the International Committee on Monuments, Artistic and Historical Sites and Archaeological Excavations and also, if he thinks fit, of any other competent organization or person.
4. The Director-General, or the High Contracting Party requesting registration, may make whatever representations they deem necessary to the High Contracting Parties which lodged the objection, with a view to causing the objection to be withdrawn.
5. If a High Contracting Party which has made an application for registration in time of peace becomes involved in an armed conflict before the entry has been made, the cultural property concerned shall at once be provisionally entered in the Register, by the Director-General, pending the confirmation, withdrawal or cancellation of any objection that may be, or may have been, made.
6. If, within a period of six months from the date of receipt of the letter of objection, the Director-General has not received from the High Contracting Party lodging the objection a communication stating that it has been withdrawn, the High Contracting Party applying for registration may request arbitration in accordance with the procedure in the following paragraph.
7. The request for arbitration shall not be made more than one year after the date of receipt by the Director-General of the letter of objection. Each of the two Parties to the dispute shall appoint an arbitrator. When more than one objection has been lodged against an application for registration, the High Contracting Parties which have lodged the objections shall, by common consent, appoint a single arbitrator. These two arbitrators shall select a chief arbitrator from the international list mentioned in Article I of the present Regulations. If such arbitrators cannot agree upon their choice, they shall ask the President of the International Court of



Justice to appoint a chief arbitrator who need not necessarily be chosen from the international list. The arbitral tribunal thus constituted shall fix its own procedure. There shall be no appeal from its decisions.

8. Each of the High Contracting Parties may declare, whenever a dispute to which it is a Party arises, that it does not wish to apply the arbitration procedure provided for in the preceding paragraph. In such cases, the objection to an application for registration shall be submitted by the Director-General to the High Contracting Parties. The objection will be confirmed only if the High Contracting Parties so decide by a two-third majority of the High Contracting Parties voting. The vote shall be taken by correspondence, unless the Director-General of the United Nations Educational, Scientific and Cultural Organization deems it essential to convene a meeting under the powers conferred upon him by Article 27 of the Convention. If the Director-General decides to proceed with the vote by correspondence, he shall invite the High Contracting Parties to transmit their votes by sealed letter within six months from the day on which they were invited to do so.

#### **ARTICLE 15. Registration**

1. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall cause to be entered in the Register, under a serial number, each item of property for which application for registration is made, provided that he has not received an objection within the time-limit prescribed in Paragraph I of Article 14.
2. If an objection has been lodged, and without prejudice to the provision of paragraph 5 of Article 14, the Director-General shall enter property in the Register only if the objection has been withdrawn or has failed to be confirmed following the procedures laid down in either paragraph 7 or paragraph 8 of Article 14.
3. Whenever paragraph 3 of Article 11 applies, the Director-General shall enter property in the Register if so requested by the Commissioner-General for Cultural Property.
4. The Director-General shall send without delay to the Secretary-General of the United Nations, to the High Contracting Parties, and, at the request of the Party applying for registration, to all other States referred to in Articles 30 and 32 of the Convention, a certified copy of each entry in the Register. Entries shall become effective thirty days after despatch of such copies.

#### **ARTICLE 16. Cancellation**

1. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall cause the registration of any property to be cancelled:
  - (a) at the request of the High Contracting Party within whose territory the cultural property is situated;
  - (b) if the High Contracting Party which requested registration has denounced the Convention, and when that denunciation has taken effect;

- (c) in the special case provided for in Article 14, paragraph 5, when an objection has been confirmed following the procedures mentioned either in paragraph 7 or in paragraph 8 of Article 14.
2. The Director-General shall send without delay, to the Secretary-General of the United Nations and to all States which received a copy of the entry in the Register, a certified copy of its cancellation. Cancellation shall take effect thirty days after the despatch of such copies.

### **CHAPTER III: TRANSPORT OF CULTURAL PROPERTY**

#### **ARTICLE 17. Procedure to obtain immunity**

1. The request mentioned in paragraph 1 of Article 12 of the Convention shall be addressed to the Commissioner-General for Cultural Property. It shall mention the reasons on which it is based and specify the approximate number and the importance of the objects to be transferred, their present location, the location now envisaged, the means of transport to be used, the route to be followed, the date proposed for the transfer, and any other relevant information.
2. If the Commissioner-General, after taking such opinions as he deems fit, considers that such transfer is justified, he shall consult those delegates of the Protecting Powers who are concerned, on the measures proposed for carrying it out. Following such consultation, he shall notify the Parties to the conflict concerned of the transfer, including in such notification all useful information.
3. The Commissioner-General shall appoint one or more inspectors, who shall satisfy themselves that only the property stated in the request is to be transferred and that the transport is to be by the approved methods and bears the distinctive emblem. The inspector or inspectors shall accompany the property to its destination.

#### **ARTICLE 18. Transport abroad**

Where the transfer under special protection is to the territory of another country, it shall be governed not only by Article 12 of the Convention and by Article 17 of the present Regulations, but by the following further provisions:

- (a) while the cultural property remains on the territory of another State, that State shall be its depositary and shall extend to it as great a measure of care as that which it bestows upon its own cultural property of comparable importance;
- (b) the depositary State shall return the property only on the cessation of the conflict; such return shall be effected within six months from the date on which it was requested;
- (c) during the various transfer operations, and while it remains on the territory of another State, the cultural property shall be exempt from confiscation and may not be disposed of either by the depositor or by the depositary. Nevertheless, when the safety of the property requires it, the depositary may, with the assent of the depositor, have the property transported to the territory of a third country, under the conditions laid down in the present article;

- (d) the request for special protection shall indicate that the State to whose territory the property is to be transferred accepts the provisions of the present Article.

#### **ARTICLE 19. Occupied territory**

Whenever a High Contracting Party occupying territory of another High Contracting Party transfers cultural property to a refuge situated elsewhere in that territory, without being able to follow the procedure provided for in Article 17 of the Regulations, the transfer in question shall not be regarded as misappropriation within the meaning of Article 4 of the Convention, provided that the Commissioner-General for Cultural Property certifies in writing, after having consulted the usual custodians, that such transfer was rendered necessary by circumstances.

### **CHAPTER IV: THE DISTINCTIVE EMBLEM**

#### **ARTICLE 20. Affixing of the emblem**

1. The placing of the distinctive emblem and its degree of visibility shall be left to the discretion of the competent authorities of each High Contracting Party. It may be displayed on flags or armlets; it may be painted on an object or represented in any other appropriate form.
2. However, without prejudice to any possible fuller markings, the emblem shall, in the event of armed conflict and in the cases mentioned in Articles 12 and 13 of the Convention, be placed on the vehicles of transport so as to be clearly visible in daylight from the air as well as from the ground.

The emblem shall be visible from the ground:



- (a) at regular intervals sufficient to indicate clearly the perimeter of a centre containing monuments under special protection;
- (b) at the entrance to other immovable cultural property under special protection.

#### **ARTICLE 21. Identification of persons**

1. The persons mentioned in Article 17, paragraph 2 (b) and (c) of the Convention may wear an armlet bearing the distinctive emblem, issued and stamped by the competent authorities.
2. Such persons shall carry a special identity card bearing the distinctive emblem. This card shall mention at least the surname and first names, the date of birth, the title or rank, and the function of the holder. The card shall bear the photograph of the holder as well as his signature or his fingerprints, or both. It shall bear the embossed stamp of the competent authorities.
3. Each High Contracting Party shall make out its own type of identity card, guided by the model annexed, by way of example, to the present Regulations. The High Contracting Parties shall transmit to each other a specimen of the model they are using. Identity cards shall be made out, if possible, at least in duplicate, one copy being kept by the issuing Power.

4. The said persons may not, without legitimate reason, be deprived of their identity card or of the right to wear the armlet.

Front



IDENTITY CARD

for personnel engaged in the  
protection of cultural property

Surname.....

First names .....

Date of birth .....

Title or Rank .....

Function.....

is the bearer of this card under the terms of the  
Convention of The Hague, dated 14 May 1954,  
for the Protection of Cultural Property in the  
event of Armed Conflict.

Date of issue

Number of Card

-----

Reverse side

Photo  
of bearer

Signature of bearer or  
finger-prints or both

Embossed  
stamp  
of military  
authority  
issuing card

Height

Eyes

Hair

Other distinguishing marks:

-----

-----

-----

-----

-----

## **B. Protocol for the Protection of Cultural Property in the Event of Armed Conflict**

[Source: Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954; available on <http://www.icrc.org>]

### **Protocol for the Protection of Cultural Property in the Event of Armed Conflict**

#### **The Hague, 14 May 1954**

The High Contracting Parties are agreed as follows:

#### **I**

1. Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May 1954.
2. Each High Contracting Party undertakes to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory. This shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory.
3. Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.
4. The High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph.

#### **II**

5. Cultural property coming from the territory of a High Contracting Party and deposited by it in the territory of another High Contracting Party for the purpose of protecting such property against the dangers of an armed conflict, shall be returned by the latter, at the end of hostilities, to the competent authorities of the territory from which it came.

#### **III**

6. The present Protocol shall bear the date of 14 May 1954 and, until the date of 31 December 1954, shall remain open for signature by all States invited to the Conference which met at The Hague from 21 April 1954 to 14 May 1954.
7. (a) The present Protocol shall be subject to ratification by Signatory States in accordance with their respective constitutional procedures.

- (b) The instruments of ratification shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.
8. From the date of its entry into force, the present Protocol shall be open for accession by all States mentioned in paragraph 6 which have not signed it as well as any other States invited to accede by the Executive Board of the United Nations Educational, Scientific and Cultural Organization. Accession shall be effected by the deposit of an instrument of accession with the Director-General of the United Nations Educational, Scientific and Cultural Organization.
9. The States referred to in paragraphs 6 and 8 may declare, at the time of signature, ratification or accession, that they will not be bound by the provisions of Section I or by those of Section II of the present Protocol.
10. (a) The present Protocol shall enter into force three months after five instruments of ratification have been deposited.
- (b) Thereafter, it shall enter into force for each High Contracting Party, three months after the deposit of its instrument of ratification or accession.
- (c) The situations referred to in Articles 18 and 19 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May 1954, shall give immediate effect to ratifications and accessions deposited by the Parties to the conflict either before or after the beginning of hostilities or occupation. In such cases, the Director-General of the United Nations Educational, Scientific and Cultural Organization shall transmit the communications referred to in paragraph 14 by the speediest method.
11. (a) Each State Party to the Protocol on the date of its entry into force shall take all necessary measures to ensure its effective application within a period of six months after such entry into force.
- (b) This period shall be six months from the date of deposit of the instruments of ratification or accession for any State which deposits its instrument of ratification or accession after the date of the entry into force of the Protocol.
12. Any High Contracting Party may, at the time of ratification or accession, or at any time thereafter, declare by notification addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization, that the present Protocol shall extend to all or any of the territories for whose international relations it is responsible. The said notification shall take effect three months after the date of its receipt.
13. (a) Each High Contracting Party may denounce the present Protocol, on its own behalf, or on behalf of any territory for whose international relations it is responsible.
- (b) The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

- (c) The denunciation shall take effect one year after receipt of the instrument of denunciation. However, if, on the expiry of this period the denouncing Party is involved in an armed conflict, the denunciation shall not take effect until the end of hostilities, or until the operations of repatriating cultural property are completed, whichever is later.
14. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall inform the States referred to in paragraphs 6 and 8, as well as the United Nations, of the deposit of all the instruments of ratification, accession or acceptance provided for in paragraphs 7, 8 and 15 and the notifications and denunciations provided for respectively in paragraphs 12 and 13.
15. (a) The present Protocol may be revised if revision is requested by more than one-third of the High Contracting Parties.
- (b) The Director-General of the United Nations Educational, Scientific and Cultural Organization shall convene a Conference for this purpose.
- (c) Amendments to the present Protocol shall enter into force only after they have been unanimously adopted by the High Contracting Parties represented at the Conference and accepted by each of the High Contracting Parties.
- (d) Acceptance by the High Contracting Parties of amendments to the present protocol, which have been adopted by the Conference mentioned in subparagraphs (b) and (c), shall be effected by the deposit of a formal instrument with the Director-General of the United Nations Educational, Scientific and Cultural Organization.
- (e) After the entry into force of amendments to the present Protocol, only the text of the said Protocol thus amended shall remain open for ratification or accession.

In accordance with Article 102 of the Charter of the United Nations, the present Protocol shall be registered with the Secretariat of the United Nations at the request of the Director-General of the United Nations Educational, Scientific and Cultural Organization.

In faith whereof the undersigned, duly authorized, have signed the present Protocol.

Done at The Hague, this fourteenth day of May 1954, in English, French, Russian and Spanish, the four texts being equally authoritative, in a single copy which shall be deposited in the archives of the United Nations Educational, Scientific and Cultural Organization, and certified true copies of which shall be delivered to all the States referred to in paragraphs 6 and 8 as well as to the United Nations.

## **C. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict**

[Source: Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999; available on <http://www.icrc.org>]

### **Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict**

**The Hague, 26 March 1999**

The Parties,

*Conscious* of the need to improve the protection of cultural property in the event of armed conflict and to establish an enhanced system of protection for specifically designated cultural property;

*Reaffirming* the importance of the provisions of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, done at the Hague on 14 May 1954, and emphasizing the necessity to supplement these provisions through measures to reinforce their implementation;

*Desiring* to provide the High Contracting Parties to the Convention with a means of being more closely involved in the protection of cultural property in the event of armed conflict by establishing appropriate procedures therefore;

*Considering* that the rules governing the protection of cultural property in the event of armed conflict should reflect developments in international law;

*Affirming* that the rules of customary international law will continue to govern questions not regulated by the provisions of this Protocol;

*Have agreed as follows:*

## **CHAPTER 1: INTRODUCTION**

### **ARTICLE 1. Definitions**

For the purposes of this Protocol:

- a) "Party" means a State Party to this Protocol;
- b) "cultural property" means cultural property as defined in Article 1 of the Convention;
- c) "Convention" means the Convention for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague on 14 May 1954;
- d) "High Contracting Party" means a State Party to the Convention;
- e) "enhanced protection" means the system of enhanced protection established by Articles 10 and 11;



- f) “military objective” means an object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage;
- g) “illicit” means under compulsion or otherwise in violation of the applicable rules of the domestic law of the occupied territory or of international law.
- h) “List” means the International List of Cultural Property under Enhanced Protection established in accordance with Article 27, sub-paragraph 1(b);
- i) “Director-General” means the Director-General of UNESCO;
- j) “UNESCO” means the United Nations Educational, Scientific and Cultural Organization;
- k) “First Protocol” means the Protocol for the Protection of Cultural Property in the Event of Armed Conflict done at The Hague on 14 May 1954.

#### **ARTICLE 2. Relation to the Convention**

This Protocol supplements the Convention in relations between the Parties.

#### **ARTICLE 3. Scope of application**

1. In addition to the provisions which shall apply in time of peace, this Protocol shall apply in situations referred to in Article 18 paragraphs 1 and 2 of the Convention and in Article 22 paragraph 1.
2. When one of the parties to an armed conflict is not bound by this Protocol, the Parties to this Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to a State party to the conflict which is not bound by it, if the latter accepts the provisions of this Protocol and so long as it applies them.

#### **ARTICLE 4. Relationship between chapter 3 and other provisions of the Convention and this protocol**

The application of the provisions of Chapter 3 of this Protocol is without prejudice to:

- a) the application of the provisions of Chapter I of the Convention and of Chapter 2 of this Protocol;
- b) the application of the provisions of Chapter 2 of the Convention save that, as between Parties to this Protocol or as between a Party and a State which accepts and applies this Protocol in accordance with Article 3 paragraph 2, where cultural property has been granted both special protection and enhanced protection, only the provisions of enhanced protection shall apply.

## **CHAPTER 2: GENERAL PROVISIONS REGARDING PROTECTION**

### **ARTICLE 5. Safeguarding of cultural property**

Preparatory measures taken in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict pursuant to Article 3 of the Convention shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property.

### **ARTICLE 6. Respect for cultural property**

With the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention:

- a) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:
  - i) that cultural property has, by its function, been made into a military objective; and
  - ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;
- b) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;
- c) the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;
- d) in case of an attack based on a decision taken in accordance with subparagraph (a), an effective advance warning shall be given whenever circumstances permit.

### **ARTICLE 7. Precautions in attack**

Without prejudice to other precautions required by international humanitarian law in the conduct of military operations, each Party to the conflict shall:

- a) do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention;
- b) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property protected under Article 4 of the Convention;

- c) refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated; and
- d) cancel or suspend an attack if it becomes apparent:
  - i) that the objective is cultural property protected under Article 4 of the Convention
  - ii) that the attack may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated.

#### **ARTICLE 8. Precautions against the effects of hostilities**

The Parties to the conflict shall, to the maximum extent feasible:

- a) remove movable cultural property from the vicinity of military objectives or provide for adequate *in situ* protection;
- b) avoid locating military objectives near cultural property.

#### **ARTICLE 9. Protection of cultural property in occupied territory**

1. Without prejudice to the provisions of Articles 4 and 5 of the Convention, a Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory:
  - a) any illicit export, other removal or transfer of ownership of cultural property;
  - b) any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property
  - c) any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence.
2. Any archaeological excavation of, alteration to, or change of use of, cultural property in occupied territory shall, unless circumstances do not permit, be carried out in close co-operation with the competent national authorities of the occupied territory.

### **CHAPTER 3: ENHANCED PROTECTION**

#### **ARTICLE 10. Enhanced protection**

Cultural property may be placed under enhanced protection provided that it meets the following three conditions:

- a) it is cultural heritage of the greatest importance for humanity;
- b) it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;

- c) it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.

#### **ARTICLE 11. The granting of enhanced protection**

1. Each Party should submit to the Committee a list of cultural property for which it intends to request the granting of enhanced protection.
2. The Party which has jurisdiction or control over the cultural property may request that it be included in the List to be established in accordance with Article 27 sub-paragraph 1(b). This request shall include all necessary information related to the criteria mentioned in Article 10. The Committee may invite a Party to request that cultural property be included in the List.
3. Other Parties, the International Committee of the Blue Shield and other non-governmental organisations with relevant expertise may recommend specific cultural property to the Committee. In such cases, the Committee may decide to invite a Party to request inclusion of that cultural property in the List.
4. Neither the request for inclusion of cultural property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State, nor its inclusion, shall in any way prejudice the rights of the parties to the dispute.
5. Upon receipt of a request for inclusion in the List, the Committee shall inform all Parties of the request. Parties may submit representations regarding such a request to the Committee within sixty days. These representations shall be made only on the basis of the criteria mentioned in Article 10. They shall be specific and related to facts. The Committee shall consider the representations, providing the Party requesting inclusion with a reasonable opportunity to respond before taking the decision. When such representations are before the Committee, decisions for inclusion in the List shall be taken, notwithstanding Article 26, by a majority of four-fifths of its members present and voting.
6. In deciding upon a request, the Committee should ask the advice of governmental and non-governmental organisations, as well as of individual experts.
7. A decision to grant or deny enhanced protection may only be made on the basis of the criteria mentioned in Article 10.
8. In exceptional cases, when the Committee has concluded that the Party requesting inclusion of cultural property in the List cannot fulfil the criteria of Article 10 sub-paragraph (b), the Committee may decide to grant enhanced protection, provided that the requesting Party submits a request for international assistance under Article 32.
9. Upon the outbreak of hostilities, a Party to the conflict may request, on an emergency basis, enhanced protection of cultural property under its jurisdiction or control by communicating this request to the Committee. The Committee shall transmit this request immediately to all Parties to the conflict. In such cases the Committee will consider representations from the Parties concerned on an

expedited basis. The decision to grant provisional enhanced protection shall be taken as soon as possible and, notwithstanding Article 26, by a majority of four-fifths of its members present and voting. Provisional enhanced protection may be granted by the Committee pending the outcome of the regular procedure for the granting of enhanced protection, provided that the provisions of Article 10 sub-paragraphs (a) and (c) are met.

10. Enhanced protection shall be granted to cultural property by the Committee from the moment of its entry in the List.
11. The Director-General shall, without delay, send to the Secretary-General of the United Nations and to all Parties notification of any decision of the Committee to include cultural property on the List.

#### **ARTICLE 12. Immunity of cultural property under enhanced protection**

The Parties to a conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack from any use of the property or its immediate surroundings in support of military action.

#### **ARTICLE 13. Loss of enhanced protection**

1. Cultural property under enhanced protection shall only lose such protection:
  - a) if such protection is suspended or cancelled in accordance with Article 14; or
  - b) if, and for as long as, the property has, by its use, become a military objective.
2. In the circumstances of sub-paragraph 1(b), such property may only be the object of attack if:
  - a) the attack is the only feasible means of terminating the use of the property referred to in sub-paragraph 1(b);
  - b) all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to the cultural property;
  - c) unless circumstances do not permit, due to requirements of immediate self-defence:
    - i) the attack is ordered at the highest operational level of command;
    - ii) effective advance warning is issued to the opposing forces requiring the termination of the use referred to in sub-paragraph 1(b); and
    - iii) reasonable time is given to the opposing forces to redress the situation.

#### **ARTICLE 14. Suspension and cancellation of enhanced protection**

1. Where cultural property no longer meets any one of the criteria in Article 10 of this Protocol, the Committee may suspend its enhanced protection status or cancel that status by removing that cultural property from the List.
2. In the case of a serious violation of Article 12 in relation to cultural property under enhanced protection arising from its use in support of military action, the

Committee may suspend its enhanced protection status. Where such violations are continuous, the Committee may exceptionally cancel the enhanced protection status by removing the cultural property from the List.

3. The Director-General shall, without delay, send to the Secretary-General of the United Nations and to all Parties to this Protocol notification of any decision of the Committee to suspend or cancel the enhanced protection of cultural property.
4. Before taking such a decision, the Committee shall afford an opportunity to the Parties to make their views known.

## **CHAPTER 4: CRIMINAL RESPONSIBILITY AND JURISDICTION**

### **ARTICLE 15. Serious violations of this Protocol**

1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:
  - a) making cultural property under enhanced protection the object of attack;
  - b) using cultural property under enhanced protection or its immediate surroundings in support of military action;
  - c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
  - d) making cultural property protected under the Convention and this Protocol the object of attack;
  - e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.
2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

### **ARTICLE 16. Jurisdiction**

1. Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 in the following cases:
  - a) when such an offence is committed in the territory of that State;
  - b) when the alleged offender is a national of that State;
  - c) in the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory.

2. With respect to the exercise of jurisdiction and without prejudice to Article 28 of the Convention:
  - a) this Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law;
  - b) Except in so far as a State which is not Party to this Protocol may accept and apply its provisions in accordance with Article 3 paragraph 2, members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is a Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them.

#### **ARTICLE 17. Prosecution**

1. The Party in whose territory the alleged offender of an offence set forth in Article 15 sub-paragraphs 1 (a) to (c) is found to be present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law.
2. Without prejudice to, if applicable, the relevant rules of international law, any person regarding whom proceedings are being carried out in connection with the Convention or this Protocol shall be guaranteed fair treatment and a fair trial in accordance with domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favorable to such person than those provided by international law.

#### **ARTICLE 18. Extradition**

1. The offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the Parties before the entry into force of this Protocol. Parties undertake to include such offences in every extradition treaty to be subsequently concluded between them.
2. When a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, the requested Party may, at its option, consider the present Protocol as the legal basis for extradition in respect of offences as set forth in Article 15 sub-paragraphs 1 (a) to (c).
3. Parties which do not make extradition conditional on the existence of a treaty shall recognise the offences set forth in Article 15 sub-paragraphs 1 (a) to (c) as extraditable offences between them, subject to the conditions provided by the law of the requested Party.

4. If necessary, offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be treated, for the purposes of extradition between Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the Parties that have established jurisdiction in accordance with Article 16 paragraph 1.

#### **ARTICLE 19. Mutual legal assistance**

1. Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article 15, including assistance in obtaining evidence at their disposal necessary for the proceedings.
2. Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, Parties shall afford one another assistance in accordance with their domestic law.

#### **ARTICLE 20. Grounds for refusal**

1. For the purpose of extradition, offences set forth in Article 15 sub-paragraphs 1 (a) to (c), and for the purpose of mutual legal assistance, offences set forth in Article 15 shall not be regarded as political offences nor as offences connected with political offences nor as offences inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such offences may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.
2. Nothing in this Protocol shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested Party has substantial grounds for believing that the request for extradition for offences set forth in Article 15 sub-paragraphs 1 (a) to (c) or for mutual legal assistance with respect to offences set forth in Article 15 has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

#### **ARTICLE 21. Measures regarding other violations**

Without prejudice to Article 28 of the Convention, each Party shall adopt such legislative, administrative or disciplinary measures as may be necessary to suppress the following acts when committed intentionally:

- a) any use of cultural property in violation of the Convention or this Protocol;
- b) any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or this Protocol.



## **CHAPTER 5: THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICTS NOT OF AN INTERNATIONAL CHARACTER**

### **ARTICLE 22. Armed conflicts not of an international character**

1. This Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.
3. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
4. Nothing in this Protocol shall prejudice the primary jurisdiction of a Party in whose territory an armed conflict not of an international character occurs over the violations set forth in Article 15.
5. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the Party in the territory of which that conflict occurs.
6. The application of this Protocol to the situation referred to in paragraph 1 shall not affect the legal status of the parties to the conflict.
7. UNESCO may offer its services to the parties to the conflict.

## **CHAPTER 6: INSTITUTIONAL ISSUES**

### **ARTICLE 23. Meeting of the Parties**

1. The Meeting of the Parties shall be convened at the same time as the General Conference of UNESCO, and in co-ordination with the Meeting of the High Contracting Parties, if such a meeting has been called by the Director-General.
2. The Meeting of the Parties shall adopt its Rules of Procedure.
3. The Meeting of the Parties shall have the following functions:
  - a) to elect the Members of the Committee, in accordance with Article 24 paragraph 1;
  - b) to endorse the Guidelines developed by the Committee in accordance with Article 27 sub-paragraph 1(a);
  - c) to provide guidelines for, and to supervise the use of the Fund by the Committee;
  - d) to consider the report submitted by the Committee in accordance with Article 27 sub-paragraph 1(d);

- e) to discuss any problem related to the application of this Protocol, and to make recommendations, as appropriate.
- 4. At the request of at least one-fifth of the Parties, the Director-General shall convene an Extraordinary Meeting of the Parties.

**ARTICLE 24. Committee for the protection of cultural property in the event of armed conflict**

- 1. The Committee for the Protection of Cultural Property in the Event of Armed Conflict is hereby established. It shall be composed of twelve Parties which shall be elected by the Meeting of the Parties.
- 2. The Committee shall meet once a year in ordinary session and in extra-ordinary sessions whenever it deems necessary.
- 3. In determining membership of the Committee, Parties shall seek to ensure an equitable representation of the different regions and cultures of the world.
- 4. Parties members of the Committee shall choose as their representatives persons qualified in the fields of cultural heritage, defence or international law, and they shall endeavour, in consultation with one another, to ensure that the Committee as a whole contains adequate expertise in all these fields.

**ARTICLE 25. Term of office**

- 1. A Party shall be elected to the Committee for four years and shall be eligible for immediate re-election only once.
- 2. Notwithstanding the provisions of paragraph 1, the term of office of half of the members chosen at the time of the first election shall cease at the end of the first ordinary session of the Meeting of the Parties following that at which they were elected. These members shall be chosen by lot by the President of this Meeting after the first election.

**ARTICLE 26. Rules of procedure**

- 1. The Committee shall adopt its Rules of Procedure.
- 2. A majority of the members shall constitute a quorum. Decisions of the Committee shall be taken by a majority of two-thirds of its members voting.
- 3. Members shall not participate in the voting on any decisions relating to cultural property affected by an armed conflict to which they are parties.

**ARTICLE 27. Functions**

- 1. The Committee shall have the following functions:
  - a) to develop Guidelines for the implementation of this Protocol;
  - b) to grant, suspend or cancel enhanced protection for cultural property and to establish, maintain and promote the List of cultural property under enhanced protection;

- c) to monitor and supervise the implementation of this Protocol and promote the identification of cultural property under enhanced protection;
  - d) to consider and comment on reports of the Parties, to seek clarifications as required, and prepare its own report on the implementation of this Protocol for the Meeting of the Parties;
  - e) to receive and consider requests for international assistance under Article 32;
  - f) to determine the use of the Fund
  - g) to perform any other function which may be assigned to it by the Meeting of the Parties.
2. The functions of the Committee shall be performed in co-operation with the Director-General.
3. The Committee shall co-operate with international and national governmental and non-governmental organizations having objectives similar to those of the Convention, its First Protocol and this Protocol. To assist in the implementation of its functions, the Committee may invite to its meetings, in an advisory capacity, eminent professional organizations such as those which have formal relations with UNESCO, including the International Committee of the Blue Shield (ICBS) and its constituent bodies. Representatives of the International Centre for the Study of the Preservation and Restoration of Cultural Property (Rome Centre) (ICCROM) and of the International Committee of the Red Cross (ICRC) may also be invited to attend in an advisory capacity.

#### **ARTICLE 28. Secretariat**

The Committee shall be assisted by the Secretariat of UNESCO which shall prepare the Committee's documentation and the agenda for its meetings and shall have the responsibility for the implementation of its decisions.

#### **ARTICLE 29. The Fund for the protection of cultural property in the event of armed conflict**

1. A Fund is hereby established for the following purposes:
- a) to provide financial or other assistance in support of preparatory or other measures to be taken in peacetime in accordance with, *inter alia*, Article 5, Article 10 sub-paragraph (b) and Article 30; and
  - b) to provide financial or other assistance in relation to emergency, provisional or other measures to be taken in order to protect cultural property during periods of armed conflict or of immediate recovery after the end of hostilities in accordance with, *inter alia*, Article 8 sub-paragraph (a).
2. The Fund shall constitute a trust fund, in conformity with the provisions of the financial regulations of UNESCO.
3. Disbursements from the Fund shall be used only for such purpose as the Committee shall decide in accordance with the guidelines as defined in Article 23 sub-paragraph 3(c). The Committee may accept contributions to be used only for

a certain programme or project, provided that the Committee shall have decided on the implementation of such programme or project.

4. The resources of the Fund shall consist of:
  - a) voluntary contributions made by the Parties;
  - b) contributions, gifts or bequests made by:
    - i) other States;
    - ii) UNESCO or other organizations of the United Nations system;
    - iii) other intergovernmental or non-governmental organizations; and
    - iv) public or private bodies or individuals;
  - c) any interest accruing on the Fund;
  - d) funds raised by collections and receipts from events organized for the benefit of the Fund; and
  - e) all other resources authorized by the guidelines applicable to the Fund.

## **CHAPTER 7: DISSEMINATION OF INFORMATION AND INTERNATIONAL ASSISTANCE**

### **ARTICLE 30. Dissemination**

1. The Parties shall endeavour by appropriate means, and in particular by educational and information programmes, to strengthen appreciation and respect for cultural property by their entire population.
2. The Parties shall disseminate this Protocol as widely as possible, both in time of peace and in time of armed conflict.
3. Any military or civilian authorities who, in time of armed conflict, assume responsibilities with respect to the application of this Protocol, shall be fully acquainted with the text thereof. To this end the Parties shall, as appropriate:
  - a) incorporate guidelines and instructions on the protection of cultural property in their military regulations;
  - b) develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes;
  - c) communicate to one another, through the Director-General, information on the laws, administrative provisions and measures taken under subparagraphs (a) and (b);
  - d) communicate to one another, as soon as possible, through the Director-General, the laws and administrative provisions which they may adopt to ensure the application of this Protocol.

**ARTICLE 31. International cooperation**

In situations of serious violations of this Protocol, the Parties undertake to act, jointly through the Committee, or individually, in cooperation with UNESCO and the United Nations and in conformity with the Charter of the United Nations.

**ARTICLE 32. International assistance**

1. A Party may request from the Committee international assistance for cultural property under enhanced protection as well as assistance with respect to the preparation, development or implementation of the laws, administrative provisions and measures referred to in Article 10.
2. A party to the conflict, which is not a Party to this Protocol but which accepts and applies provisions in accordance with Article 3, paragraph 2, may request appropriate international assistance from the Committee.
3. The Committee shall adopt rules for the submission of requests for international assistance and shall define the forms the international assistance may take.
4. Parties are encouraged to give technical assistance of all kinds, through the Committee, to those Parties or parties to the conflict who request it.

**ARTICLE 33. Assistance of UNESCO**

1. A Party may call upon UNESCO for technical assistance in organizing the protection of its cultural property, such as preparatory action to safeguard cultural property, preventive and organizational measures for emergency situations and compilation of national inventories of cultural property, or in connection with any other problem arising out of the application of this Protocol. UNESCO shall accord such assistance within the limits fixed by its programme and by its resources.
2. Parties are encouraged to provide technical assistance at bilateral or multilateral level.
3. UNESCO is authorized to make, on its own initiative, proposals on these matters to the Parties.

**CHAPTER 8: EXECUTION OF THIS PROTOCOL****ARTICLE 34. Protecting Powers**

This Protocol shall be applied with the co-operation of the Protecting Powers responsible for safeguarding the interests of the Parties to the conflict.

**ARTICLE 35. Conciliation procedure**

1. The Protecting Powers shall lend their good offices in all cases where they may deem it useful in the interests of cultural property, particularly if there is disagreement between the Parties to the conflict as to the application or interpretation of the provisions of this Protocol.
2. For this purpose, each of the Protecting Powers may, either at the invitation of one Party, of the Director-General, or on its own initiative, propose to the parties to

the conflict a meeting of their representatives, and in particular of the authorities responsible for the protection of cultural property, if considered appropriate, on the territory of a State not party to the conflict. The parties to the conflict shall be bound to give effect to the proposals for meeting made to them. The Protecting Powers shall propose for approval by the Parties to the conflict a person belonging to a State not party to the conflict or a person presented by the Director-General, which person shall be invited to take part in such a meeting in the capacity of Chairman.

#### **ARTICLE 36. Conciliation in absence of Protecting Powers**

1. In a conflict where no Protecting Powers are appointed the Director-General may lend good offices or act by any other form of conciliation or mediation, with a view to settling the disagreement.
2. At the invitation of one Party or of the Director-General, the Chairman of the Committee may propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for the protection of cultural property, if considered appropriate, on the territory of a State not party to the conflict.

#### **ARTICLE 37. Translations and reports**

1. The Parties shall translate this Protocol into their official languages and shall communicate these official translations to the Director-General.
2. The Parties shall submit to the Committee, every four years, a report on the implementation of this Protocol.

#### **ARTICLE 38. State responsibility**

No provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation.

### **CHAPTER 9: FINAL CLAUSES**

#### **ARTICLE 39. Languages**

This Protocol is drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authentic.

#### **ARTICLE 40. Signature**

This Protocol shall bear the date of 26 March 1999. It shall be opened for signature by all High Contracting Parties at The Hague from 17 May 1999 until 31 December 1999.

#### **ARTICLE 41. Ratification, acceptance or approval**

1. This Protocol shall be subject to ratification, acceptance or approval by High Contracting Parties which have signed this Protocol, in accordance with their respective constitutional procedures.
2. The instruments of ratification, acceptance or approval shall be deposited with the Director-General.

**ARTICLE 42. Accession**

1. This Protocol shall be open for accession by other High Contracting Parties from 1 January 2000.
2. Accession shall be effected by the deposit of an instrument of accession with the Director-General.

**ARTICLE 43. Entry into force**

1. This Protocol shall enter into force three months after twenty instruments of ratification, acceptance, approval or accession have been deposited.
2. Thereafter, it shall enter into force, for each Party, three months after the deposit of its instrument of ratification, acceptance, approval or accession.

**ARTICLE 44. Entry into force in situations of armed conflict**

The situations referred to in Articles 18 and 19 of the Convention shall give immediate effect to ratifications, acceptances or approvals of or accessions to this Protocol deposited by the parties to the conflict either before or after the beginning of hostilities or occupation. In such cases the Director-General shall transmit the communications referred to in Article 46 by the speediest method.

**ARTICLE 45. Denunciation**

1. Each Party may denounce this Protocol.
2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General.
3. The denunciation shall take effect one year after the receipt of the instrument of denunciation. However, if, on the expiry of this period, the denouncing Party is involved in an armed conflict, the denunciation shall not take effect until the end of hostilities, or until the operations of repatriating cultural property are completed, whichever is the later.

**ARTICLE 46. Notifications**

The Director-General shall inform all High Contracting Parties as well as the United Nations, of the deposit of all the instruments of ratification, acceptance, approval or accession provided for in Articles 41 and 42 and of denunciations provided for in Article 45.

**ARTICLE 47. Registration with the United Nations**

In conformity with Article 102 of the Charter of the United Nations, this Protocol shall be registered with the Secretariat of the United Nations at the request of the Director-General.

**IN FAITH WHEREOF** the undersigned, duly authorized, have signed the present Protocol.

**DONE** at The Hague, this twenty-sixth day of March 1999, in a single copy which shall be deposited in the archives of the UNESCO, and certified true copies of which shall be delivered to all the High Contracting Parties.

**Document No. 11, Convention on Prohibitions or Restrictions  
on the Use of Certain Conventional Weapons**

[Source: Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980; available at [www.icrc.org](http://www.icrc.org)]

**Convention on Prohibitions or Restrictions on the Use of Certain Conventional  
Weapons Which May be Deemed to be Excessively Injurious or to Have  
Indiscriminate Effects****Geneva, 10 October 1980**

*The High Contracting Parties,*

*Recalling* that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

*Further recalling* the general principle of the protection of the civilian population against the effects of hostilities,

*Basing themselves* on the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, and on the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering,

*Also recalling* that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment,

*Confirming their determination* that in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience,

*Desiring* to contribute to international détente, the ending of the arms race and the building of confidence among States, and hence to the realization of the aspiration of all peoples to live in peace,

*Recognizing* the importance of pursuing every effort which may contribute to progress towards general and complete disarmament under strict and effective international control,

*Reaffirming* the need to continue the codification and progressive development of the rules of international law applicable in armed conflict,



*Wishing* to prohibit or restrict further the use of certain conventional weapons and believing that the positive results achieved in this area may facilitate the main talks on disarmament with a view to putting an end to the production, stockpiling and proliferation of such weapons,

*Emphasizing* the desirability that all States become parties to this Convention and its annexed Protocols, especially the militarily significant States,

*Bearing in mind* that the General Assembly of the United Nations and the United Nations Disarmament Commission may decide to examine the question of a possible broadening of the scope of the prohibitions and restrictions contained in this Convention and its annexed Protocols,

*Further bearing in mind* that the Committee on Disarmament may decide to consider the question of adopting further measures to prohibit or restrict the use of certain conventional weapons,

*Have agreed* as follows:

#### **ARTICLE 1. Scope of application**

This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions.

[See Document No. 12, Amendment to Article 1 of the 1980 Convention, in order to extend it to Non-International Armed Conflicts]

#### **ARTICLE 2. Relations with other international agreements**

Nothing in this Convention or its annexed Protocols shall be interpreted as detracting from other obligations imposed upon the High Contracting Parties by international humanitarian law applicable in armed conflict.

#### **ARTICLE 3. Signature**

This Convention shall be open for signature by all States at United Nations Headquarters in New York for a period of twelve months from 10 April 1981.

#### **ARTICLE 4. Ratification, acceptance, approval or accession**

1. This Convention is subject to ratification, acceptance or approval by the Signatories. Any State which has not signed this Convention may accede to it.
2. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.
3. Expressions of consent to be bound by any of the Protocols annexed to this Convention shall be optional for each State, provided that at the time of the deposit of its instrument of ratification, acceptance or approval of this Convention or of accession thereto, that State shall notify the Depositary of its consent to be bound by any two or more of these Protocols.

4. At any time after the deposit of its instrument of ratification, acceptance or approval of this Convention or of accession thereto, a State may notify the Depositary of its consent to be bound by any annexed Protocol by which it is not already bound.
5. Any Protocol by which a High Contracting Party is bound shall for that Party form an integral part of this Convention.

#### **ARTICLE 5. Entry into force**

1. This Convention shall enter into force six months after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.
2. For any State which deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force six months after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.
3. Each of the Protocols annexed to this Convention shall enter into force six months after the date by which twenty States have notified their consent to be bound by it in accordance with paragraph 3 or 4 of Article 4 of this Convention.
4. For any State which notifies its consent to be bound by a Protocol annexed to this Convention after the date by which twenty States have notified their consent to be bound by it, the Protocol shall enter into force six months after the date on which that State has notified its consent so to be bound.

#### **ARTICLE 6. Dissemination**

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate this Convention and those of its annexed Protocols by which they are bound as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction, so that those instruments may become known to their armed forces.

#### **ARTICLE 7. Treaty relations upon entry into force of this Convention**

1. When one of the parties to a conflict is not bound by an annexed Protocol, the parties bound by this Convention and that annexed Protocol shall remain bound by them in their mutual relations.
2. Any High Contracting Party shall be bound by this Convention and any Protocol annexed thereto which is in force for it, in any situation contemplated by Article 1, in relation to any State which is not a party to this Convention or bound by the relevant annexed Protocol, if the latter accepts and applies this Convention or the relevant Protocol, and so notifies the Depositary.
3. The Depositary shall immediately inform the High Contracting Parties concerned of any notification received under paragraph 2 of this Article.
4. This Convention, and the annexed Protocols by which a High Contracting Party is bound, shall apply with respect to an armed conflict against that High Contracting

Party of the type referred to in Article 1, paragraph 4, of Additional Protocol I to the Geneva Conventions of 12 August 1949 for the Protection of War Victims:

- (a) where the High Contracting Party is also a party to Additional Protocol I and an authority referred to in Article 96, paragraph 3, of that Protocol has undertaken to apply the Geneva Conventions and Additional Protocol I in accordance with Article 96, paragraph 3, of the said Protocol, and undertakes to apply this Convention and the relevant annexed Protocols in relation to that conflict; or
- (b) where the High Contracting Party is not a party to Additional Protocol I and an authority of the type referred to in subparagraph (a) above accepts and applies the obligations of the Geneva Conventions and of this Convention and the relevant annexed Protocols in relation to that conflict. Such an acceptance and application shall have in relation to that conflict the following effects:
  - (i) the Geneva Conventions and this Convention and its relevant annexed Protocols are brought into force for the parties to the conflict with immediate effect;
  - (ii) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Geneva Conventions, this Convention and its relevant annexed Protocols; and
  - (iii) the Geneva Conventions, this Convention and its relevant annexed Protocols are equally binding upon all parties to the conflict.

The High Contracting Party and the authority may also agree to accept and apply the obligations of Additional Protocol I to the Geneva Conventions on a reciprocal basis.

#### **ARTICLE 8. Review and amendments**

1. (a) At any time after the entry into force of this Convention any High Contracting Party may propose amendments to this Convention or any annexed Protocol by which it is bound. Any proposal for an amendment shall be communicated to the Depositary, who shall notify it to all the High Contracting Parties and shall seek their views on whether a conference should be convened to consider the proposal. If a majority, that shall not be less than eighteen of the High Contracting Parties so agree, he shall promptly convene a conference to which all High Contracting Parties shall be invited. States not parties to this Convention shall be invited to the conference as observers.
  - (b) Such a conference may agree upon amendments which shall be adopted and shall enter into force in the same manner as this Convention and the annexed Protocols, provided that amendments to this Convention may be adopted only by the High Contracting Parties and that amendments to a specific annexed Protocol may be adopted only by the High Contracting Parties which are bound by that Protocol.
2. (a) At any time after the entry into force of this Convention any High Contracting Party may propose additional protocols relating to other categories of

conventional weapons not covered by the existing annexed Protocols. Any such proposal for an additional protocol shall be communicated to the Depositary, who shall notify it to all the High Contracting Parties in accordance with subparagraph 1 (a) of this Article. If a majority, that shall not be less than eighteen of the High Contracting Parties so agree, the Depositary shall promptly convene a conference to which all States shall be invited.

- (b) Such a conference may agree, with the full participation of all States represented at the conference, upon additional protocols which shall be adopted in the same manner as this Convention, shall be annexed thereto and shall enter into force as provided in paragraphs 3 and 4 of Article 5 of this Convention.
3. (a) If, after a period of ten years following the entry into force of this Convention, no conference has been convened in accordance with sub-paragraph 1 (a) or 2 (a) of this Article, any High Contracting Party may request the Depositary to convene a conference to which all High Contracting Parties shall be invited to review the scope and operation of this Convention and the Protocols annexed thereto and to consider any proposal for amendments of this Convention or of the existing Protocols. States not parties to this Convention shall be invited as observers to the conference. The conference may agree upon amendments which shall be adopted and enter into force in accordance with sub-paragraph 1 (b) above.
- (b) At such conference consideration may also be given to any proposal for additional protocols relating to other categories of conventional weapons not covered by the existing annexed Protocols. All States represented at the conference may participate fully in such consideration. Any additional protocols shall be adopted in the same manner as this Convention, shall be annexed thereto and shall enter into force as provided in paragraphs 3 and 4 of Article 5 of this Convention.
  - (c) Such a conference may consider whether provision should be made for the convening of a further conference at the request of any High Contracting Party if, after a similar period to that referred to in sub-paragraph 3 (a) of this Article, no conference has been convened in accordance with sub-paragraph 1 (a) or 2 (a) of this Article.

#### **ARTICLE 9. Denunciation**

- 1. Any High Contracting Party may denounce this Convention or any of its annexed Protocols by so notifying the Depositary.
- 2. Any such denunciation shall only take effect one year after receipt by the Depositary of the notification of denunciation. If, however, on the expiry of that year the denouncing High Contracting Party is engaged in one of the situations referred to in Article 1, the Party shall continue to be bound by the obligations of this Convention and of the relevant annexed Protocols until the end of the armed conflict or occupation and, in any case, until the termination of operations connected with the final release, repatriation or re-establishment of the person

protected by the rules of international law applicable in armed conflict, and in the case of any annexed Protocol containing provisions concerning situations in which peace-keeping, observation or similar functions are performed by United Nations forces or missions in the area concerned, until the termination of those functions.

3. Any denunciation of this Convention shall be considered as also applying to all annexed Protocols by which the denouncing High Contracting Party is bound.
4. Any denunciation shall have effect only in respect of the denouncing High Contracting Party.
5. Any denunciation shall not affect the obligations already incurred, by reason of an armed conflict, under this Convention and its annexed Protocols by such denouncing High Contracting Party in respect of any act committed before this denunciation becomes effective.

#### **ARTICLE 10. Depositary**

1. The Secretary-General of the United Nations shall be the Depositary of this Convention and of its annexed Protocols.
2. In addition to his usual functions, the Depositary shall inform all States of:
  - (a) signatures affixed to this Convention under Article 3;
  - (b) deposits of instruments of ratification, acceptance or approval of or accession to this Convention deposited under Article 4;
  - (c) notifications of consent to be bound by annexed Protocols under Article 4;
  - (d) the dates of entry into force of this Convention and of each of its annexed Protocols under Article 5; and
  - (e) notifications of denunciation received under article 9, and their effective date.

#### **ARTICLE 11. Authentic texts**

The original of this Convention with the annexed Protocols, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Depositary, who shall transmit certified true copies thereof to all States.

**Document No. 12, Amendment to Article 1 of the 1980 Convention,  
in Order to Extend it to Non-International Armed Conflicts**

[Source: Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980. Amendment to Article 1, 21 December 2001; available at [www.icrc.org](http://www.icrc.org)]

**Convention on Prohibitions or Restrictions on the Use of Certain Conventional  
Weapons Which May be Deemed to be Excessively Injurious or to Have  
Indiscriminate Effects (Geneva, 10 October 1980)****Amendment to Article 1, 21 December 2001**

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.
3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.
4. Nothing in this Convention or its annexed Protocols shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
5. Nothing in this Convention or its annexed Protocols shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.
6. The application of the provisions of this Convention and its annexed Protocols to parties to a conflict which are not High Contracting Parties that have accepted this Convention or its annexed Protocols, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.
7. The provisions of Paragraphs 2-6 of this Article shall not prejudice additional Protocols adopted after 1 January 2002, which may apply, exclude or modify the scope of their application in relation to this Article.

**Document No. 13, Protocol on Non-Detectable Fragments  
(Protocol I to the 1980 Convention)**

[Source: Protocol on Non-Detectable Fragments (Protocol I). Geneva, 10 October 1980; available at [www.icrc.org](http://www.icrc.org)]

**Protocol on Non-Detectable Fragments  
(Protocol I)**

**Geneva, 10 October 1980**

It is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.

**Document No. 14, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention)**

[Source: Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). Geneva, 10 October 1980; available at [www.icrc.org](http://www.icrc.org)]

**Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons  
(Protocol III)****Geneva, 10 October 1980****ARTICLE 1. Definitions**

For the purpose of this Protocol:

1. “Incendiary weapon” means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target.
  - (a) Incendiary weapons can take the form of, for example, flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances.
  - (b) Incendiary weapons do not include:
    - (i) Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems;
    - (ii) Munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.
2. “Concentration of civilians” means any concentration of civilians, be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads.
3. “Military objective” means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
4. “Civilian objects” are all objects which are not military objectives as defined in paragraph 3.
5. “Feasible precautions” are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.



**ARTICLE 2. Protection of civilians and civilian objects**

1. It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons.
2. It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.
3. It is further prohibited to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.
4. It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.

**Document No. 15, Protocol on Blinding Laser Weapons  
(Protocol IV to the 1980 Convention)**

[Source: Protocol on Blinding Laser Weapons (Protocol IV), 13 October 1995; available at [www.icrc.org](http://www.icrc.org)]

**Protocol on Blinding Laser Weapons  
(Protocol IV)**

**13 October 1995**

**ARTICLE 1**

It is prohibited to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices. The High Contracting Parties shall not transfer such weapons to any State or non-State entity.

**ARTICLE 2**

In the employment of laser systems, the High Contracting Parties shall take all feasible precautions to avoid the incidence of permanent blindness to unenhanced vision. Such precautions shall include training of their armed forces and other practical measures.

**ARTICLE 3**

Blinding as an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment, is not covered by the prohibition of this Protocol.

**ARTICLE 4**

For the purpose of this protocol “permanent blindness” means irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery. Serious disability is equivalent to visual acuity of less than 20/200 Snellen measured using both eyes.

**Document No. 16, Protocol on Prohibitions or Restrictions on the Use of Mines,  
Booby-Traps and Other Devices, as amended on 3 May 1996  
(Protocol II to the 1980 Convention)**

[Source: Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II); available at [www.icrc.org](http://www.icrc.org)]

**Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and  
Other Devices as amended on 3 May 1996  
(Protocol II)**

**ARTICLE I. Scope of application**

1. This Protocol relates to the use on land of the mines, booby-traps and other devices, defined herein, including mines laid to interdict beaches, waterway crossings or river crossings, but does not apply to the use of anti-ship mines at sea or in inland waterways.
2. This Protocol shall apply, in addition to situations referred to in Article I of this Convention, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.
3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Protocol.
4. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
5. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.
6. The application of the provisions of this Protocol to parties to a conflict, which are not High Contracting Parties that have accepted this Protocol, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

**ARTICLE 2. Definitions**

For the purpose of this Protocol:

1. “Mine” means a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle.

2. "Remotely-delivered mine" means a mine not directly emplaced but delivered by artillery, missile, rocket, mortar, or similar means, or dropped from an aircraft. Mines delivered from a land-based system from less than 500 metres are not considered to be "remotely delivered", provided that they are used in accordance with Article 5 and other relevant Articles of this Protocol.
3. "Anti-personnel mine" means a mine primarily designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.
4. "Booby-trap" means any device or material which is designed, constructed or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.
5. "Other devices" means manually-emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time.
6. "Military objective" means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
7. "Civilian objects" are all objects which are not military objectives as defined in paragraph 6 of this Article.
8. "Minefield" is a defined area in which mines have been emplaced and "mined area" is an area which is dangerous due to the presence of mines. "Phoney minefield" means an area free of mines that simulates a minefield. The term "minefield" includes phoney minefields.
9. "Recording" means a physical, administrative and technical operation designed to obtain, for the purpose of registration in official records, all available information facilitating the location of minefields, mined areas, mines, booby-traps and other devices.
10. "Self-destruction mechanism" means an incorporated or externally attached automatically-functioning mechanism which secures the destruction of the munition into which it is incorporated or to which it is attached.
11. "Self-neutralization mechanism" means an incorporated automatically-functioning mechanism which renders inoperable the munition into which it is incorporated.
12. "Self-deactivating" means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example, a battery, that is essential to the operation of the munition.
13. "Remote control" means control by commands from a distance.
14. "Anti-handling device" means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with the mine.

15. "Transfer" involves, in addition to the physical movement of mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced mines.

**ARTICLE 3. General restrictions on the use, of mines, booby-traps and other devices**

1. This Article applies to:
  - (a) mines;
  - (b) booby-traps; and
  - (c) other devices.
2. Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol.
3. It is prohibited in all circumstances to use any mine, booby-trap or other device which is designed or of a nature to cause superfluous injury or unnecessary suffering.
4. Weapons to which this Article applies shall strictly comply with the standards and limitations specified in the Technical Annex with respect to each particular category.
5. It is prohibited to use mines, booby-traps or other devices which employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations.
6. It is prohibited to use a self-deactivating mine equipped with an anti-handling device that is designed in such a manner that the anti-handling device is capable of functioning after the mine has ceased to be capable of functioning.
7. It is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects.
8. The indiscriminate use of weapons to which this Article applies is prohibited. Indiscriminate use is any placement of such weapons:
  - (a) which is not on, or directed against, a military objective. In case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used; or
  - (b) which employs a method or means of delivery which cannot be directed at a specific military objective; or
  - (c) which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

9. Several clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are not to be treated as a single military objective.
10. All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations. These circumstances include, but are not limited to:
  - (a) the short- and long-term effect of mines upon the local civilian population for the duration of the minefield;
  - (b) possible measures to protect civilians (for example, fencing, signs, warning and monitoring);
  - (c) the availability and feasibility of using alternatives; and
  - (d) the short- and long-term military requirements for a minefield.
11. Effective advance warning shall be given of any emplacement of mines, booby-traps and other devices which may affect the civilian population, unless circumstances do not permit.

**ARTICLE 4. Restrictions on the use of anti-personnel mines**

It is prohibited to use anti-personnel mines which are not detectable, as specified in paragraph 2 of the Technical Annex.

**ARTICLE 5. Restrictions on the use of anti-personnel mines  
other than remotely-delivered mines**

1. This Article applies to anti-personnel mines other than remotely-delivered mines.
2. It is prohibited to use weapons to which this Article applies which are not in compliance with the provisions on self-destruction and self-deactivation in the Technical Annex, unless:
  - (a) such weapons are placed within a perimeter-marked area which is monitored by military personnel and protected by fencing or other means, to ensure the effective exclusion of civilians from the area. The marking must be of a distinct and durable character and must at least be visible to a person who is about to enter the perimeter-marked area; and
  - (b) such weapons are cleared before the area is abandoned, unless the area is turned over to the forces of another State which accept responsibility for the maintenance of the protections required by this Article and the subsequent clearance of those weapons.
3. A party to a conflict is relieved from further compliance with the provisions of subparagraphs 2 (a) and 2 (b) of this Article only if such compliance is not feasible due to forcible loss of control of the area as a result of enemy military action, including situations where direct enemy military action makes it impossible to comply. If that

party regains control of the area, it shall resume compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article.

4. If the forces of a party to a conflict gain control of an area in which weapons to which this Article applies have been laid, such forces shall, to the maximum extent feasible, maintain and, if necessary, establish the protections required by this Article until such weapons have been cleared.
5. All feasible measures shall be taken to prevent the unauthorized removal, defacement, destruction or concealment of any device, system or material used to establish the perimeter of a perimeter-marked area.
6. Weapons to which this Article applies which propel fragments in a horizontal arc of less than 90 degrees and which are placed on or above the ground may be used without the measures provided for in sub-paragraph 2 (a) of this Article for a maximum period of 72 hours, if:
  - (a) they are located in immediate proximity to the military unit that emplaced them; and
  - (b) the area is monitored by military personnel to ensure the effective exclusion of civilians.

#### **ARTICLE 6. Restrictions on the use of remotely-delivered mines**

1. It is prohibited to use remotely-delivered mines unless they are recorded in accordance with sub-paragraph I (b) of the Technical Annex.
2. It is prohibited to use remotely-delivered anti-personnel mines which are not in compliance with the provisions on self-destruction and self-deactivation in the Technical Annex.
3. It is prohibited to use remotely-delivered mines other than anti-personnel mines, unless, to the extent feasible, they are equipped with an effective self-destruction or self-neutralization mechanism and have a back-up self-deactivation feature, which is designed so that the mine will no longer function as a mine when the mine no longer serves the military purpose for which it was placed in position.
4. Effective advance warning shall be given of any delivery or dropping of remotely-delivered mines which may affect the civilian population, unless circumstances do not permit.

#### **ARTICLE 7. Prohibitions on the use of booby-traps and other devices**

1. Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use booby-traps and other devices which are in any way attached to or associated with:
  - (a) internationally recognized protective emblems, signs or signals;
  - (b) sick, wounded or dead persons;
  - (c) burial or cremation sites or graves;

- (d) medical facilities, medical equipment, medical supplies or medical transportation;
  - (e) children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
  - (f) food or drink;
  - (g) kitchen utensils or appliances except in military establishments, military locations or military supply depots;
  - (h) objects clearly of a religious nature;
  - (i) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
  - (j) animals or their carcasses.
2. It is prohibited to use booby-traps or other devices in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material.
3. Without prejudice to the provisions of Article 3, it is prohibited to use weapons to which this Article applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:
- (a) they are placed on or in the close vicinity of a military objective; or
  - (b) measures are taken to protect civilians from their effects, for example, the posting of warning sentries, the issuing of warnings or the provision of fences.

#### **ARTICLE 8. Transfers**

1. In order to promote the purposes of this Protocol, each High Contracting Party:
- (a) undertakes not to transfer any mine the use of which is prohibited by this Protocol;
  - (b) undertakes not to transfer any mine to any recipient other than a State or a State agency authorized to receive such transfers;
  - (c) undertakes to exercise restraint in the transfer of any mine the use of which is restricted by this Protocol. In particular, each High Contracting Party undertakes not to transfer any anti-personnel mines to States which are not bound by this Protocol, unless the recipient State agrees to apply this Protocol; and
  - (d) undertakes to ensure that any transfer in accordance with this Article takes place in full compliance, by both the transferring and the recipient State, with the relevant provisions of this Protocol and the applicable norms of international humanitarian law.
2. In the event that a High Contracting Party declares that it will defer compliance with specific provisions on the use of certain mines, as provided for in the Technical Annex, sub-paragraph I (a) of this Article shall however apply to such mines.



3. All High Contracting Parties, pending the entry into force of this Protocol, will refrain from any actions which would be inconsistent with sub-paragraph I (a) of this Article.

**ARTICLE 9. Recording and use of information on minefields,  
mined areas, mines, booby-traps and other devices**

1. All information concerning minefields, mined areas, mines, booby-traps and other devices shall be recorded in accordance with the provisions of the Technical Annex.
2. All such records shall be retained by the parties to a conflict, who shall, without delay after the cessation of active hostilities, take all necessary and appropriate measures, including the use of such information, to protect civilians from the effects of minefields, mined areas, mines, booby-traps and other devices in areas under their control.

At the same time, they shall also make available to the other party or parties to the conflict and to the Secretary-General of the United Nations all such information in their possession concerning minefields, mined areas, mines, booby-traps and other devices laid by them in areas no longer under their control; provided, however, subject to reciprocity, where the forces of a party to a conflict are in the territory of an adverse party, either party may withhold such information from the Secretary-General and the other party, to the extent that security interests require such withholding, until neither party is in the territory of the other. In the latter case, the information withheld shall be disclosed as soon as those security interests permit. Wherever possible, the parties to the conflict shall seek, by mutual agreement, to provide for the release of such information at the earliest possible time in a manner consistent with the security interests of each party.

3. This Article is without prejudice to the provisions of Articles 10 and 12 of this Protocol.

**ARTICLE 10. Removal of minefields, mined areas, mines, booby-traps  
and other devices and international cooperation**

1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with Article 3 and paragraph 2 of Article 5 of this Protocol.
2. High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control.
3. With respect to minefields, mined areas, mines, booby-traps and other devices laid by a party in areas over which it no longer exercises control, such party shall provide to the party in control of the area pursuant to paragraph 2 of this Article, to the extent permitted by such party, technical and material assistance necessary to fulfil such responsibility.
4. At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in

appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities.

**ARTICLE 11. Technological cooperation and assistance**

1. Each High Contracting Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information concerning the implementation of this Protocol and means of mine clearance. In particular, High Contracting Parties shall not impose undue restrictions on the provision of mine clearance equipment and related technological information for humanitarian purposes.
2. Each High Contracting Party undertakes to provide information to the database on mine clearance established within the United Nations System, especially information concerning various means and technologies of mine clearance, and lists of experts, expert agencies or national points of contact on mine clearance.
3. Each High Contracting Party in a position to do so shall provide assistance for mine clearance through the United Nations System, other international bodies or on a bilateral basis, or contribute to the United Nations Voluntary Trust Fund for Assistance in Mine Clearance.
4. Requests by High Contracting Parties for assistance, substantiated by relevant information, may be submitted to the United Nations, to other appropriate bodies or to other States. These requests may be submitted to the Secretary-General of the United Nations, who shall transmit them to all High Contracting Parties and to relevant international organizations.
5. In the case of requests to the United Nations, the Secretary-General of the United Nations, within the resources available to the Secretary-General of the United Nations, may take appropriate steps to assess the situation and, in cooperation with the requesting High Contracting Party, determine the appropriate provision of assistance in mine clearance or implementation of the Protocol. The Secretary-General may also report to High Contracting Parties on any such assessment as well as on the type and scope of assistance required.
6. Without prejudice to their constitutional and other legal provisions, the High Contracting Parties undertake to cooperate and transfer technology to facilitate the implementation of the relevant prohibitions and restrictions set out in this Protocol.
7. Each High Contracting Party has the right to seek and receive technical assistance, where appropriate, from another High Contracting Party on specific relevant technology, other than weapons technology, as necessary and feasible, with a view to reducing any period of deferral for which provision is made in the Technical Annex.

**ARTICLE 12. Protection from the effects of minefields, mined areas,  
mines, booby-traps and other devices**

1. Application
  - (a) With the exception of the forces and missions referred to in sub-paragraph 2(a)(i) of this Article, this Article applies only to missions which are performing functions

in an area with the consent of the High Contracting Party on whose territory the functions are performed.

- (b) The application of the provisions of this Article to parties to a conflict which are not High Contracting Parties shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.
  - (c) The provisions of this Article are without prejudice to existing international humanitarian law, or other international instruments as applicable, or decisions by the Security Council of the United Nations, which provide for a higher level of protection to personnel functioning in accordance with this Article.
- 2. Peace-keeping and certain other forces and missions
  - (a) This paragraph applies to:
    - (i) any United Nations force or mission performing peace-keeping, observation or similar functions in any area in accordance with the Charter of the United Nations;
    - (ii) any mission established pursuant to Chapter VIII of the Charter of the United Nations and performing its functions in the area of a conflict.
  - (b) Each High Contracting Party or party to a conflict, if so requested by the head of a force or mission to which this paragraph applies, shall:
    - (i) so far as it is able, take such measures as are necessary to protect the force or mission from the effects of mines, booby-traps and other devices in any area under its control;
    - (ii) if necessary in order effectively to protect such personnel, remove or render harmless, so far as it is able, all mines, booby-traps and other devices in that area; and
    - (iii) inform the head of the force or mission of the location of all known minefields, mined areas, mines, booby-traps and other devices in the area in which the force or mission is performing its functions and, so far as is feasible, make available to the head of the force or mission all information in its possession concerning such minefields, mined areas, mines, booby-traps and other devices.
- 3. Humanitarian and fact-finding missions of the United Nations System
  - (a) This paragraph applies to any humanitarian or fact-finding mission of the United Nations System.
  - (b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall:
    - (i) provide the personnel of the mission with the protections set out in sub-paragraph 2(b) (i) of this Article; and
    - (ii) if access to or through any place under its control is necessary for the performance of the mission's functions and in order to provide the personnel of the mission with safe passage to or through that place:

- (aa) unless on-going hostilities prevent, inform the head of the mission of a safe route to that place if such information is available; or
- (bb) if information identifying a safe route is not provided in accordance with sub-paragraph (aa), so far as is necessary and feasible, clear a lane through minefields.

#### 4. Missions of the International Committee of the Red Cross

- (a) This paragraph applies to any mission of the International Committee of the Red Cross performing functions with the consent of the host State or States as provided for by the Geneva Conventions of 12 August 1949 and, where applicable, their Additional Protocols.
- (b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall:
  - (i) provide the personnel of the mission with the protections set out in sub-paragraph 2(b) (i) of this Article; and
  - (ii) take the measures set out in sub-paragraph 3(b) (ii) of this Article.

#### 5. Other humanitarian missions and missions of enquiry

- (a) Insofar as paragraphs 2, 3 and 4 above do not apply to them, this paragraph applies to the following missions when they are performing functions in the area of a conflict or to assist the victims of a conflict:
  - (i) any humanitarian mission of a national Red Cross or Red Crescent Society or of their International Federation;
  - (ii) any mission of an impartial humanitarian organization, including any impartial humanitarian demining mission; and
  - (iii) any mission of enquiry established pursuant to the provisions of the Geneva Conventions of 12 August 1949 and, where applicable, their Additional Protocols.
- (b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall, so far as is feasible:
  - (i) provide the personnel of the mission with the protections set out in sub-paragraph 2(b) (i) of this Article, and
  - (ii) take the measures set out in sub-paragraph 3(b) (ii) of this Article.

#### 6. Confidentiality

All information provided in confidence pursuant to this Article shall be treated by the recipient in strict confidence and shall not be released outside the force or mission concerned without the express authorization of the provider of the information.

#### 7. Respect for laws and regulations

Without prejudice to such privileges and immunities as they may enjoy or to the requirements of their duties, personnel participating in the forces and missions referred to in this Article shall:

- (a) respect the laws and regulations of the host State; and
- (b) refrain from any action or activity incompatible with the impartial and international nature of their duties.

#### **ARTICLE 13. Consultations of High Contracting Parties**

1. The High Contracting Parties undertake to consult and cooperate with each other on all issues related to the operation of this Protocol. For this purpose, a conference of High Contracting Parties shall be held annually.
2. Participation in the annual conferences shall be determined by their agreed Rules of Procedure.
3. The work of the conference shall include:
  - (a) review of the operation and status of this Protocol;
  - (b) consideration of matters arising from reports by High Contracting Parties according to paragraph 4 of this Article;
  - (c) preparation for review conferences; and
  - (d) consideration of the development of technologies to protect civilians against indiscriminate effects of mines.
4. The High Contracting Parties shall provide annual reports to the Depositary, who shall circulate them to all High Contracting Parties in advance of the Conference, on any of the following matters:
  - (a) dissemination of information on this Protocol to their armed forces and to the civilian population;
  - (b) mine clearance and rehabilitation programmes;
  - (c) steps taken to meet technical requirements of this Protocol and any other relevant information pertaining thereto;
  - (d) legislation related to this Protocol;
  - (e) measures taken on international technical information exchange, on international cooperation on mine clearance, and on technical cooperation and assistance; and
  - (f) other relevant matters.
5. The cost of the Conference of High Contracting Parties shall be borne by the High Contracting Parties and States not parties participating in the work of the Conference, in accordance with the United Nations scale of assessment adjusted appropriately.

#### **ARTICLE 14. Compliance**

1. Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control.

2. The measures envisaged in paragraph I of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, wilfully kill or cause serious injury to civilians and to bring such persons to justice.
3. Each High Contracting Party shall also require that its armed forces issue relevant military instructions and operating procedures and that armed forces personnel receive training commensurate with their duties and responsibilities to comply with the provisions of this Protocol.
4. The High Contracting Parties undertake to consult each other and to cooperate with each other bilaterally, through the Secretary-General of the United Nations or through other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.

### **Technical Annex**

#### **1. Recording**

- (a) Recording of the location of mines other than remotely-delivered mines, minefields, mined areas, booby-traps and other devices shall be carried out in accordance with the following provisions:
  - (i) the location of the minefields, mined areas and areas of booby-traps and other devices shall be specified accurately by relation to the coordinates of at least two reference points and the estimated dimensions of the area containing these weapons in relation to those reference points;
  - (ii) maps, diagrams or other records shall be made in such a way as to indicate the location of minefields, mined areas, booby-traps and other devices in relation to reference points, and these records shall also indicate their perimeters and extent;
  - (iii) for purposes of detection and clearance of mines, booby-traps and other devices, maps, diagrams or other records shall contain complete information on the type, number, emplacing method, type of fuse and life time, date and time of laying, anti-handling devices (if any) and other relevant information on all these weapons laid. Whenever feasible the minefield record shall show the exact location of every mine, except in row minefields where the row location is sufficient. The precise location and operating mechanism of each booby-trap laid shall be individually recorded.
- (b) The estimated location and area of remotely-delivered mines shall be specified by coordinates of reference points (normally corner points) and shall be ascertained and when feasible marked on the ground at the earliest opportunity. The total number and types of mines laid, the date and time of laying and the self-destruction time periods shall also be recorded.

- (c) Copies of records shall be held at a level of command sufficient to guarantee their safety as far as possible.
- (d) The use of mines produced after the entry into force of this Protocol is prohibited unless they are marked in English or in the respective national language or languages with the following information:
  - (i) name of the country of origin;
  - (ii) month and year of production; and
  - (iii) serial number or lot number.

The marking should be visible, legible, durable and resistant to environmental effects, as far as possible.

## **2. Specifications on detectability**

- (a) With respect to anti-personnel mines produced after 1 January 1997, such mines shall incorporate in their construction a material or device that enables the mine to be detected by commonly-available technical mine detection equipment and provides a response signal equivalent to a signal from 8 grammes or more of iron in a single coherent mass.
- (b) With respect to anti-personnel mines produced before 1 January 1997, such mines shall either incorporate in their construction, or have attached prior to their emplacement, in a manner not easily removable, a material or device that enables the mine to be detected by commonly-available technical mine detection equipment and provides a response signal equivalent to a signal from 8 grammes or more of iron in a single coherent mass.
- (c) In the event that a High Contracting Party determines that it cannot immediately comply with sub-paragraph (b), it may declare at the time of its notification of consent to be bound by this Protocol that it will defer compliance with sub-paragraph (b) for a period not to exceed 9 years from the entry into force of this Protocol. In the meantime it shall, to the extent feasible, minimize the use of anti-personnel mines that do not so comply.

## **3. Specifications on self-destruction and self-deactivation**

- (a) All remotely-delivered anti-personnel mines shall be designed and constructed so that no more than 10% of activated mines will fail to self-destruct within 30 days after emplacement, and each mine shall have a back-up self-deactivation feature designed and constructed so that, in combination with the self-destruction mechanism, no more than one in one thousand activated mines will function as a mine 120 days after emplacement.
- (b) All non-remotely delivered anti-personnel mines, used outside marked areas, as defined in Article 5 of this Protocol, shall comply with the requirements for self-destruction and self-deactivation stated in sub-paragraph (a).

- (c) In the event that a High Contracting Party determines that it cannot immediately comply with sub-paragraphs (a) and/or (b), it may declare at the time of its notification of consent to be bound by this Protocol, that it will, with respect to mines produced prior to the entry into force of this Protocol defer compliance with sub-paragraphs (a) and/or (b) for a period not to exceed 9 years from the entry into force of this Protocol. During this period of deferral, the High Contracting Party shall:
  - (i) undertake to minimize, to the extent feasible, the use of anti-personnel mines that do not so comply, and
  - (ii) with respect to remotely-delivered anti-personnel mines, comply with either the requirements for self-destruction or the requirements for self-deactivation and, with respect to other anti-personnel mines comply with at least the requirements for self-deactivation.

#### **4. International signs for minefields and mined areas**

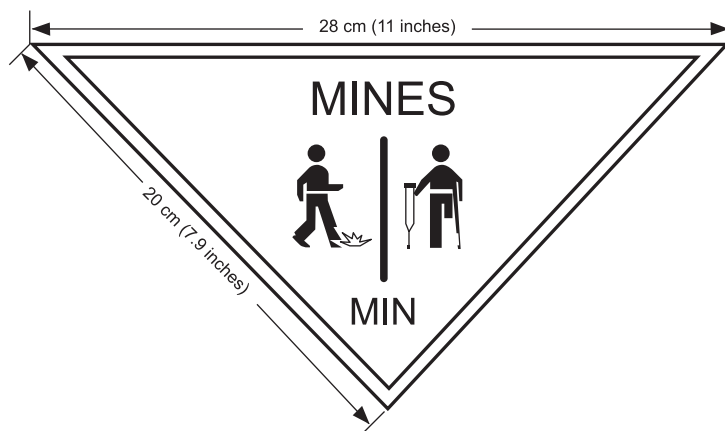
Signs similar to the example attached [1] and as specified below shall be utilized in the marking of minefields and mined areas to ensure their visibility and recognition by the civilian population:

- (a) *size and shape*: a triangle or square no smaller than 28 centimetres (11 inches) by 20 centimetres (7.9 inches) for a triangle, and 15 centimetres (6 inches) per side for a square;
- (b) *colour*: red or orange with a yellow reflecting border
- (c) *symbol*: the symbol illustrated in the Attachment, or an alternative readily recognizable in the area in which the sign is to be displayed as identifying a dangerous area;
- (d) *language*: the sign should contain the word “mines” in one of the six official languages of the Convention (Arabic, Chinese, English, French, Russian and Spanish) and the language or languages prevalent in that area;
- (e) *spacing*: signs should be placed around the minefield or mined area at a distance sufficient to ensure their visibility at any point by a civilian approaching the area.



[1]

## WARNING SIGN FOR AREAS CONTAINING MINES



**Document No. 17, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction**

[Source: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, 18 September 1997; available at [www.icrc.org](http://www.icrc.org)]

**Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997****Preamble**

*The States Parties,*

*Determined* to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, and have other severe consequences for years after emplacement,

*Believing* it necessary to do their utmost to contribute in an efficient and coordinated manner to face the challenge of removing anti-personnel mines placed throughout the world, and to assure their destruction,

*Wishing* to do their utmost in providing assistance for the care and rehabilitation, including the social and economic reintegration of mine victims,

*Recognizing* that a total ban of anti-personnel mines would also be an important confidence-building measure,

*Welcoming* the adoption of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and calling for the early ratification of this Protocol by all States which have not yet done so,

*Welcoming* also United Nations General Assembly Resolution 51/45 S of 10 December 1996 urging all States to pursue vigorously an effective, legally-binding international agreement to ban the use, stockpiling, production and transfer of anti-personnel landmines,

*Welcoming* furthermore the measures taken over the past years, both unilaterally and multilaterally, aiming at prohibiting, restricting or suspending the use, stockpiling, production and transfer of anti-personnel mines,

*Stressing* the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines and recognizing the efforts to that end undertaken by the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines and numerous other non-governmental organizations around the world,

*Recalling* the Ottawa Declaration of 5 October 1996 and the Brussels Declaration of 27 June 1997 urging the international community to negotiate an international and legally binding agreement prohibiting the use, stockpiling, production and transfer of anti-personnel mines,

*Emphasizing* the desirability of attracting the adherence of all States to this Convention, and determined to work strenuously towards the promotion of its universalization in all relevant fora including, *inter alia*, the United Nations, the Conference on Disarmament, regional organizations, and groupings, and review conferences of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects,

*Basing* themselves on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, on the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants,

*Have agreed* as follows:

#### **ARTICLE 1. General obligations**

1. Each State Party undertakes never under any circumstances:
  - a) To use anti-personnel mines;
  - b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;
  - c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.
2. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.

#### **ARTICLE 2. Definitions**

1. "Anti-personnel mine" means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.
2. "Mine" means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle.
3. "Anti-handling device" means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.

4. "Transfer" involves, in addition to the physical movement of anti-personnel mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced anti-personnel mines.
5. "Mined area" means an area which is dangerous due to the presence or suspected presence of mines.

#### **ARTICLE 3. Exceptions**

1. Notwithstanding the general obligations under Article 1, the retention or transfer of a number of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques is permitted. The amount of such mines shall not exceed the minimum number absolutely necessary for the above-mentioned purposes.
2. The transfer of anti-personnel mines for the purpose of destruction is permitted.

#### **ARTICLE 4. Destruction of stockpiled anti-personnel mines**

Except as provided for in Article 3, each State Party undertakes to destroy or ensure the destruction of all stockpiled anti-personnel mines it owns or possesses, or that are under its jurisdiction or control, as soon as possible but not later than four years after the entry into force of this Convention for that State Party.

#### **ARTICLE 5. Destruction of anti-personnel mines in mined areas**

1. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party.
2. Each State Party shall make every effort to identify all areas under its jurisdiction or control in which anti-personnel mines are known or suspected to be emplaced and shall ensure as soon as possible that all anti-personnel mines in mined areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means, to ensure the effective exclusion of civilians, until all anti-personnel mines contained therein have been destroyed. The marking shall at least be to the standards set out in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.
3. If a State Party believes that it will be unable to destroy or ensure the destruction of all anti-personnel mines referred to in paragraph 1 within that time period, it may submit a request to a Meeting of the States Parties or a Review Conference for an extension of the deadline for completing the destruction of such anti-personnel mines, for a period of up to ten years.
4. Each request shall contain:
  - a) The duration of the proposed extension;

- b) A detailed explanation of the reasons for the proposed extension, including:
    - (i) The preparation and status of work conducted under national demining programs;
    - (ii) The financial and technical means available to the State Party for the destruction of all the anti-personnel mines; and
    - (iii) Circumstances which impede the ability of the State Party to destroy all the anti-personnel mines in mined areas;
  - c) The humanitarian, social, economic, and environmental implications of the extension; and
  - d) Any other information relevant to the request for the proposed extension.
5. The Meeting of the States Parties or the Review Conference shall, taking into consideration the factors contained in paragraph 4, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension period.
6. Such an extension may be renewed upon the submission of a new request in accordance with paragraphs 3, 4 and 5 of this Article. In requesting a further extension period a State Party shall submit relevant additional information on what has been undertaken in the previous extension period pursuant to this Article.

#### **ARTICLE 6. International cooperation and assistance**

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance, where feasible, from other States Parties to the extent possible.
2. Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision of mine clearance equipment and related technological information for humanitarian purposes.
3. Each State Party in a position to do so shall provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims and for mine awareness programs. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organizations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organizations, or on a bilateral basis.
4. Each State Party in a position to do so shall provide assistance for mine clearance and related activities. Such assistance may be provided, *inter alia*, through the United Nations system, international or regional organizations or institutions, non-governmental organizations or institutions, or on a bilateral basis, or by contributing to the United Nations Voluntary Trust Fund for Assistance in Mine Clearance, or other regional funds that deal with demining.

5. Each State Party in a position to do so shall provide assistance for the destruction of stockpiled anti-personnel mines.
6. Each State Party undertakes to provide information to the database on mine clearance established within the United Nations system, especially information concerning various means and technologies of mine clearance, and lists of experts, expert agencies or national points of contact on mine clearance.
7. States Parties may request the United Nations, regional organizations, other States Parties or other competent intergovernmental or non-governmental fora to assist its authorities in the elaboration of a national demining program to determine, *inter alia*:
  - a) The extent and scope of the anti-personnel mine problem;
  - b) The financial, technological and human resources that are required for the implementation of the program;
  - c) The estimated number of years necessary to destroy all anti-personnel mines in mined areas under the jurisdiction or control of the concerned State Party;
  - d) Mine awareness activities to reduce the incidence of mine-related injuries or deaths;
  - e) Assistance to mine victims;
  - f) The relationship between the Government of the concerned State Party and the relevant governmental, inter-governmental or non-governmental entities that will work in the implementation of the program.
8. Each State Party giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programs.

#### **ARTICLE 7. Transparency measures**

1. Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party on:
  - a) The national implementation measures referred to in Article 9;
  - b) The total of all stockpiled anti-personnel mines owned or possessed by it, or under its jurisdiction or control, to include a breakdown of the type, quantity and, if possible, lot numbers of each type of anti-personnel mine stockpiled;
  - c) To the extent possible, the location of all mined areas that contain, or are suspected to contain, anti-personnel mines under its jurisdiction or control, to include as much detail as possible regarding the type and quantity of each type of anti-personnel mine in each mined area and when they were emplaced;
  - d) The types, quantities and, if possible, lot numbers of all anti-personnel mines retained or transferred for the development of and training in mine detection,

mine clearance or mine destruction techniques, or transferred for the purpose of destruction, as well as the institutions authorized by a State Party to retain or transfer anti-personnel mines, in accordance with Article 3;

- e) The status of programs for the conversion or de-commissioning of anti-personnel mine production facilities;
  - f) The status of programs for the destruction of anti-personnel mines in accordance with Articles 4 and 5, including details of the methods which will be used in destruction, the location of all destruction sites and the applicable safety and environmental standards to be observed;
  - g) The types and quantities of all anti-personnel mines destroyed after the entry into force of this Convention for that State Party, to include a breakdown of the quantity of each type of anti-personnel mine destroyed, in accordance with Articles 4 and 5, respectively, along with, if possible, the lot numbers of each type of anti-personnel mine in the case of destruction in accordance with Article 4;
  - h) The technical characteristics of each type of anti-personnel mine produced, to the extent known, and those currently owned or possessed by a State Party, giving, where reasonably possible, such categories of information as may facilitate identification and clearance of anti-personnel mines; at a minimum, this information shall include the dimensions, fusing, explosive content, metallic content, colour photographs and other information which may facilitate mine clearance; and
  - i) The measures taken to provide an immediate and effective warning to the population in relation to all areas identified under paragraph 2 of Article 5.
- 2. The information provided in accordance with this Article shall be updated by the States Parties annually, covering the last calendar year, and reported to the Secretary-General of the United Nations not later than 30 April of each year.
  - 3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.

#### **ARTICLE 8. Facilitation and clarification of compliance**

- 1. The States Parties agree to consult and cooperate with each other regarding the implementation of the provisions of this Convention, and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations under this Convention.
- 2. If one or more States Parties wish to clarify and seek to resolve questions relating to compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall provide, through the Secretary-General

of the United Nations, within 28 days to the requesting State Party all information which would assist in clarifying this matter.

3. If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of the States Parties. The Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond.
4. Pending the convening of any meeting of the States Parties, any of the States Parties concerned may request the Secretary-General of the United Nations to exercise his or her good offices to facilitate the clarification requested.
5. The requesting State Party may propose through the Secretary-General of the United Nations the convening of a Special Meeting of the States Parties to consider the matter. The Secretary-General of the United Nations shall thereupon communicate this proposal and all information submitted by the States Parties concerned, to all States Parties with a request that they indicate whether they favour a Special Meeting of the States Parties, for the purpose of considering the matter. In the event that within 14 days from the date of such communication, at least one-third of the States Parties favours such a Special Meeting, the Secretary-General of the United Nations shall convene this Special Meeting of the States Parties within a further 14 days. A quorum for this Meeting shall consist of a majority of States Parties.
6. The Meeting of the States Parties or the Special Meeting of the States Parties, as the case may be, shall first determine whether to consider the matter further, taking into account all information submitted by the States Parties concerned. The Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach a decision by consensus. If despite all efforts to that end no agreement has been reached, it shall take this decision by a majority of States Parties present and voting.
7. All States Parties shall cooperate fully with the Meeting of the States Parties or the Special Meeting of the States Parties in the fulfilment of its review of the matter, including any fact-finding missions that are authorized in accordance with paragraph 8.
8. If further clarification is required, the Meeting of the States Parties or the Special Meeting of the States Parties shall authorize a fact-finding mission and decide on its mandate by a majority of States Parties present and voting. At any time the requested State Party may invite a fact-finding mission to its territory. Such a mission shall take place without a decision by a Meeting of the States Parties or a Special Meeting of the States Parties to authorize such a mission. The mission, consisting of up to 9 experts, designated and approved in accordance with paragraphs 9 and 10, may collect additional information on the spot or in other



places directly related to the alleged compliance issue under the jurisdiction or control of the requested State Party.

9. The Secretary-General of the United Nations shall prepare and update a list of the names, nationalities and other relevant data of qualified experts provided by States Parties and communicate it to all States Parties. Any expert included on this list shall be regarded as designated for all fact-finding missions unless a State Party declares its non-acceptance in writing. In the event of non-acceptance, the expert shall not participate in fact-finding missions on the territory or any other place under the jurisdiction or control of the objecting State Party, if the non-acceptance was declared prior to the appointment of the expert to such missions.
10. Upon receiving a request from the Meeting of the States Parties or a Special Meeting of the States Parties, the Secretary-General of the United Nations shall, after consultations with the requested State Party, appoint the members of the mission, including its leader. Nationals of States Parties requesting the fact-finding mission or directly affected by it shall not be appointed to the mission. The members of the fact-finding mission shall enjoy privileges and immunities under Article VI of the Convention on the Privileges and Immunities of the United Nations, adopted on 13 February 1946.
11. Upon at least 72 hours notice, the members of the fact-finding mission shall arrive in the territory of the requested State Party at the earliest opportunity. The requested State Party shall take the necessary administrative measures to receive, transport and accommodate the mission, and shall be responsible for ensuring the security of the mission to the maximum extent possible while they are on territory under its control.
12. Without prejudice to the sovereignty of the requested State Party, the fact-finding mission may bring into the territory of the requested State Party the necessary equipment which shall be used exclusively for gathering information on the alleged compliance issue. Prior to its arrival, the mission will advise the requested State Party of the equipment that it intends to utilize in the course of its fact-finding mission.
13. The requested State Party shall make all efforts to ensure that the fact-finding mission is given the opportunity to speak with all relevant persons who may be able to provide information related to the alleged compliance issue.
14. The requested State Party shall grant access for the fact-finding mission to all areas and installations under its control where facts relevant to the compliance issue could be expected to be collected. This shall be subject to any arrangements that the requested State Party considers necessary for:
  - a) The protection of sensitive equipment, information and areas;
  - b) The protection of any constitutional obligations the requested State Party may have with regard to proprietary rights, searches and seizures, or other constitutional rights; or

- c) The physical protection and safety of the members of the fact-finding mission. In the event that the requested State Party makes such arrangements, it shall make every reasonable effort to demonstrate through alternative means its compliance with this Convention.
- 15. The fact-finding mission may remain in the territory of the State Party concerned for no more than 14 days, and at any particular site no more than 7 days, unless otherwise agreed.
- 16. All information provided in confidence and not related to the subject matter of the fact-finding mission shall be treated on a confidential basis.
- 17. The fact-finding mission shall report, through the Secretary-General of the United Nations, to the Meeting of the States Parties or the Special Meeting of the States Parties the results of its findings.
- 18. The Meeting of the States Parties or the Special Meeting of the States Parties shall consider all relevant information, including the report submitted by the fact-finding mission, and may request the requested State Party to take measures to address the compliance issue within a specified period of time. The requested State Party shall report on all measures taken in response to this request.
- 19. The Meeting of the States Parties or the Special Meeting of the States Parties may suggest to the States Parties concerned ways and means to further clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law. In circumstances where the issue at hand is determined to be due to circumstances beyond the control of the requested State Party, the Meeting of the States Parties or the Special Meeting of the States Parties may recommend appropriate measures, including the use of cooperative measures referred to in Article 6.
- 20. The Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach its decisions referred to in paragraphs 18 and 19 by consensus, otherwise by a two-thirds majority of States Parties present and voting.

#### **ARTICLE 9. National implementation measures**

Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

#### **ARTICLE 10. Settlement of disputes**

- 1. The States Parties shall consult and cooperate with each other to settle any dispute that may arise with regard to the application or the interpretation of this Convention. Each State Party may bring any such dispute before the Meeting of the States Parties.
- 2. The Meeting of the States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices,

calling upon the States parties to a dispute to start the settlement procedure of their choice and recommending a time-limit for any agreed procedure.

3. This Article is without prejudice to the provisions of this Convention on facilitation and clarification of compliance.

#### **ARTICLE 11. Meetings of the States Parties**

1. The States Parties shall meet regularly in order to consider any matter with regard to the application or implementation of this Convention, including:
  - a) The operation and status of this Convention;
  - b) Matters arising from the reports submitted under the provisions of this Convention;
  - c) International cooperation and assistance in accordance with Article 6;
  - d) The development of technologies to clear anti-personnel mines;
  - e) Submissions of States Parties under Article 8; and
  - f) Decisions relating to submissions of States Parties as provided for in Article 5.
2. The First Meeting of the States Parties shall be convened by the Secretary-General of the United Nations within one year after the entry into force of this Convention. The subsequent meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.
3. Under the conditions set out in Article 8, the Secretary-General of the United Nations shall convene a Special Meeting of the States Parties.
4. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend these meetings as observers in accordance with the agreed Rules of Procedure.

#### **ARTICLE 12. Review Conferences**

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.
2. The purpose of the Review Conference shall be:
  - a) To review the operation and status of this Convention;
  - b) To consider the need for and the interval between further Meetings of the States Parties referred to in paragraph 2 of Article 11;

- c) To take decisions on submissions of States Parties as provided for in Article 5; and
  - d) To adopt, if necessary, in its final report conclusions related to the implementation of this Convention.
3. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Review Conference as observers in accordance with the agreed Rules of Procedure.

#### **ARTICLE 13. Amendments**

1. At any time after the entry into force of this Convention any State Party may propose amendments to this Convention. Any proposal for an amendment shall be communicated to the Depositary, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the Depositary no later than 30 days after its circulation that they support further consideration of the proposal, the Depositary shall convene an Amendment Conference to which all States Parties shall be invited.
2. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Amendment Conference as observers in accordance with the agreed Rules of Procedure.
3. The Amendment Conference shall be held immediately following a Meeting of the States Parties or a Review Conference unless a majority of the States Parties request that it be held earlier.
4. Any amendment to this Convention shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to the States Parties.
5. An amendment to this Convention shall enter into force for all States Parties to this Convention which have accepted it, upon the deposit with the Depositary of instruments of acceptance by a majority of States Parties. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

#### **ARTICLE 14. Costs**

1. The costs of the Meetings of the States Parties, the Special Meetings of the States Parties, the Review Conferences and the Amendment Conferences shall be borne by the States Parties and States not parties to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately.

2. The costs incurred by the Secretary-General of the United Nations under Articles 7 and 8 and the costs of any fact-finding mission shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.

#### **ARTICLE 15. Signature**

This Convention, done at Oslo, Norway, on 18 September 1997, shall be open for signature at Ottawa, Canada, by all States from 3 December 1997 until 4 December 1997, and at the United Nations Headquarters in New York from 5 December 1997 until its entry into force.

#### **ARTICLE 16. Ratification, acceptance, approval or accession**

1. This Convention is subject to ratification, acceptance or approval of the Signatories.
2. It shall be open for accession by any State which has not signed the Convention.
3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

#### **ARTICLE 17. Entry into force**

1. This Convention shall enter into force on the first day of the sixth month after the month in which the 40<sup>th</sup> instrument of ratification, acceptance, approval or accession has been deposited.
2. For any State which deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the 40<sup>th</sup> instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the sixth month after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

#### **ARTICLE 18. Provisional application**

Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally paragraph 1 of Article 1 of this Convention pending its entry into force.

#### **ARTICLE 19. Reservations**

The Articles of this Convention shall not be subject to reservations.

#### **ARTICLE 20. Duration and withdrawal**

1. This Convention shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating this withdrawal.
3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-

month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.

4. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law.

**ARTICLE 21. Depositary**

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.

**ARTICLE 22. Authentic texts**

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

**Document No. 18, Protocol on Explosive Remnants of War  
(Protocol V to the 1980 Convention)**

[Source: Protocol on Explosive Remnants of War (Protocol V). Geneva, 28 November 2003; available at [www.icrc.org](http://www.icrc.org)]

**Protocol on Explosive Remnants of War  
(Protocol V)****28 November 2003**

*The High Contracting Parties,*

*Recognising* the serious post-conflict humanitarian problems caused by explosive remnants of war,

*Conscious* of the need to conclude a Protocol on post-conflict remedial measures of a generic nature in order to minimise the risks and effects of explosive remnants of war,

*And willing* to address generic preventive measures, through voluntary best practices specified in a Technical Annex for improving the reliability of munitions, and therefore minimising the occurrence of explosive remnants of war,

*Have agreed* as follows:

**ARTICLE 1. General provision and scope of application**

1. In conformity with the Charter of the United Nations and of the rules of the international law of armed conflict applicable to them, High Contracting Parties agree to comply with the obligations specified in this Protocol, both individually and in co-operation with other High Contracting Parties, to minimise the risks and effects of explosive remnants of war in post-conflict situations.
2. This Protocol shall apply to explosive remnants of war on the land territory including internal waters of High Contracting Parties.
3. This Protocol shall apply to situations resulting from conflicts referred to in Article 1, paragraphs 1 to 6, of the Convention, as amended on 21 December 2001.
4. Articles 3, 4, 5 and 8 of this Protocol apply to explosive remnants of war other than existing explosive remnants of war as defined in Article 2, paragraph 5 of this Protocol.

**ARTICLE 2. Definitions**

For the purpose of this Protocol,

1. *Explosive ordnance* means conventional munitions containing explosives, with the exception of mines, booby traps and other devices as defined in Protocol II of this Convention as amended on 3 May 1996.
2. *Unexploded ordnance* means explosive ordnance that has been primed, fused, armed, or otherwise prepared for use and used in an armed conflict. It may have

been fired, dropped, launched or projected and should have exploded but failed to do so.

3. *Abandoned explosive ordnance* means explosive ordnance that has not been used during an armed conflict, that has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left it behind or dumped it. Abandoned explosive ordnance may or may not have been primed, fused, armed or otherwise prepared for use.
4. *Explosive remnants of war* means unexploded ordnance and abandoned explosive ordnance.
5. *Existing explosive remnants of war* means unexploded ordnance and abandoned explosive ordnance that existed prior to the entry into force of this Protocol for the High Contracting Party on whose territory it exists.

### **ARTICLE 3. Clearance, removal or destruction of explosive remnants of war**

1. Each High Contracting Party and party to an armed conflict shall bear the responsibilities set out in this Article with respect to all explosive remnants of war in territory under its control. In cases where a user of explosive ordnance which has become explosive remnants of war, does not exercise control of the territory, the user shall, after the cessation of active hostilities, provide where feasible, *inter alia* technical, financial, material or human resources assistance, bilaterally or through a mutually agreed third party, including *inter alia* through the United Nations system or other relevant organisations, to facilitate the marking and clearance, removal or destruction of such explosive remnants of war.
2. After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control. Areas affected by explosive remnants of war which are assessed pursuant to paragraph 3 of this Article as posing a serious humanitarian risk shall be accorded priority status for clearance, removal or destruction.
3. After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall take the following measures in affected territories under its control, to reduce the risks posed by explosive remnants of war:
  - (a) survey and assess the threat posed by explosive remnants of war;
  - (b) assess and prioritise needs and practicability in terms of marking and clearance, removal or destruction;
  - (c) mark and clear, remove or destroy explosive remnants of war;
  - (d) take steps to mobilise resources to carry out these activities.
4. In conducting the above activities High Contracting Parties and parties to an armed conflict shall take into account international standards, including the International Mine Action Standards.



5. High Contracting Parties shall co-operate, where appropriate, both among themselves and with other states, relevant regional and international organisations and non-governmental organisations on the provision of *inter alia* technical, financial, material and human resources assistance including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil the provisions of this Article.

#### **ARTICLE 4. Recording, retaining and transmission of information**

1. High Contracting Parties and parties to an armed conflict shall to the maximum extent possible and as far as practicable record and retain information on the use of explosive ordnance or abandonment of explosive ordnance, to facilitate the rapid marking and clearance, removal or destruction of explosive remnants of war, risk education and the provision of relevant information to the party in control of the territory and to civilian populations in that territory.
2. High Contracting Parties and parties to an armed conflict which have used or abandoned explosive ordnance which may have become explosive remnants of war shall, without delay after the cessation of active hostilities and as far as practicable, subject to these parties' legitimate security interests, make available such information to the party or parties in control of the affected area, bilaterally or through a mutually agreed third party including *inter alia* the United Nations or, upon request, to other relevant organisations which the party providing the information is satisfied are or will be undertaking risk education and the marking and clearance, removal or destruction of explosive remnants of war in the affected area.
3. In recording, retaining and transmitting such information, the High Contracting Parties should have regard to Part 1 of the Technical Annex.

#### **ARTICLE 5. Other precautions for the protection of the civilian population, individual civilians and civilian objects from the risks and effects of explosive remnants of war**

1. High Contracting Parties and parties to an armed conflict shall take all feasible precautions in the territory under their control affected by explosive remnants of war to protect the civilian population, individual civilians and civilian objects from the risks and effects of explosive remnants of war. Feasible precautions are those precautions which are practicable or practicably possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. These precautions may include warnings, risk education to the civilian population, marking, fencing and monitoring of territory affected by explosive remnants of war, as set out in Part 2 of the Technical Annex.

#### **ARTICLE 6. Provisions for the protection of humanitarian missions and organisations from the effects of explosive remnants of war**

1. Each High Contracting Party and party to an armed conflict shall:
  - (a) Protect, as far as feasible, from the effects of explosive remnants of war, humanitarian missions and organisations that are or will be operating in the area under the control of the High Contracting Party or party to an armed conflict and with that party's consent.

- (b) Upon request by such a humanitarian mission or organisation, provide, as far as feasible, information on the location of all explosive remnants of war that it is aware of in territory where the requesting humanitarian mission or organisation will operate or is operating.
- 2. The provisions of this Article are without prejudice to existing International Humanitarian Law or other international instruments as applicable or decisions by the Security Council of the United Nations which provide for a higher level of protection.

**ARTICLE 7. Assistance with respect to existing explosive remnants of war**

- 1. Each High Contracting Party has the right to seek and receive assistance, where appropriate, from other High Contracting Parties, from states non-party and relevant international organisations and institutions in dealing with the problems posed by existing explosive remnants of war.
- 2. Each High Contracting Party in a position to do so shall provide assistance in dealing with the problems posed by existing explosive remnants of war, as necessary and feasible. In so doing, High Contracting Parties shall also take into account the humanitarian objectives of this Protocol, as well as international standards including the International Mine Action Standards.

**ARTICLE 8. Co-operation and assistance**

- 1. Each High Contracting Party in a position to do so shall provide assistance for the marking and clearance, removal or destruction of explosive remnants of war, and for risk education to civilian populations and related activities *inter alia* through the United Nations system, other relevant international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organisations, or on a bilateral basis.
- 2. Each High Contracting Party in a position to do so shall provide assistance for the care and rehabilitation and social and economic reintegration of victims of explosive remnants of war. Such assistance may be provided *inter alia* through the United Nations system, relevant international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organisations, or on a bilateral basis.
- 3. Each High Contracting Party in a position to do so shall contribute to trust funds within the United Nations system, as well as other relevant trust funds, to facilitate the provision of assistance under this Protocol.
- 4. Each High Contracting Party shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information other than weapons related technology, necessary for the implementation of this Protocol. High Contracting Parties undertake to facilitate such exchanges in accordance with national legislation and shall not impose undue restrictions on

the provision of clearance equipment and related technological information for humanitarian purposes.

5. Each High Contracting Party undertakes to provide information to the relevant databases on mine action established within the United Nations system, especially information concerning various means and technologies of clearance of explosive remnants of war, lists of experts, expert agencies or national points of contact on clearance of explosive remnants of war and, on a voluntary basis, technical information on relevant types of explosive ordnance.
6. High Contracting Parties may submit requests for assistance substantiated by relevant information to the United Nations, to other appropriate bodies or to other states. These requests may be submitted to the Secretary-General of the United Nations, who shall transmit them to all High Contracting Parties and to relevant international organisations and non-governmental organisations.
7. In the case of requests to the United Nations, the Secretary-General of the United Nations, within the resources available to the Secretary-General of the United Nations, may take appropriate steps to assess the situation and in co-operation with the requesting High Contracting Party and other High Contracting Parties with responsibility as set out in Article 3 above, recommend the appropriate provision of assistance. The Secretary-General may also report to High Contracting Parties on any such assessment as well as on the type and scope of assistance required, including possible contributions from the trust funds established within the United Nations system.

#### **ARTICLE 9. Generic preventive measures**

1. Bearing in mind the different situations and capacities, each High Contracting Party is encouraged to take generic preventive measures aimed at minimising the occurrence of explosive remnants of war, including, but not limited to, those referred to in part 3 of the Technical Annex.
2. Each High Contracting Party may, on a voluntary basis, exchange information related to efforts to promote and establish best practices in respect of paragraph 1 of this Article.

#### **ARTICLE 10. Consultations of High Contracting Parties**

1. The High Contracting Parties undertake to consult and co-operate with each other on all issues related to the operation of this Protocol. For this purpose, a Conference of High Contracting Parties shall be held as agreed to by a majority, but no less than eighteen High Contracting Parties.
2. The work of the conferences of High Contracting Parties shall include:
  - (a) review of the status and operation of this Protocol;
  - (b) consideration of matters pertaining to national implementation of this Protocol, including national reporting or updating on an annual basis.
  - (c) preparation for review conferences.

3. The costs of the Conference of High Contracting Parties shall be borne by the High Contracting Parties and States not parties participating in the Conference, in accordance with the United Nations scale of assessment adjusted appropriately.

#### **ARTICLE 11. Compliance**

1. Each High Contracting Party shall require that its armed forces and relevant agencies or departments issue appropriate instructions and operating procedures and that its personnel receive training consistent with the relevant provisions of this Protocol.
2. The High Contracting Parties undertake to consult each other and to co-operate with each other bilaterally, through the Secretary-General of the United Nations or through other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.

#### **Technical Annex**

This Technical Annex contains suggested best practice for achieving the objectives contained in Articles 4, 5 and 9 of this Protocol. This Technical Annex will be implemented by High Contracting Parties on a voluntary basis.

1. Recording, storage and release of information for Unexploded Ordnance (UXO) and Abandoned Explosive Ordnance (AXO)
  - (a) Recording of information: Regarding explosive ordnance which may have become UXO a State should endeavour to record the following information as accurately as possible:
    - (i) the location of areas targeted using explosive ordnance;
    - (ii) the approximate number of explosive ordnance used in the areas under (i);
    - (iii) the type and nature of explosive ordnance used in areas under (i);
    - (iv) the general location of known and probable UXO;

Where a State has been obliged to abandon explosive ordnance in the course of operations, it should endeavour to leave AXO in a safe and secure manner and record information on this ordnance as follows:

- (v) the location of AXO;
    - (vi) the approximate amount of AXO at each specific site;
    - (vii) the types of AXO at each specific site.
  - (b) Storage of information: Where a State has recorded information in accordance with paragraph (a), it should be stored in such a manner as to allow for its retrieval and subsequent release in accordance with paragraph (c).
  - (c) Release of information: Information recorded and stored by a State in accordance with paragraphs (a) and (b) should, taking into account the

security interests and other obligations of the State providing the information, be released in accordance with the following provisions:

(i) *Content:*

On UXO the released information should contain details on:

- (1) the general location of known and probable UXO;
- (2) the types and approximate number of explosive ordnance used in the targeted areas;
- (3) the method of identifying the explosive ordnance including colour, size and shape and other relevant markings;
- (4) the method for safe disposal of the explosive ordnance.

On AXO the released information should contain details on:

- (5) the location of the AXO;
- (6) the approximate number of AXO at each specific site;
- (7) the types of AXO at each specific site;
- (8) the method of identifying the AXO, including colour, size and shape;
- (9) information on type and methods of packing for AXO;
- (10) state of readiness;
- (11) the location and nature of any booby traps known to be present in the area of AXO.

(ii) *Recipient:* The information should be released to the party or parties in control of the affected territory and to those persons or institutions that the releasing State is satisfied are, or will be, involved in UXO or AXO clearance in the affected area, in the education of the civilian population on the risks of UXO or AXO.

(iii) *Mechanism:* A State should, where feasible, make use of those mechanisms established internationally or locally for the release of information, such as through UNMAS, IMSMA, and other expert agencies, as considered appropriate by the releasing State.

(iv) *Timing:* The information should be released as soon as possible, taking into account such matters as any ongoing military and humanitarian operations in the affected areas, the availability and reliability of information and relevant security issues.

2. Warnings, risk education, marking, fencing and monitoring

Key terms

(a) Warnings are the punctual provision of cautionary information to the civilian population, intended to minimise risks caused by explosive remnants of war in affected territories.

(b) Risk education to the civilian population should consist of risk education programmes to facilitate information exchange between affected communities, government authorities and humanitarian organisations so that affected communities are informed about the threat from explosive remnants of war. Risk education programmes are usually a long-term activity.

### Best practice elements of warnings and risk education

- (c) All programmes of warnings and risk education should, where possible, take into account prevailing national and international standards, including the International Mine Action Standards.
- (d) Warnings and risk education should be provided to the affected civilian population which comprises civilians living in or around areas containing explosive remnants of war and civilians who transit such areas.
- (e) Warnings should be given, as soon as possible, depending on the context and the information available. A risk education programme should replace a warnings programme as soon as possible. Warnings and risk education always should be provided to the affected communities at the earliest possible time.
- (f) Parties to a conflict should employ third parties such as international organisations and non-governmental organisations when they do not have the resources and skills to deliver efficient risk education.
- (g) Parties to a conflict should, if possible, provide additional resources for warnings and risk education. Such items might include: provision of logistical support, production of risk education materials, financial support and general cartographic information.

### Marking, fencing, and monitoring of an explosive remnants of war affected area

- (h) When possible, at any time during the course of a conflict and thereafter, where explosive remnants of war exist the parties to a conflict should, at the earliest possible time and to the maximum extent possible, ensure that areas containing explosive remnants of war are marked, fenced and monitored so as to ensure the effective exclusion of civilians, in accordance with the following provisions.
- (i) Warning signs based on methods of marking recognised by the affected community should be utilised in the marking of suspected hazardous areas. Signs and other hazardous area boundary markers should as far as possible be visible, legible, durable and resistant to environmental effects and should clearly identify which side of the marked boundary is considered to be within the explosive remnants of war affected area and which side is considered to be safe.
- (j) An appropriate structure should be put in place with responsibility for the monitoring and maintenance of permanent and temporary marking systems, integrated with national and local risk education programmes.

## 3. Generic preventive measures

States producing or procuring explosive ordnance should to the extent possible and as appropriate endeavour to ensure that the following measures are implemented and respected during the life-cycle of explosive ordnance.

- (a) Munitions manufacturing management
  - (i) Production processes should be designed to achieve the greatest reliability of munitions.

- (ii) Production processes should be subject to certified quality control measures.
- (iii) During the production of explosive ordnance, certified quality assurance standards that are internationally recognised should be applied.
- (iv) Acceptance testing should be conducted through live-fire testing over a range of conditions or through other validated procedures.
- (v) High reliability standards should be required in the course of explosive ordnance transactions and transfers.

(b) Munitions management

In order to ensure the best possible long-term reliability of explosive ordnance, States are encouraged to apply best practice norms and operating procedures with respect to its storage, transport, field storage, and handling in accordance with the following guidance.

- (i) Explosive ordnance, where necessary, should be stored in secure facilities or appropriate containers that protect the explosive ordnance and its components in a controlled atmosphere, if necessary.
- (ii) A State should transport explosive ordnance to and from production facilities, storage facilities and the field in a manner that minimises damage to the explosive ordnance.
- (iii) Appropriate containers and controlled environments, where necessary, should be used by a State when stockpiling and transporting explosive ordnance.
- (iv) The risk of explosions in stockpiles should be minimised by the use of appropriate stockpile arrangements.
- (v) States should apply appropriate explosive ordnance logging, tracking and testing procedures, which should include information on the date of manufacture of each number, lot or batch of explosive ordnance, and information on where the explosive ordnance has been, under what conditions it has been stored, and to what environmental factors it has been exposed.
- (vi) Periodically, stockpiled explosive ordnance should undergo, where appropriate, live-firing testing to ensure that munitions function as desired.
- (vii) Sub-assemblies of stockpiled explosive ordnance should, where appropriate, undergo laboratory testing to ensure that munitions function as desired.
- (viii) Where necessary, appropriate action, including adjustment to the expected shelf-life of ordnance, should be taken as a result of information acquired by logging, tracking and testing procedures, in order to maintain the reliability of stockpiled explosive ordnance.

(c) Training

The proper training of all personnel involved in the handling, transporting and use of explosive ordnance is an important factor in seeking to ensure its

reliable operation as intended. States should therefore adopt and maintain suitable training programmes to ensure that personnel are properly trained with regard to the munitions with which they will be required to deal.

(d) Transfer

A State planning to transfer explosive ordnance to another State that did not previously possess that type of explosive ordnance should endeavour to ensure that the receiving State has the capability to store, maintain and use that explosive ordnance correctly.

(e) Future production

A State should examine ways and means of improving the reliability of explosive ordnance that it intends to produce or procure, with a view to achieving the highest possible reliability.



**Document No. 19, Convention on Cluster Munitions**

[Source: Convention on Cluster Munitions, Dublin, 30 May 2008; available at [www.clusterconvention.org](http://www.clusterconvention.org)]

**Convention on Cluster Munitions****Dublin, 30 May 2008****The States Parties to this Convention,**

*Deeply concerned* that civilian populations and individual civilians continue to bear the brunt of armed conflict,

*Determined* to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned,

*Concerned* that cluster munition remnants kill or maim civilians, including women and children, obstruct economic and social development, including through the loss of livelihood, impede post-conflict rehabilitation and reconstruction, delay or prevent the return of refugees and internally displaced persons, can negatively impact on national and international peace-building and humanitarian assistance efforts, and have other severe consequences that can persist for many years after use,

*Deeply concerned* also at the dangers presented by the large national stockpiles of cluster munitions retained for operational use and *determined* to ensure their rapid destruction,

*Believing* it necessary to contribute effectively in an efficient, coordinated manner to resolving the challenge of removing cluster munition remnants located throughout the world, and to ensure their destruction,

*Determined* also to ensure the full realisation of the rights of all cluster munition victims and recognising their inherent dignity,

*Resolved* to do their utmost in providing assistance to cluster munition victims, including medical care, rehabilitation and psychological support, as well as providing for their social and economic inclusion,

*Recognising* the need to provide age- and gender-sensitive assistance to cluster munition victims and to address the special needs of vulnerable groups,

*Bearing in mind* the Convention on the Rights of Persons with Disabilities which, *inter alia*, requires that States Parties to that Convention undertake to ensure and promote the full realisation of all human rights and fundamental freedoms of all persons with disabilities without discrimination of any kind on the basis of disability,

*Mindful* of the need to coordinate adequately efforts undertaken in various fora to address the rights and needs of victims of various types of weapons, and *resolved* to avoid discrimination among victims of various types of weapons,

*Reaffirming* that in cases not covered by this Convention or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law, derived from established custom, from the principles of humanity and from the dictates of public conscience,

*Resolved* also that armed groups distinct from the armed forces of a State shall not, under any circumstances, be permitted to engage in any activity prohibited to a State Party to this Convention,

*Welcoming* the very broad international support for the international norm prohibiting anti-personnel mines, enshrined in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction,

*Welcoming* also the adoption of the Protocol on Explosive Remnants of War, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, and its entry into force on 12 November 2006, and *wishing* to enhance the protection of civilians from the effects of cluster munition remnants in post-conflict environments,

*Bearing in mind* also United Nations Security Council Resolution 1325 on women, peace and security and United Nations Security Council Resolution 1612 on children in armed conflict,

*Welcoming* further the steps taken nationally, regionally and globally in recent years aimed at prohibiting, restricting or suspending the use, stockpiling, production and transfer of cluster munitions,

*Stressing* the role of public conscience in furthering the principles of humanity as evidenced by the global call for an end to civilian suffering caused by cluster munitions and *recognising* the efforts to that end undertaken by the United Nations, the International Committee of the Red Cross, the Cluster Munition Coalition and numerous other non-governmental organisations around the world,

*Reaffirming* the Declaration of the Oslo Conference on Cluster Munitions, by which, *inter alia*, States recognised the grave consequences caused by the use of cluster munitions and committed themselves to conclude by 2008 a legally binding instrument that would prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians, and would establish a framework for cooperation and assistance that ensures adequate provision of care and rehabilitation for victims, clearance of contaminated areas, risk reduction education and destruction of stockpiles,

*Emphasising* the desirability of attracting the adherence of all States to this Convention, and *determined* to work strenuously towards the promotion of its universalisation and its full implementation,

*Basing* themselves on the principles and rules of international humanitarian law, in particular the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, and the rules that the parties to a conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations against

military objectives only, that in the conduct of military operations constant care shall be taken to spare the civilian population, civilians and civilian objects and that the civilian population and individual civilians enjoy general protection against dangers arising from military operations,

**HAVE AGREED** as follows:

### **Article 1**

#### *General obligations and scope of application*

1. Each State Party undertakes never under any circumstances to:
  - a. Use cluster munitions;
  - b. Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;
  - c. Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.
2. Paragraph 1 of this Article applies, mutatis mutandis, to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft.
3. This Convention does not apply to mines.

### **Article 2**

#### *Definitions*

For the purposes of this Convention:

1. **Cluster munition victims** means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities;
2. **Cluster munition** means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. It does not mean the following:
  - a. A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;
  - b. A munition or submunition designed to produce electrical or electronic effects;
  - c. A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
    - i. Each munition contains fewer than ten explosive submunitions;
    - ii. Each explosive submunition weighs more than four kilograms;

- iii. Each explosive submunition is designed to detect and engage a single target object;
  - iv. Each explosive submunition is equipped with an electronic self-destruction mechanism;
  - v. Each explosive submunition is equipped with an electronic self-deactivating feature;
3. **Explosive submunition** means a conventional munition that in order to perform its task is dispersed or released by a cluster munition and is designed to function by detonating an explosive charge prior to, on or after impact;
  4. **Failed cluster munition** means a cluster munition that has been fired, dropped, launched, projected or otherwise delivered and which should have dispersed or released its explosive submunitions but failed to do so;
  5. **Unexploded submunition** means an explosive submunition that has been dispersed or released by, or otherwise separated from, a cluster munition and has failed to explode as intended;
  6. **Abandoned cluster munitions** means cluster munitions or explosive submunitions that have not been used and that have been left behind or dumped, and that are no longer under the control of the party that left them behind or dumped them. They may or may not have been prepared for use;
  7. **Cluster munition remnants** means failed cluster munitions, abandoned cluster munitions, unexploded submunitions and unexploded bomblets;
  8. **Transfer** involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions, but does not involve the transfer of territory containing cluster munition remnants;
  9. **Self-destruction mechanism** means an incorporated automatically-functioning mechanism which is in addition to the primary initiating mechanism of the munition and which secures the destruction of the munition into which it is incorporated;
  10. **Self-deactivating** means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example a battery, that is essential to the operation of the munition;
  11. **Cluster munition contaminated area** means an area known or suspected to contain cluster munition remnants;
  12. **Mine** means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle;
  13. **Explosive bomblet** means a conventional munition, weighing less than 20 kilograms, which is not self-propelled and which, in order to perform its task, is dispersed or released by a dispenser, and is designed to function by detonating an explosive charge prior to, on or after impact;

14. **Dispenser** means a container that is designed to disperse or release explosive bomblets and which is affixed to an aircraft at the time of dispersal or release;
15. **Unexploded bomblet** means an explosive bomblet that has been dispersed, released or otherwise separated from a dispenser and has failed to explode as intended.

### Article 3

#### *Storage and stockpile destruction*

1. Each State Party shall, in accordance with national regulations, separate all cluster munitions under its jurisdiction and control from munitions retained for operational use and mark them for the purpose of destruction.
2. Each State Party undertakes to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 of this Article as soon as possible but not later than eight years after the entry into force of this Convention for that State Party. Each State Party undertakes to ensure that destruction methods comply with applicable international standards for protecting public health and the environment.
3. If a State Party believes that it will be unable to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 of this Article within eight years of entry into force of this Convention for that State Party it may submit a request to a Meeting of States Parties or a Review Conference for an extension of the deadline for completing the destruction of such cluster munitions by a period of up to four years. A State Party may, in exceptional circumstances, request additional extensions of up to four years. The requested extensions shall not exceed the number of years strictly necessary for that State Party to complete its obligations under paragraph 2 of this Article.
4. Each request for an extension shall set out:
  - a. The duration of the proposed extension;
  - b. A detailed explanation of the proposed extension, including the financial and technical means available to or required by the State Party for the destruction of all cluster munitions referred to in paragraph 1 of this Article and, where applicable, the exceptional circumstances justifying it;
  - c. A plan for how and when stockpile destruction will be completed;
  - d. The quantity and type of cluster munitions and explosive submunitions held at the entry into force of this Convention for that State Party and any additional cluster munitions or explosive submunitions discovered after such entry into force;
  - e. The quantity and type of cluster munitions and explosive submunitions destroyed during the period referred to in paragraph 2 of this Article; and
  - f. The quantity and type of cluster munitions and explosive submunitions remaining to be destroyed during the proposed extension and the annual destruction rate expected to be achieved.

5. The Meeting of States Parties or the Review Conference shall, taking into consideration the factors referred to in paragraph 4 of this Article, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension. The States Parties may decide to grant a shorter extension than that requested and may propose benchmarks for the extension, as appropriate. A request for an extension shall be submitted a minimum of nine months prior to the Meeting of States Parties or the Review Conference at which it is to be considered.
6. Notwithstanding the provisions of Article 1 of this Convention, the retention or acquisition of a limited number of cluster munitions and explosive submunitions for the development of and training in cluster munition and explosive submunition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures, is permitted. The amount of explosive submunitions retained or acquired shall not exceed the minimum number absolutely necessary for these purposes.
7. Notwithstanding the provisions of Article 1 of this Convention, the transfer of cluster munitions to another State Party for the purpose of destruction, as well as for the purposes described in paragraph 6 of this Article, is permitted.
8. States Parties retaining, acquiring or transferring cluster munitions or explosive submunitions for the purposes described in paragraphs 6 and 7 of this Article shall submit a detailed report on the planned and actual use of these cluster munitions and explosive submunitions and their type, quantity and lot numbers. If cluster munitions or explosive submunitions are transferred to another State Party for these purposes, the report shall include reference to the receiving party. Such a report shall be prepared for each year during which a State Party retained, acquired or transferred cluster munitions or explosive submunitions and shall be submitted to the Secretary-General of the United Nations no later than 30 April of the following year.

#### **Article 4**

##### *Clearance and destruction of cluster munition remnants and risk reduction education*

1. Each State Party undertakes to clear and destroy, or ensure the clearance and destruction of, cluster munition remnants located in cluster munition contaminated areas under its jurisdiction or control, as follows:
  - a. Where cluster munition remnants are located in areas under its jurisdiction or control at the date of entry into force of this Convention for that State Party, such clearance and destruction shall be completed as soon as possible but not later than ten years from that date;
  - b. Where, after entry into force of this Convention for that State Party, cluster munitions have become cluster munition remnants located in areas under its jurisdiction or control, such clearance and destruction must be completed as

- soon as possible but not later than ten years after the end of the active hostilities during which such cluster munitions became cluster munition remnants; and
- c. Upon fulfilling either of its obligations set out in sub-paragraphs (a) and (b) of this paragraph, that State Party shall make a declaration of compliance to the next Meeting of States Parties.
2. In fulfilling its obligations under paragraph 1 of this Article, each State Party shall take the following measures as soon as possible, taking into consideration the provisions of Article 6 of this Convention regarding international cooperation and assistance:
    - a. Survey, assess and record the threat posed by cluster munition remnants, making every effort to identify all cluster munition contaminated areas under its jurisdiction or control;
    - b. Assess and prioritise needs in terms of marking, protection of civilians, clearance and destruction, and take steps to mobilise resources and develop a national plan to carry out these activities, building, where appropriate, upon existing structures, experiences and methodologies;
    - c. Take all feasible steps to ensure that all cluster munition contaminated areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means to ensure the effective exclusion of civilians. Warning signs based on methods of marking readily recognisable by the affected community should be utilised in the marking of suspected hazardous areas. Signs and other hazardous area boundary markers should, as far as possible, be visible, legible, durable and resistant to environmental effects and should clearly identify which side of the marked boundary is considered to be within the cluster munition contaminated areas and which side is considered to be safe;
    - d. Clear and destroy all cluster munition remnants located in areas under its jurisdiction or control; and
    - e. Conduct risk reduction education to ensure awareness among civilians living in or around cluster munition contaminated areas of the risks posed by such remnants.
  3. In conducting the activities referred to in paragraph 2 of this Article, each State Party shall take into account international standards, including the International Mine Action Standards (IMAS).
  4. This paragraph shall apply in cases in which cluster munitions have been used or abandoned by one State Party prior to entry into force of this Convention for that State Party and have become cluster munition remnants that are located in areas under the jurisdiction or control of another State Party at the time of entry into force of this Convention for the latter.
    - a. In such cases, upon entry into force of this Convention for both States Parties, the former State Party is strongly encouraged to provide, *inter alia*, technical, financial, material or human resources assistance to the latter State Party, either bilaterally or through a mutually agreed third party, including through

the United Nations system or other relevant organisations, to facilitate the marking, clearance and destruction of such cluster munition remnants.

- b. Such assistance shall include, where available, information on types and quantities of the cluster munitions used, precise locations of cluster munition strikes and areas in which cluster munition remnants are known to be located.
5. If a State Party believes that it will be unable to clear and destroy or ensure the clearance and destruction of all cluster munition remnants referred to in paragraph 1 of this Article within ten years of the entry into force of this Convention for that State Party, it may submit a request to a Meeting of States Parties or a Review Conference for an extension of the deadline for completing the clearance and destruction of such cluster munition remnants by a period of up to five years. The requested extension shall not exceed the number of years strictly necessary for that State Party to complete its obligations under paragraph 1 of this Article.
6. A request for an extension shall be submitted to a Meeting of States Parties or a Review Conference prior to the expiry of the time period referred to in paragraph 1 of this Article for that State Party. Each request shall be submitted a minimum of nine months prior to the Meeting of States Parties or Review Conference at which it is to be considered. Each request shall set out:
  - a. The duration of the proposed extension;
  - b. A detailed explanation of the reasons for the proposed extension, including the financial and technical means available to and required by the State Party for the clearance and destruction of all cluster munition remnants during the proposed extension;
  - c. The preparation of future work and the status of work already conducted under national clearance and demining programmes during the initial ten year period referred to in paragraph 1 of this Article and any subsequent extensions;
  - d. The total area containing cluster munition remnants at the time of entry into force of this Convention for that State Party and any additional areas containing cluster munition remnants discovered after such entry into force;
  - e. The total area containing cluster munition remnants cleared since entry into force of this Convention;
  - f. The total area containing cluster munition remnants remaining to be cleared during the proposed extension;
  - g. The circumstances that have impeded the ability of the State Party to destroy all cluster munition remnants located in areas under its jurisdiction or control during the initial ten year period referred to in paragraph 1 of this Article, and those that may impede this ability during the proposed extension;
  - h. The humanitarian, social, economic and environmental implications of the proposed extension; and
  - i. Any other information relevant to the request for the proposed extension.



7. The Meeting of States Parties or the Review Conference shall, taking into consideration the factors referred to in paragraph 6 of this Article, including, *inter alia*, the quantities of cluster munition remnants reported, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension. The States Parties may decide to grant a shorter extension than that requested and may propose benchmarks for the extension, as appropriate.
8. Such an extension may be renewed by a period of up to five years upon the submission of a new request, in accordance with paragraphs 5, 6 and 7 of this Article. In requesting a further extension a State Party shall submit relevant additional information on what has been undertaken during the previous extension granted pursuant to this Article.

### **Article 5**

#### *Victim assistance*

1. Each State Party with respect to cluster munition victims in areas under its jurisdiction or control shall, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion. Each State Party shall make every effort to collect reliable relevant data with respect to cluster munition victims.
2. In fulfilling its obligations under paragraph 1 of this Article each State Party shall:
  - a. Assess the needs of cluster munition victims;
  - b. Develop, implement and enforce any necessary national laws and policies;
  - c. Develop a national plan and budget, including timeframes to carry out these activities, with a view to incorporating them within the existing national disability, development and human rights frameworks and mechanisms, while respecting the specific role and contribution of relevant actors;
  - d. Take steps to mobilise national and international resources;
  - e. Not discriminate against or among cluster munition victims, or between cluster munition victims and those who have suffered injuries or disabilities from other causes; differences in treatment should be based only on medical, rehabilitative, psychological or socio-economic needs;
  - f. Closely consult with and actively involve cluster munition victims and their representative organisations;
  - g. Designate a focal point within the government for coordination of matters relating to the implementation of this Article; and
  - h. Strive to incorporate relevant guidelines and good practices including in the areas of medical care, rehabilitation and psychological support, as well as social and economic inclusion.

## Article 6

### *International cooperation and assistance*

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance.
2. Each State Party in a position to do so shall provide technical, material and financial assistance to States Parties affected by cluster munitions, aimed at the implementation of the obligations of this Convention. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organisations or institutions, non-governmental organisations or institutions, or on a bilateral basis.
3. Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision and receipt of clearance and other such equipment and related technological information for humanitarian purposes.
4. In addition to any obligations it may have pursuant to paragraph 4 of Article 4 of this Convention, each State Party in a position to do so shall provide assistance for clearance and destruction of cluster munition remnants and information concerning various means and technologies related to clearance of cluster munitions, as well as lists of experts, expert agencies or national points of contact on clearance and destruction of cluster munition remnants and related activities.
5. Each State Party in a position to do so shall provide assistance for the destruction of stockpiled cluster munitions, and shall also provide assistance to identify, assess and prioritise needs and practical measures in terms of marking, risk reduction education, protection of civilians and clearance and destruction as provided in Article 4 of this Convention.
6. Where, after entry into force of this Convention, cluster munitions have become cluster munition remnants located in areas under the jurisdiction or control of a State Party, each State Party in a position to do so shall urgently provide emergency assistance to the affected State Party.
7. Each State Party in a position to do so shall provide assistance for the implementation of the obligations referred to in Article 5 of this Convention to adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for social and economic inclusion of cluster munition victims. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent Societies and their International Federation, non-governmental organisations or on a bilateral basis.

8. Each State Party in a position to do so shall provide assistance to contribute to the economic and social recovery needed as a result of cluster munition use in affected States Parties.
9. Each State Party in a position to do so may contribute to relevant trust funds in order to facilitate the provision of assistance under this Article.
10. Each State Party that seeks and receives assistance shall take all appropriate measures in order to facilitate the timely and effective implementation of this Convention, including facilitation of the entry and exit of personnel, materiel and equipment, in a manner consistent with national laws and regulations, taking into consideration international best practices.
11. Each State Party may, with the purpose of developing a national action plan, request the United Nations system, regional organisations, other States Parties or other competent intergovernmental or non-governmental institutions to assist its authorities to determine, *inter alia*:
  - a. The nature and extent of cluster munition remnants located in areas under its jurisdiction or control;
  - b. The financial, technological and human resources required for the implementation of the plan;
  - c. The time estimated as necessary to clear and destroy all cluster munition remnants located in areas under its jurisdiction or control;
  - d. Risk reduction education programmes and awareness activities to reduce the incidence of injuries or deaths caused by cluster munition remnants;
  - e. Assistance to cluster munition victims; and
  - f. The coordination relationship between the government of the State Party concerned and the relevant governmental, intergovernmental or non-governmental entities that will work in the implementation of the plan.
12. States Parties giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programmes.

## Article 7

### *Transparency measures*

1. Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party, on:
  - a. The national implementation measures referred to in Article 9 of this Convention;
  - b. The total of all cluster munitions, including explosive submunitions, referred to in paragraph 1 of Article 3 of this Convention, to include a breakdown of their type, quantity and, if possible, lot numbers of each type;

- c. The technical characteristics of each type of cluster munition produced by that State Party prior to entry into force of this Convention for it, to the extent known, and those currently owned or possessed by it, giving, where reasonably possible, such categories of information as may facilitate identification and clearance of cluster munitions; at a minimum, this information shall include the dimensions, fusing, explosive content, metallic content, colour photographs and other information that may facilitate the clearance of cluster munition remnants;
- d. The status and progress of programmes for the conversion or decommissioning of production facilities for cluster munitions;
- e. The status and progress of programmes for the destruction, in accordance with Article 3 of this Convention, of cluster munitions, including explosive submunitions, with details of the methods that will be used in destruction, the location of all destruction sites and the applicable safety and environmental standards to be observed;
- f. The types and quantities of cluster munitions, including explosive submunitions, destroyed in accordance with Article 3 of this Convention, including details of the methods of destruction used, the location of the destruction sites and the applicable safety and environmental standards observed;
- g. Stockpiles of cluster munitions, including explosive submunitions, discovered after reported completion of the programme referred to in sub-paragraph (e) of this paragraph, and plans for their destruction in accordance with Article 3 of this Convention;
- h. To the extent possible, the size and location of all cluster munition contaminated areas under its jurisdiction or control, to include as much detail as possible regarding the type and quantity of each type of cluster munition remnant in each such area and when they were used;
- i. The status and progress of programmes for the clearance and destruction of all types and quantities of cluster munition remnants cleared and destroyed in accordance with Article 4 of this Convention, to include the size and location of the cluster munition contaminated area cleared and a breakdown of the quantity of each type of cluster munition remnant cleared and destroyed;
- j. The measures taken to provide risk reduction education and, in particular, an immediate and effective warning to civilians living in cluster munition contaminated areas under its jurisdiction or control;
- k. The status and progress of implementation of its obligations under Article 5 of this Convention to adequately provide age- and gender- sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for social and economic inclusion of cluster munition victims and to collect reliable relevant data with respect to cluster munition victims;
- l. The name and contact details of the institutions mandated to provide information and to carry out the measures described in this paragraph;

- m. The amount of national resources, including financial, material or in kind, allocated to the implementation of Articles 3, 4 and 5 of this Convention; and
  - n. The amounts, types and destinations of international cooperation and assistance provided under Article 6 of this Convention.
2. The information provided in accordance with paragraph 1 of this Article shall be updated by the States Parties annually, covering the previous calendar year, and reported to the Secretary-General of the United Nations not later than 30 April of each year.
  3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.

### **Article 8**

#### *Facilitation and clarification of compliance*

1. The States Parties agree to consult and cooperate with each other regarding the implementation of the provisions of this Convention and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations under this Convention.
2. If one or more States Parties wish to clarify and seek to resolve questions relating to a matter of compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information that would assist in clarifying the matter.
3. If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of States Parties. The Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond.
4. Pending the convening of any Meeting of States Parties, any of the States Parties concerned may request the Secretary-General of the United Nations to exercise his or her good offices to facilitate the clarification requested.
5. Where a matter has been submitted to it pursuant to paragraph 3 of this Article, the Meeting of States Parties shall first determine whether to consider that matter further, taking into account all information submitted by the States Parties concerned. If it does so determine, the Meeting of States Parties may suggest

to the States Parties concerned ways and means further to clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law. In circumstances where the issue at hand is determined to be due to circumstances beyond the control of the requested State Party, the Meeting of States Parties may recommend appropriate measures, including the use of cooperative measures referred to in Article 6 of this Convention.

6. In addition to the procedures provided for in paragraphs 2 to 5 of this Article, the Meeting of States Parties may decide to adopt such other general procedures or specific mechanisms for clarification of compliance, including facts, and resolution of instances of non-compliance with the provisions of this Convention as it deems appropriate.

### **Article 9**

#### *National implementation measures*

Each State Party shall take all appropriate legal, administrative and other measures to implement this Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

### **Article 10**

#### *Settlement of disputes*

1. When a dispute arises between two or more States Parties relating to the interpretation or application of this Convention, the States Parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of their choice, including recourse to the Meeting of States Parties and referral to the International Court of Justice in conformity with the Statute of the Court.
2. The Meeting of States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties concerned to start the settlement procedure of their choice and recommending a time-limit for any agreed procedure.

### **Article 11**

#### *Meetings of States Parties*

1. The States Parties shall meet regularly in order to consider and, where necessary, take decisions in respect of any matter with regard to the application or implementation of this Convention, including:
  - a. The operation and status of this Convention;
  - b. Matters arising from the reports submitted under the provisions of this Convention;

- c. International cooperation and assistance in accordance with Article 6 of this Convention;
  - d. The development of technologies to clear cluster munition remnants;
  - e. Submissions of States Parties under Articles 8 and 10 of this Convention; and
  - f. Submissions of States Parties as provided for in Articles 3 and 4 of this Convention.
2. The first Meeting of States Parties shall be convened by the Secretary-General of the United Nations within one year of entry into force of this Convention. The subsequent meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.
3. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend these meetings as observers in accordance with the agreed rules of procedure.

## **Article 12**

### *Review Conferences*

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.
2. The purpose of the Review Conference shall be:
  - a. To review the operation and status of this Convention;
  - b. To consider the need for and the interval between further Meetings of States Parties referred to in paragraph 2 of Article 11 of this Convention; and
  - c. To take decisions on submissions of States Parties as provided for in Articles 3 and 4 of this Convention.
3. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend each Review Conference as observers in accordance with the agreed rules of procedure.

### **Article 13**

#### *Amendments*

1. At any time after its entry into force any State Party may propose amendments to this Convention. Any proposal for an amendment shall be communicated to the Secretary-General of the United Nations, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the Secretary-General of the United Nations no later than 90 days after its circulation that they support further consideration of the proposal, the Secretary-General of the United Nations shall convene an Amendment Conference to which all States Parties shall be invited.
2. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend each Amendment Conference as observers in accordance with the agreed rules of procedure.
3. The Amendment Conference shall be held immediately following a Meeting of States Parties or a Review Conference unless a majority of the States Parties request that it be held earlier.
4. Any amendment to this Convention shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to all States.
5. An amendment to this Convention shall enter into force for States Parties that have accepted the amendment on the date of deposit of acceptances by a majority of the States which were Parties at the date of adoption of the amendment. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

### **Article 14**

#### *Costs and administrative tasks*

1. The costs of the Meetings of States Parties, the Review Conferences and the Amendment Conferences shall be borne by the States Parties and States not party to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately.
2. The costs incurred by the Secretary-General of the United Nations under Articles 7 and 8 of this Convention shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.
3. The performance by the Secretary-General of the United Nations of administrative tasks assigned to him or her under this Convention is subject to an appropriate United Nations mandate.



**Article 15***Signature*

This Convention, done at Dublin on 30 May 2008, shall be open for signature at Oslo by all States on 3 December 2008 and thereafter at United Nations Headquarters in New York until its entry into force.

**Article 16***Ratification, acceptance, approval or accession*

1. This Convention is subject to ratification, acceptance or approval by the Signatories.
2. It shall be open for accession by any State that has not signed the Convention.
3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

**Article 17***Entry into force*

1. This Convention shall enter into force on the first day of the sixth month after the month in which the thirtieth instrument of ratification, acceptance, approval or accession has been deposited.
2. For any State that deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the sixth month after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

**Article 18***Provisional application*

Any State may, at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally Article 1 of this Convention pending its entry into force for that State.

**Article 19***Reservations*

The Articles of this Convention shall not be subject to reservations.

**Article 20***Duration and withdrawal*

1. This Convention shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other

States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating withdrawal.

3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.

## **Article 21**

### *Relations with States not party to this Convention*

1. Each State Party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention.
2. Each State Party shall notify the governments of all States not party to this Convention, referred to in paragraph 3 of this Article, of its obligations under this Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions.
3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.
4. Nothing in paragraph 3 of this Article shall authorise a State Party:
  - a. To develop, produce or otherwise acquire cluster munitions;
  - b. To itself stockpile or transfer cluster munitions;
  - c. To itself use cluster munitions; or
  - d. To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

## **Article 22**

### *Depositary*

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.

## **Article 23**

### *Authentic texts*

The Arabic, Chinese, English, French, Russian and Spanish texts of this Convention shall be equally authentic.

**Case No. 20, The Issue of Mercenaries**

[See also **Document No. 30**, Montreux Document on Private Military and Security Companies and **Case No. 274**, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea]

**A. Art. 47 of Protocol I**

[**Source:** Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; available on <http://www.icrc.org/ihl>]

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
  - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
  - (b) does, in fact, take a direct part in the hostilities;
  - (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
  - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
  - (e) is not a member of the armed forces of a Party to the conflict; and
  - (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

**B. International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989**

[**Source:** United Nations, A/RES/44/34 (4 December 1989), available on <http://www.icrc.org/ihl>]

*The States Parties to the present Convention, [...]*

Being aware of the recruitment, use, financing and training of mercenaries for activities which violate principles of international law, such as those of sovereign equality, political independence, territorial integrity of States and self-determination of peoples,

Affirming that the recruitment, use, financing and training of mercenaries should be considered as offences of grave concern to all States and that any person committing any of these offences should be either prosecuted or extradited [...],

*Have agreed as follows:*

**Article 1**

For the purposes of the present Convention,

1. A mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
  - (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
  - (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
  - (d) Is not a member of the armed forces of a party to the conflict; and
  - (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
2. A mercenary is also any person who, in any other situation:
- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at :
    - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
    - (ii) Undermining the territorial integrity of a State;
  - (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
  - (c) Is neither a national nor a resident of the State against which such an act is directed;
  - (d) Has not been sent by a State on official duty; and
  - (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

#### **Article 2**

Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention.

#### **Article 3**

1. A mercenary, as defined in article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention. [...]

#### **Article 5**

1. States Parties shall not recruit, use, finance or train mercenaries and shall prohibit such activities in accordance with the provisions of the present Convention.
2. States Parties shall not recruit, use, finance or train mercenaries for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination, as recognized by international law, and shall take, in conformity with international law, the appropriate measures to prevent the recruitment, use, financing or training of mercenaries for that purpose.

3. They shall make the offences set forth in the present Convention punishable by appropriate penalties which take into account the grave nature of those offences. [...]

**Article 9**

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in the present Convention which are committed :
  - (a) In its territory or on board a ship or aircraft registered in that State;
  - (b) By any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in that territory. [...]

**Article 10**

[...]

3. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled:
  - (a) To communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to protect his rights or, if he is a stateless person, the State in whose territory he has his habitual residence;
  - (b) To be visited by a representative of that State.
4. The provisions of paragraph 3 of this article shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 9, paragraph 1 (b), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender. [...]

**Article 11**

Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in the present Convention shall be guaranteed at all stages of the proceedings fair treatment and all the rights and guarantees provided for in the law of the State in question. Applicable norms of international law should be taken into account. [...]

**Article 16**

The present Convention shall be applied without prejudice to:

- (a) The rules relating to the international responsibility of States;
- (b) The law of armed conflict and international humanitarian law, including the provisions relating to the status of combatant or of prisoner of war. [...]

**[N.B.:** On 1 January 2010, 32 States had ratified or acceded to this convention, which entered into force on 20 October 2001.]

## C. UN Report submitted by M. E. Bernaldes Ballesteros, Special Rapporteur on the Question of the Use of Mercenaries

[Source: UN. E/CN.4/2004/15, 24 December 2003; available on <http://www.ohchr.org>]

### THE RIGHT OF PEOPLES TO SELF-DETERMINATION AND ITS APPLICATION TO PEOPLES UNDER COLONIAL OR ALIEN DOMINATION OR FOREIGN OCCUPATION

Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; report submitted by Mr. Enrique Bernaldes Ballesteros, Special Rapporteur

[...]

#### Introduction

1. The present report is the last submitted to the Commission on Human Rights by the Special Rapporteur, after 16 years in the discharge of the mandate established by Commission resolution 1987/16.
2. By resolution 2003/2 of 14 April 2003 the Commission [...] reaffirms [...] its condemnation of mercenary activities as a violation of the principle of self-determination to which all peoples have a right, pointing out that such activities constitute a danger to peace and security in developing countries, particularly in Africa and in small island States. [...]
3. The Commission, pursuant to the investigations conducted by the Special Rapporteur, recognized that armed conflicts, terrorism, arms trafficking and covert operations by third Powers, *inter alia*, encourage the demand on the global market for mercenaries. [...]
4. The Commission reaffirmed, *inter alia*, that the use of mercenaries and their recruitment, financing and training were causes for grave concern to all States and violated the purposes and principles enshrined in the Charter of the United Nations. It welcomed the entry into force of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries; it welcomed the cooperation extended by those countries that had received a visit from the Special Rapporteur and welcomed the adoption by some States of national legislation that restricted the recruitment, assembly, financing, training and transit of mercenaries.
5. The Commission also requested the Special Rapporteur to hold consultations on implementation of the resolution and to report, at its sixtieth session, with specific recommendations, his findings on the use of mercenaries. [...]
6. The Commission called upon all States to consider taking the necessary action to ratify or accede to the International Convention; it invited them to investigate the possibility of mercenary involvement whenever and wherever criminal acts occurred; and it urged them to cooperate fully with the Special Rapporteur in the fulfilment of his mandate. [...]

## II. MERCENARY ACTIVITIES IN AFRICA

[...]

21. The destabilizing activities undertaken under apartheid affected all southern Africa. In South Africa and outside South African territory, members of the African National Congress (ANC) were persecuted and, in more than one case, murdered by mercenaries. During the 1990s South Africa freed itself from that regime, which was replaced by a multiracial democracy that respected its various ethnic communities and was firmly committed to the protection of human rights. In that new context the Special Rapporteur visited South Africa in 1997. Today South Africa has interesting legislation that, in particular, prohibits any kind of mercenary activity, the country having moved forward in the regulation and supervision of private companies that offer security services internationally so as to prevent them from employing mercenaries.
22. The situation in West Africa is of particular concern to the Special Rapporteur. The presence of mercenaries has been observed in the armed conflict that has affected Sierra Leone since the 1996 elections, particularly during the so-called “cleansing operation” in 1998 and the invasion of Freetown in January 1999. [...]
23. Sierra Leone is well on the way towards peace and an improved human rights situation. Nevertheless violent acts continue in some areas, particularly along the border with Liberia. In January 2003 a village in Kailahun district was attacked by irregular Liberian armed groups. The situation in the diamond-producing areas is also disquieting, in that it has not proven possible to consolidate State authority and the presence of mercenaries guarding installations has been observed. [...]
25. The Special Rapporteur was informed that at the end of August 2003 a group of mercenaries that was preparing to travel to Côte d’Ivoire was arrested by the French police at a Paris airport. The group had reportedly been recruited by Sergeant Major Ibrahim Coulibaly. [...]

## III. DEVELOPMENT OF MERCENARY ACTIVITIES AND OF THE MANDATE

26. The mandate on the use of mercenaries was created in 1987 in a context in which it was necessary to reaffirm the right of peoples to self-determination, particularly as it was threatened by mercenary activities in Africa. However, the Special Rapporteur soon needed to concern himself with the presence of mercenaries in Central America, another centre of conflict at that time. Guatemala and El Salvador were experiencing internal armed conflict, and in Nicaragua the Sandinista National Liberation Front, which had succeeded in freeing the country from the bloody Somoza dictatorship, had to confront the Contras. The Iran-Contra scandal revealed the involvement of mercenaries in the conflict. The Special Rapporteur received numerous reports of this on his visits to the United States of America and Nicaragua in 1989 and investigated various covert operations.
27. In the early 1990s, the Special Rapporteur had to make a visit to Maldives, following an attempted coup d’état by mercenaries and young Sri Lankans belonging to

the Tamil ethnic group. The Special Rapporteur was thus able to observe the particular risk to which small island developing States, facing the possibility of external aggression involving a mercenary element, are exposed. The Special Rapporteur also observed that any State, organization, or rich political adventurer with territorial ambition or designs on power could relatively easily arm groups of mercenaries by recruiting inexperienced young men in exchange for payment.

28. The disappearance of bipolar tensions and the end of the cold war gave birth to the hope that more favourable conditions would arise for greater respect for the self-determination of peoples and for a gradual lessening of armed conflict. Regrettably this has not come to pass. On the contrary, new sources of tension, stoked by various dominant interests, have emerged. The use in practice of mercenaries has increased, as has their use in the commission of violations of human rights and of international humanitarian law. The disappearance of the Soviet Union generated friction between some of the sovereign, independent States that emerged on its former territory. In the former Yugoslavia the "weekend mercenaries" appeared, and in both Bosnia and Herzegovina and Afghanistan the presence of mujahedin, or Muslim combatants, fighting for a cause and not for money, has been observed. [...]
29. Subsequently, the Special Rapporteur was called upon to consider the new problem represented by the use, recruitment and training of mercenaries by private military security companies offering their services on the international market. He analysed the activities of Executive Outcomes in Angola and Sierra Leone and of Sandline International in Sierra Leone and Papua New Guinea. Today hundreds of new companies have emerged that have developed the model for the delivery of international military security services; they now operate on the five continents. The downsizing of a number of national armies has given rise to an abundant supply of well-trained military professionals, who suddenly lost their jobs.
30. Whether acting individually, or in the employ of contemporary multi-purpose security companies, the mercenary is generally present as a violator of human rights. On occasion he acts as a professional agent in terrorist operations; he takes part in illicit trafficking; he commits acts of sabotage, among others. The mercenary is an element in all kinds of covert operation. In comparison with the cost of mobilizing armed forces, the mercenary offers an inexpensive means of conducting operations, and is available to governments, transnational corporations, organizations, sects and groups, simply for payment. The mercenary is hired because he has no scruples in riding roughshod over the norms of international humanitarian law or even in committing serious crimes and human rights violations. The Special Rapporteur conducted an in-depth study of military security companies during a visit in January 1999, at the invitation of the British Government, to the United Kingdom of Great Britain and Northern Ireland.
31. At the Special Rapporteur's suggestion, the issue of military security companies was taken up at the two meetings of experts on mercenaries organized by the Office of the United Nations High Commissioner for Human Rights in 2001 and 2002. There are continued reports of crimes and offences committed by



employees of these companies, including murders, rapes and kidnappings of children, which generally go completely unpunished. International law and domestic legislation in States must regulate the activities of these companies and establish oversight and monitoring mechanisms that clearly differentiate military consultancy services from participation in armed conflicts and from anything that could be considered intervention in matters of public order and security that are the exclusive responsibility of the State. [...]

#### **IV. TERRORISM AND MERCENARY ACTIVITIES**

35. On several occasions the Special Rapporteur has requested the inclusion of the link between terrorism and mercenary activities in his mandate. [...] Nothing prevents mercenaries, for payment, from taking part in the commission of a terrorist act, understood as a criminal act committed for ideological reasons with claims of political legitimacy, and with the aim of promoting collective terror. The possibility of mercenary involvement should not be discarded in the investigation of any terrorist attack.
36. The terrorist act does not necessarily need to be carried out by a member of the clandestine organization. Such organizations may make use of mercenaries with sound experience in the military arts, piloting of aircraft, handling of sophisticated weapons, preparation of high explosives, etc. These relationships are not, however, organizational or ongoing. Yet those who plan terror do not always rely on fanatical devotees to the cause. This connection has been overlooked in the recent, extensive international counter-terrorism legislation. The involvement of mercenaries in the commission of terrorist acts must always be investigated. The impunity of mercenaries must not continue.

#### **V. PROPOSAL FOR A NEW LEGAL DEFINITION OF A MERCENARY**

37. In the course of his work, the Special Rapporteur has found that one of the greatest problems in combating mercenary activities is the absence of a clear, unambiguous and comprehensive legal definition of a mercenary.
38. Article 47 of Protocol I Additional to the Geneva Conventions of 1949 contains a definition of a mercenary intended to deny the mercenary the rights of a combatant or of a prisoner of war. Given its nature as an instrument of international humanitarian law, the Protocol does not legislate on mercenaries themselves, but on their possible involvement in an armed conflict. It restricts itself to regulation of a specific situation. It provides what is to be understood by mercenary for this purpose, stipulating a set of elements that must be present, cumulatively, to determine who is and who is not a mercenary. The loopholes and shortcomings in the international legislation are compounded by the fact that the domestic legislation of most States does not criminalize mercenary activity. A mercenary may become a social outcast, but the law can take no action against him.
39. In 1989, by its resolution 44/34, the General Assembly adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

However, the Convention entered into force only in 2001. Some of its provisions could be considered progress towards eradicating mercenary activity, since the International Convention includes provisions that facilitate the prosecution of mercenaries and promote inter-State cooperation in that regard. But the Convention essentially maintains the concurrent elements required to define a mercenary. Article 1, paragraph 1, repeats almost word for word the definition of mercenary found in article 47 of Additional Protocol I, while article 1, paragraph 2, refers to the use of mercenaries in concerted acts of violence against the constitutional order or territorial integrity of a State.

40. International legislation contains a number of loopholes regarding the requirements relating to nationality, residence, changes in nationality to conceal identity as a mercenary, the participation of mercenaries in illicit trafficking or in organized crime, and, lastly their participation in terrorist acts. [...]
43. The Special Rapporteur has formulated a proposal for a new legal definition of a mercenary, with the following major elements:
  - (a) Empirical evidence shows that because international law does not deal thoroughly enough with mercenary activity, such activities have expanded. In cases in which mercenaries have been brought to trial for crimes such as aggravated homicide, the fact that they were mercenaries was never taken into account, even as an aggravating circumstance;
  - (b) Mercenary activities seriously violate one or more legal rights. The motivation for a mercenary's activities always threatens fundamental rights such as the right to life, physical integrity or freedom of individuals. Such activities also threaten peace, political stability, the legal order and the rational exploitation of natural resources;
  - (c) Mercenary activity must be considered a crime in and of itself and be internationally prosecutable, both because it violates human rights and because it affects the self determination of peoples. In this crime, the mercenary who participates directly in the commission of the crime must be considered a perpetrator with direct criminal responsibility. It must also be borne in mind that mercenary activity is a complex crime in which criminal responsibility falls upon those who recruited, employed, trained and financed the mercenary or mercenaries, and upon those who planned and ordered his criminal activity;
  - (d) Where mercenary activity is proved to have occurred because of a decision by a third Power which uses mercenaries to intervene in another State, that activity must be considered a covert crime. Hiring mercenaries in order to avoid acting directly cannot be considered a mitigating factor, as international law tolerates neither direct nor indirect intervention. States which use mercenaries to attack another State or to commit unlawful acts against persons must be punished;
  - (e) Mercenaries themselves use their professional know-how and sell it for the commission of a crime which involves a dual motivation: that of the purchaser, and that of the person who, for payment, sells himself;

- (f) The term “mercenary” signifies, and applies to, persons with military training who offer paid professional services to take part in criminal activity. Mercenary activity has usually involved intervention in an armed conflict in a country other than the mercenary’s own;
  - (g) The presence of mercenaries has been noted in such activities as arms and drug trafficking, illicit trafficking in general, terrorism, destabilization of legitimate governments, acts related to forcible control of valuable natural resources, selective assassination, abduction and other organized criminal activities. What is involved, therefore, is an activity that can take multiple forms, all of them criminal, where the highly skilled professionalism of the agent is what is prized and paid for;
  - (h) The new legal definition of a mercenary includes the use of mercenaries by private companies offering military assistance, consultancy and security services internationally, which generally employ them in countries experiencing internal armed conflict. Accordingly, there would need to be an international legal method of prohibiting these companies from hiring mercenaries and from engaging in any type of intervention that would mean their direct participation in military operations in the context of international or internal armed conflicts;
  - (i) [...] The principle that should be adopted in elaborating the new legal definition of mercenary is that the State is not authorized to recruit and employ mercenaries. International law and the constitutional law of each State assign the tasks of security, public order and defence to the regular military and police forces, by virtue of the concept of sovereignty;
  - (j) The proposal for a new legal definition of a mercenary should also take into account the fact that the current norms of international and customary law referring to mercenaries and their activities condemn mercenary acts in the broad sense of paid military services that are not subject to the humanitarian norms applicable in armed conflicts services which usually lead to the commission of war crimes and human rights violations;
  - (k) The provisions in force include a requirement that a mercenary be a “foreigner” in the affected country, along with other requirements for defining a person involved in such acts as a mercenary. This requirement of being a foreigner should be reviewed, so that the definition rests mainly on the nature and purpose of the unlawful act to which an agent is linked by means of a payment. To the question of whether a national who attacks his own country and commits crimes can be defined as a mercenary, the reply would need to be affirmative if that national is linked to another State or to an organization of another State which has paid him to intervene and commit crimes against the country of which he is a national. Such a paid criminal act would be a mercenary act because of its nature and purpose.
44. First, the concept of a mercenary should be inclusive; that is, it should cover the participation of mercenaries in both international and internal armed conflicts.

Second, and going well beyond article 47 of Additional Protocol I, the definition should include both the mercenary as an individual agent and mercenarism as a concept related to the responsibility of the State and organizations concerned in the planning and execution of mercenary acts. Third, mercenary activity should be considered not only in relation to the self-determination of peoples but also as encompassing a broad range of actions, including the destabilization of constitutional governments, various kinds of illicit trafficking, terrorism and violations of fundamental rights. [...]

46. The proposal should affect neither the status nor the treatment of the obligations of mercenaries and of the parties to a conflict under international humanitarian law; in other words, the amendment should be debated and approved within the text of the Convention, without prejudice to article 47 of Additional Protocol I to the 1949 Geneva Conventions.
47. The Special Rapporteur has proposed the following amendments to the first three articles of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries:

#### **“Article 1**

For the purposes of the present Convention,

1. A mercenary is any person who:
  - (a) Is specially recruited locally or abroad in order to participate in an armed conflict or in any of the crimes set forth in article 3 of this Convention;
  - (b) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict or of the country in which the crime is committed. An exception is made for a national of the country affected by the crime, when the national is hired to commit the crime in his country of nationality and uses his status as national to conceal the fact that he is being used as a mercenary by the State or organization that hires him. Nationality obtained fraudulently is excluded;
  - (c) Is motivated to participate in an armed conflict by profit or the desire for private gain;
  - (d) Does not form part of the regular armed forces or police forces at whose side the person fights or of the State in whose territory the concerted act of violence is perpetrated. Similarly, has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
2. A mercenary is also any person who, in any other situation:
  - (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
    - (i) Overthrowing a government or otherwise undermining the constitutional, legal, economic or financial order or the valuable natural resources of a State; or

- (ii) Undermining the territorial integrity and basic territorial infrastructure of a State;
  - (iii) Committing an attack against the life, integrity or security of persons or committing terrorist acts;
  - (iv) Denying self-determination or maintaining racist regimes or foreign occupation;
- (b) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict or of the country in which the crime is committed. An exception is made for a national of the country affected by the crime, when the national is hired to commit the crime in his country of nationality and uses his status as national to conceal the fact that he is being used as a mercenary by the State or organization that hires him. Nationality obtained fraudulently is excluded;
- (c) Is motivated to participate in an armed conflict by profit or the desire for private gain;
- (d) Does not form part of the regular armed forces or police forces at whose side the person fights or of the State in whose territory the concerted act of violence is perpetrated. Similarly, has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

#### **Article 2**

Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention.

#### **Article 3**

1. A mercenary, as defined in article 1 of this Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an international crime for the purposes of the Convention. A mercenary who participates in the following acts also commits an internationally prosecutable offence: destabilization of legitimate governments, terrorism, trafficking in persons, drugs and arms and any other illicit trafficking, sabotage, selective assassination, transnational organized crime, forcible control of valuable natural resources and unlawful possession of nuclear or bacteriological materials.
2. Nothing in this article limits the scope of application of article 4 of this Convention.
3. Where a person is convicted of an offence under article 1 of the Convention, any dominant motive of the perpetrator should be taken into account when sentencing the offender."

[...]

## VII. COMMENTS ON CONTINUANCE OF THE MANDATE

[...]

### A. Difficulties and problems encountered in discharge of the mandate

52. Unlike other thematic mandates discharged within the established framework of an international legal instrument under which reality can be verified, the mandate on the use of mercenaries lacks a clear and precise legal framework. [...] The limitations of the definition of a mercenary contained in the 1997 Protocol I Additional to the General Conventions of 1949, the shortcomings in the International Convention and the general lack of national legislation on the subject and of precedent involving cases of mercenaries who have been tried and convicted constitute serious lacunae in the work of analysis and identification of situations that the mandate should cover.
53. The Special Rapporteur was called upon to make good this deficiency, by having recourse to international customary law, legal doctrine, and expert views, and by seeking the opinion of Governments, jurists, politicians in government posts and members of international and non-governmental organizations. Unfortunately the scientific literature on the matter is limited, and the available material comprises newspaper articles, television reports, fictional accounts, leaflets, and other materials that deal superficially with the topic of mercenaries. Popular imagination has been fed by the belief that the mercenary is a redeeming hero, a being who kills evil oppressors without let or hindrance and whose watchword is freedom. The criminal nature of mercenary activities is hidden. These widespread beliefs have had an impact on the work of the Special Rapporteur, particularly on some missions, where he has suffered from a lack of understanding and ideological attacks on his work.
54. In interviews that he conducted with young men held in prison on charges of being mercenaries, the Special Rapporteur noted the damage created by heroic propaganda extolling mercenaries, stoked by low quality literature in Western countries. These young men said that they felt like superheroes of freedom. Their awareness was generally clouded when they acted as criminal agents. They accepted that they had received money for the commission of their crimes, but not that they had acted as mercenaries.
55. In any event, the confessions of these young men indicated the existence of complex networks for recruitment, hiring and military and ideological training, and of links with paramilitary organizations, extremist groups and intelligence services. It is very difficult to disentangle these complex networks and connections. It is very difficult to gain access to this level, well protected as it is. The Special Rapporteur has had to work for the most part on the basis of confessions, reports by third parties, State investigations, circumstantial evidence and logical inferences.

[...]

57. Mercenaries are used by drug cartels, terrorist organizations, organized criminal gangs and organizations engaging in trafficking in persons, weapons, diamonds and precious stones, among other things. They are also used by legally constituted private companies offering military security and assistance services on the international market. The Special Rapporteur has noted the growth and diversification of these companies, which are today active on the five continents. Their publicity and propaganda services even go so far as to represent them as alternatives to regular armed forces, and the Special Rapporteur is aware of treatises that propose the replacement of government forces in international peacekeeping operations by such private companies.

[...]

## VIII. CONCLUSIONS

63. At the conclusion of 16 years and in submitting his final report to the Commission on Human Rights, the Special Rapporteur notes that despite efforts by the United Nations and inter-State regional organizations to combat mercenary activities and curtail them as far as possible, such activities have not disappeared. On the one hand, the traditional type of mercenary intervention which impedes the exercise of the right of peoples to self-determination remains; on the other hand, there are the beginnings of a process of change, in which the mercenary becomes a multi-role, multipurpose professional, recruited, hired and trained to commit criminal acts and violate human rights.

[...]

67. The Special Rapporteur suggests that private companies offering military assistance, consultancy and security services on the international market should be regulated and placed under international supervision. They should be warned that the recruitment of mercenaries constitutes a violation of international law. Accordingly the legal instruments that allow effective legal prosecution of both the mercenary agent and of the company that hires and employs him must be refined. A particular concern must be for the crimes and offences committed by employees of such companies not to go unpunished, as is usually the case.

[...]

## **D. Report submitted by the Working Group on the Use of Mercenaries**

[Source: Human Rights Council, "Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination", A/HRC/7/7, 9 January 2008, available at [www.un.org](http://www.un.org). Footnotes omitted]

**United Nations  
General Assembly  
A/HRC/7/7 9 January 2008  
HUMAN RIGHTS COUNCIL Seventh session [...]**

**Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination**

Chairperson-Rapporteur: José Luis Gomez del Prado

[...]

### **I. INTRODUCTION**

1. The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination was established in 2005, pursuant to resolution 2005/2 of the Commission on Human Rights and assumed by the Human Rights Council, which replaced the previous mandate of the Special Rapporteur established in 1987.

[...]

3. For the purpose of this report, and while recognizing the definitional challenges, the Working Group refers to private military and private security companies (PMSCs) as including private companies which perform all types of security assistance, training, provision and consulting services, i.e. ranging from unarmed logistical support, armed security guards, and those involved in defensive or offensive military and/or security-related activities, particularly in armed conflict areas and/or post-conflict situations.

### **II. ACTIVITIES OF THE WORKING GROUP**

#### **A. Second session of the Working Group**

4. [...] During the session, the Working Group held consultations with Member States, United Nations agencies and organs, including different divisions and branches of the Office of the United Nations High Commissioner for Human Rights (OHCHR), the International Labour Organization (ILO), the International Committee of the Red Cross (ICRC), regional and other intergovernmental organizations, non-governmental organizations (NGOs), and an association of PMSCs.
5. A representative of ICRC continued dialogue with the Working Group on approaches of international humanitarian law, including the definition of mercenaries and the responsibilities of States with respect to PMSCs and their employees. The ICRC



representative noted that few PMSC employees are regular combatants and members of armed forces, and they are thus civilians and lose protection under international humanitarian law when taking direct part in hostilities.

[...]

### III. THEMATIC ISSUES: THE STATE AS PRINCIPAL HOLDER OF THE USE OF FORCE

#### A. Privatization of warfare and security

23. The Working Group observes that in the last 20 years there has been, primarily in Western European and North American countries and particularly in the United States and the United Kingdom, a significant increase in private military and security companies which provide its services in zones of low-intensity armed conflict and post-conflict situation such as Afghanistan, the Balkans, Iraq, Colombia, Somalia and the Sudan. [...]
24. The globalization of the world economy and the shifting from centralized government to diffused "governance" or "ungovernance", together with the downsizing of regular armed forces of States, which have had important reductions in the public sector both in developed and developing countries are some of the causes behind the rapid development of the privatization of violence. [...] Classical inter-State wars with clear front lines have almost disappeared. Instead, we witness low-intensity armed conflicts; a widespread use of light weapons; and the privatization of military functions and asymmetry of the parties in the conflict.
25. The outsourcing of a number of basic functions which traditionally were carried out by national armies or police forces, known as the top-down privatization, has blurred the borderlines between the public services of the State and the private commercial sector creating a dangerous "grey zone". In zones of armed conflict the employees of transnational private military and security companies, contracted as civilians but armed as military personnel, operate in these "grey zones" with uncertainties as to whether their status is that of a combatant or of a civilian. As has been synthesized by one analyst, the development of private military and security companies has produced a new type of security guards and private soldiers who operate in war zones and high-risk insecurity areas under murky legal restraints. These new modalities have replaced to a certain extent the use of traditional individual mercenaries.
26. Private military and security companies fill the vacuum mainly left in three types of unstable situations: (i) in zones of low-intensity armed conflict (the new asymmetrical wars) where the armies are not fully deployed or in post-conflict situations with a high level of insecurity; (ii) in armed conflicts when international organizations do not intervene; and (iii) in troubled areas in developing countries where there is no presence of the State and extractive transnational corporations operate. [...]
28. The distinction between humanitarian non-profitable organizations and corporations working for pecuniary gain is also being blurred by PMSCs. In conflict or post-conflict areas, such as Afghanistan and Iraq, where PMSCs sometimes

provide security details and protection work to humanitarian NGOs, it has become difficult for the population as well as government officials to distinguish one from another. Humanitarian and aid-type assistance risk becoming associated with an intervening force and PMSCs which may be perceived as biased. PMSCs do not hesitate to utilize the aims of humanitarian non-profit organizations to advertise their activities. One of such companies recurrently puts an ad in the Journal of International Peace Operations (IPOA) in relation with its activities in Afghanistan, Somalia, Congo, Bosnia and Herzegovina, the Sudan and Iraq displaying a picture of an individual feeding a malnourished baby with the following message *"Through selfless commitment and compassion for all people, Blackwater works to make a difference in the world and provides hope to those who still live in desperate times"*. The increasing importance of these PMSCs poses a number of essential questions regarding the way they operate in these various situations as well as to the need for regulatory mechanisms.

## **B. The PMSC industry**

29. The Working Group notes that the PMSC industry currently provides in the international market a broad spectrum of services such as building and site security, convoy and transport security, close individual security, advisory and training of local forces, air support, logistical support, prison security, propaganda tactics, intelligence, covert operations and surveillance. These tasks were traditionally fulfilled by the national armed forces and the police. PMSCs also provide armed protection for transnational corporations in unstable regions. Their services are used by Governments and NGOs, transnational corporations, humanitarian organizations, the media and international organizations.

[...]

31. In Iraq, the number of "private contractors" fulfilling a number of military and quasi-military tasks varies according to different sources and the manner they are counted, ranging between 20,000 and 100,000 persons working for PMSCs. Most estimates agree to a figure between 20,000 and nearly 50,000 foreign armed "private contractors". According to the Private Security Company Association of Iraq there would be some 70,000 persons providing armed protection, out of which 14,000 would be unregistered Iraqis and 20,000 unregistered foreigners. Other semi-official estimates give the following figures: 3,000 to 5,000 United States security contractors, 7,000 to 10,000 expatriates such as Australians, British, Canadians and South Africans, 15,000 to 20,000 third-country nationals from countries such as Bulgaria, Colombia, Chile, El Salvador, Fiji, Honduras, Nepal, Peru, the Philippines, Romania, Russian Federation, Ukraine and others, as well as 25,000 to 30,000 Iraqi host-country nationals. [...]
32. [...] In addition, the Working Group received estimations of some 4,000 to 6,000 expatriates from the United States of America, the United Kingdom, Australia, New Zealand and South Africa, some 1,500 to 2,000 third country nationals from Nepal, Fiji, Singapore, the Philippines and Nigeria, and some 15,000 to 20,000 Afghan nationals performing private security functions in Afghanistan. [...]

33. A number of the contracts for Afghanistan and Iraq outsourced by United States government departments to PMSCs are in their turn subcontracted to other companies registered in the United States or abroad. Many of them are private employment agencies (and some of them “ghost” companies, which may have never been legally registered) entrusted with the selection of former military and police personnel from third countries. [...]
34. One of the major PMSCs providing military and security services in armed conflicts or post-conflict zones is Blackwater, a PMSC based in the United States. It is estimated to have some 2,300 private soldiers in nine countries and a database of more than 20,000 former military personnel ready for deployment and engagement on a short notice anywhere in the world. Its division in the Barbados, Blackwater’s Greystone Ltd., employs third-country nationals from countries such as Chile, Nepal, El Salvador, Honduras and others at salaries which are lower than those recruited in the United States. Behind the humanitarian façade, one of the main objectives of the corporation, as indicated by its founder, Erik Prince, would be to obtain for his own private military force a substantial piece of the current United Nations peacekeeping US\$ 6-10 billion budget. Blackwater has been involved since the very first days of the occupation in Iraq and its convoys have been ambushed, its helicopters brought down, and it had 30 casualties including in a high-profile incident in Fallujah. [...]

**C. Recruitment, working conditions and compensation of “private security guards”**

38. The Working Group is concerned that private contractors perform military and quasi-military tasks in situations of conflict. PMSC employees often find themselves working in a situation of armed conflict where they are constantly exposed to “great risk and immediate danger” in a “hostile environment” including but not limited to “the threats inherent in a war situation”. Recruited by PMSC these individuals often operate in a grey area with limited oversight or army control. Most of them are neither nationals of one of the parties to the conflict nor residents of the country in conflict. Although they were not specifically recruited to take part in hostilities, their contracts did not specify either that they would receive military training and would be militarily armed. Recruited in their respective countries from all over the world as “private security guards” to provide protection, most of them have in fact taken part in an internal low-intensity armed conflict. These third-countries nationals are not members of the armed forces of a party to the conflict and they have not been officially sent by their respective States. Many individuals interviewed by the Working Group on its missions have been essentially motivated by private gain. These are all characteristics of the mercenary-related activities and modalities of the conflicts of the twenty-first century.

[...]

**D. Lack of accountability**

45. In Iraq, by Order 17 issued by the Administrator of the Coalition Provisional Authority on 27 June 2004, contractors are immune from prosecution. Something similar

occurs in Colombia where any of the abuses which may be committed by United States military personnel and private contractors working under Plan Colombia can neither be investigated nor judged. Furthermore, following an agreement between Colombia and the United States of America in 2003, the Government of Colombia would not be able to submit to the jurisdiction of the International Criminal Court United States armed forces personnel and private contractors working for transnational private security companies who have committed crimes against humanity.

46. The Working Group has reported the alleged involvement in human rights abuses in the prison of Abu Ghraib in Iraq of employees of two PMSCs who have never been subject to external investigations nor legally sanctioned, despite assurances given by the Government of the United States of America. [...] It has also been alleged that “private security guards” would also detain Iraqis without authorization. According to Iraqi officials and information from the United Nations Assistance Mission in Iraq (UNAMI), on 16 September 2007, in al-Nusur Square in the neighbourhood of Mansour in Baghdad, security contractors protecting a United States State Department convoy, which was allegedly attacked, opened fire on civilians killing at least 11 persons, with alleged use of security company helicopters firing into the streets, resulting in civilian casualties and injuries. The security firm Blackwater claimed that its personnel came under attack by “armed enemies” and fired back in self-defence. Iraqi authorities and witnesses claim the security personnel opened fire unprovoked. [...]

## DISCUSSION

1. Which dangers arise from the phenomenon of mercenarism? For the exercise of the right to self-determination? How do the UN Convention, Art. 47 of Protocol I, and the UN Special Rapporteur address these dangers?
2. (*PI, Art. 47*)
  - a. Why should only foreigners come within the definition of mercenaries? Do you agree with the Special Rapporteur that the notion should not be restricted to foreigners? (*Part C, para. 43(k)*) What was the reason for this limitation in Protocol I? Why should only those motivated by profit come within the definition?
  - b. Does Art. 47(1) of Protocol I mean that mercenaries are not protected by IHL? Or does it, on the contrary, mean that they are protected as civilians? Could mercenaries be neither combatants nor civilians? (GC III, Art. 4; GC IV, Art. 4)
  - c. Does Art. 47 of Protocol I prohibit the use of mercenaries? Is it a violation of Art. 47 or any other rule of IHL to be a mercenary? What are the consequences of Art. 47 for a mercenary? Does Art. 47(1) state the obvious, taking into account Art. 47(2)(e)?
  - d. What are the differences between the definition given by Art. 47 of Protocol I and that given by the UN Convention? Why was it deemed necessary by the drafters of the Convention to add the provisions of Art. 1(2)?
3. a. Under IHL, may mercenaries be directly targeted? If they are not combatants, does it mean that they are entitled to the same protection as civilians directly participating in hostilities?

May mercenaries be targeted at any time, or only when they are involved in hostilities? [See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]

- b. Under IHL, are mercenaries detained by the enemy during an international armed conflict protected as civilians? Are they protected persons? May the ICRC visit them? (GC IV, Arts 4(1) and (4), 5 and 143; P I, Art. 47)
  - c. Under IHL, may a mercenary be prosecuted for the mere fact of being a mercenary? Under the UN Convention? Under IHL, may he be prosecuted only if he commits war crimes? Are those persons accused of being mercenaries and who fall into the hands of the enemy in an international armed conflict protected persons under IHL? Are they protected civilians or prisoners of war? Should the judicial guarantees provided for in international law “be taken into account” or must they be respected? (*UN Convention, Art. 11*) Are they applicable? (GC III, Arts 4, 5(2) and 82-108; GC IV, Arts 4(1), (4) and 5; P I, Arts 47 and 75)
4. Does the fact that Protocol I contains the definition of a mercenary reduce the possibilities of that provision’s application, as only States party to Protocol I are bound by it? What is the status of a mercenary, as defined in Art. 47 of Protocol I, in the hands of a State not party to Protocol I? (GC III, Art. 4; GC IV, Art. 4)
  5. Does the status of mercenary exist in non-international armed conflicts? Would it be useful to introduce a rule similar to Art. 47 into the law of non-international armed conflicts? Does the absence of such a rule make it more difficult to punish mercenaries?
  6. What is the probability of a person falling under Art. 47 of Protocol I? Can a State ensure that anyone fighting for it does not fall under Art. 47?
  7. Could an intervention by mercenaries in an armed conflict transform that conflict into an international armed conflict between the mercenaries’ State of origin and the State in which the mercenaries are about to fight?
  8. If mercenarism was to be radically prevented, what should be done? Should not the prohibition on mercenaries’ activities have been based on a prohibition at State level and not, or not solely, at the individual level? Why does IHL not have any provision to that effect?
  9. Does the prohibition of mercenarism imply that the general trend of outsourcing State tasks to private companies may not concern the defence and security sector? What risks does the privatization of defence, security and police activities entail? How could these activities be privatized while safeguarding the values of IHL and human rights?
  10. (*Part C, Report of the Special Rapporteur*)
    - a. (*Paras 43 and 47*) What do you think of the amended articles of the UN Convention suggested by the Rapporteur? From the standpoint of IHL? From the perspective of combating the mercenary phenomenon?
    - b. (*UN Convention, Art. 1(2); Part C, paras 43 and 47*) May a person who meets the definition of a mercenary in the UN Convention, but who fights in favour of a people’s self-determination or a “legitimate government”, still be called a mercenary? What would be the status of such a person under the UN Convention? Protocol I? Would the UN Special Rapporteur consider that person to be a mercenary? Would he tolerate mercenaries who defend a “legitimate government” or the “territorial integrity and basic territorial infrastructure of a State”, or who fight against an “illegitimate government”? Would he consider that they are committing an international crime? Would you agree that a distinction should be made between mercenaries fighting against “legitimate governments” or against the self-determination of a people, and those fighting

against “illegitimate governments” or in favour of self-determination? What would the risks of such a distinction be?

- c. Are the suggested new Arts 1(2) and 3 dealing with a *jus in bello* or with a *jus ad bellum* issue?
- d. Is the suggested Art. 1(2) applicable (only or equally) in armed conflicts? If it is applicable (as the terms “conflict” in subpara. (b) and “armed conflict” in subpara. (c) suggest), would it be admissible to deprive anyone of IHL protection because he or she is fighting for the aims mentioned in subpara. (a)?
- e. May a person who has combatant status under IHL be prosecuted for some or all of the crimes mentioned under the suggested Art. 3? May a person who is protected by the IHL of non-international armed conflicts be prosecuted for such crimes?
- f. (*Paras 30 and 43*) Why does the Special Rapporteur assume that mercenaries commit more war crimes and human rights violations than other participants in armed conflicts?

11. (*Part D, Report of the Working Group*)

- a. What is the difference between traditional mercenaries and employees of PMSCs? Are the latter defined under IHL? May employees of PMSCs be considered as mercenaries as defined by Art. 47 of Protocol I? Under which conditions?
- b. Under IHL, what, if any, activities in armed conflicts may a State not outsource to PMSCs? May a State outsource direct participation in hostilities to a PMSC that is not made up of combatants of that State?
- c. (*Paras 5 and 25*) Do you agree with the ICRC representative that “few PMSC employees are regular combatants and members of armed forces, and they are thus civilians and lose protection under international humanitarian law when taking direct part in hostilities”? Do you agree with the Working Group that PMSC employees operate in grey zones and that it is difficult to determine whether they are combatants or civilians? Or do they rather act in a grey zone between direct participation in hostilities, self-defence and law enforcement?
- d. When are PMSC employees combatants? When are they considered as civilians directly participating in hostilities? When are they considered, if ever, as only indirectly participating in hostilities? Do they lose their protection as civilians in such a case?
- e. (*Para. 29*) What are the consequences of the diversification of the activities undertaken by PMSC employees? Do they enjoy a different protection under IHL according to their activities? When are activities mentioned in para. 29 covered by Art. 47 of Protocol I?
- f. (*Para. 29*) When does the provision of convoy and transport security, the guarding of military bases or the guarding of government offices constitute direct participation in hostilities? If force is used in performing those tasks, when can it be classified as self-defence under criminal law rather than as direct participation in hostilities? Does it depend on against whom force is used? [See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]
- g. (*Para. 29*) When does advice to and training of local forces constitute direct participation in hostilities? When does the provision of prison security? When does intelligence? When do covert operations? [See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]
- h. (*Paras 31 and 32*) What are the consequences of the diversification of nationalities of persons recruited by PMSCs? Under IHL, are their employees protected according to their nationality? What status and protection would an Iraqi national employed by an American PMSC in Iraq

- have? An American employee of the same company? Any other foreign employee? Would any of them be considered a protected person under IHL? (GC IV, Art. 4)
- i. Are PMSC employees operating in an armed conflict bound by IHL? Only by criminalized rules of IHL? Is there a higher risk of them, rather than combatants, violating IHL?
  - j. How can PMSC employees know whether a given activity constitutes direct participation in hostilities? Why does it matter for them? Must a State hiring them make sure that they can know? May a State hire them for activities in which they will not know when they are directly participating in hostilities?
12. (*Part D, para. 28*) What are the risks of having PMSCs ensuring the protection of humanitarian organizations? Does it become dangerous because the same company may simultaneously also be involved in the conduct of hostilities? Is it realistic to expect the enemy and the local population to distinguish between employees involved in hostilities and employees protecting humanitarian workers? Should PMSCs be prohibited from engaging in both activities at the same time?
  13.
    - a. (*Part D, paras 45 and 46*) Who has an obligation and who has jurisdiction to prosecute violations of IHL committed by employees of PMSCs? The contracting State? The State on whose territory the violations were committed? The State(s) of nationality of the employee(s) concerned? All these States?
    - b. When is the international responsibility of a State engaged when violations of IHL are committed by employees of a PMSC that it has hired? Beyond that, has a State a due diligence obligation to ensure respect for IHL by PMSCs it hires? What is the legal basis for such an obligation?
    - c. (*Part D, para. 33*) Is the international responsibility of the State that hired the PMSC engaged for violations committed by employees of a company subcontracted by that PMSC?
  14. (*Part D, paras 45 and 46*) Would immunity from prosecution for employees who have committed war crimes be lawful under IHL? May a State decide that violations committed by private contractors can be neither investigated nor judged? May a State agree to accord immunity to certain persons, even for war crimes? At least if another State has jurisdiction and undertakes to prosecute those persons? (GC IV, Arts 146 and 149; CIHL, Rule 158)

**Document No. 21, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction**

[Source: Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993; available at [www.icrc.org](http://www.icrc.org)]

**Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction**

**Paris, 13 January 1993**

**PREAMBLE**

The State Parties to this Convention,

*Determined* to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction,

*Desiring* to contribute to the realization of the purposes and principles of the Charter of the United Nations,

*Recalling* that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925 (the Geneva Protocol of 1925),

*Recognizing* that this Convention reaffirms principles and objectives of and obligations assumed under the Geneva Protocol of 1925, and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction signed at London, Moscow and Washington, on 10 April 1972,

*Bearing in mind* the objective contained in Article IX of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,

*Determined* for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention, thereby complementing the obligations assumed under the Geneva Protocol of 1925,

*Recognizing* the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare,

*Considering* that achievements in the field of chemistry should be used exclusively for the benefit of mankind,

*Desiring* to promote free trade in chemicals as well as international cooperation and exchange of scientific and technical information in the field of chemical activities for



purposes not prohibited under this Convention in order to enhance the economic and technological development of all States Parties,

*Convinced* that the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of these common objectives,

*Have agreed* as follows:

#### **ARTICLE I. GENERAL OBLIGATIONS**

1. Each State Party to this Convention undertakes never under any circumstances:
  - (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
  - (b) To use chemical weapons;
  - (c) To engage in any military preparations to use chemical weapons;
  - (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.
2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention.
4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
5. Each State Party undertakes not to use riot control agents as a method of warfare.

#### **ARTICLE II. DEFINITIONS AND CRITERIA**

For the purposes of this Convention:

1. "Chemical Weapons" means the following, together or separately:
  - (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;
  - (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;
  - (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

2. “Toxic Chemical” means:

Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(For the purpose of implementing this Convention, toxic chemicals which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

3. “Precursor” means:

Any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.

(For the purpose of implementing this Convention, precursors which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

4. “Key Component of Binary or Multicomponent Chemical Systems” (hereinafter referred to as “key component”) means:

The precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.

5. “Old Chemical Weapons” means:

(a) Chemical weapons which were produced before 1925; or

(b) Chemical weapons produced in the period between 1925 and 1946 that have deteriorated to such extent that they can no longer be used as chemical weapons.

6. “Abandoned Chemical Weapons” means:

Chemical weapons, including old chemical weapons, abandoned by a State after 1 January 1925 on the territory of another State without the consent of the latter.

7. “Riot Control Agent” means:

Any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

8. “Chemical Weapons Production Facility”:

(a) Means any equipment, as well as any building housing such equipment, that was designed, constructed or used at any time since 1 January 1946:

(i) As part of the stage in the production of chemicals (“final technological stage”) where the material flows would contain, when the equipment is in operation:

- (1) Any chemical listed in Schedule 1 in the Annex on Chemicals; or
  - (2) Any other chemical that has no use, above 1 tonne per year on the territory of a State Party or in any other place under the jurisdiction or control of a State Party, for purposes not prohibited under this Convention, but can be used for chemical weapons purposes; or
  - (ii) For filling chemical weapons, including, *inter alia*, the filling of chemicals listed in Schedule 1 into munitions, devices or bulk storage containers; the filling of chemicals into containers that form part of assembled binary munitions and devices or into chemical submunitions that form part of assembled unitary munitions and devices, and the loading of the containers and chemical submunitions into the respective munitions and devices;
- (b) Does not mean:
- (i) Any facility having a production capacity for synthesis of chemicals specified in subparagraph (a) (i) that is less than 1 tonne;
  - (ii) Any facility in which a chemical specified in subparagraph (a) (i) is or was produced as an unavoidable by-product of activities for purposes not prohibited under this Convention, provided that the chemical does not exceed 3 per cent of the total product and that the facility is subject to declaration and inspection under the Annex on Implementation and Verification (hereinafter referred to as "Verification Annex"); or
  - (iii) The single small-scale facility for production of chemicals listed in Schedule 1 for purposes not prohibited under this Convention as referred to in Part VI of the Verification Annex.

9. "Purposes Not Prohibited Under this Convention" means:

- (a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;
- (b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;
- (c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;
- (d) Law enforcement including domestic riot control purposes.

10. "Production Capacity" means:

The annual quantitative potential for manufacturing a specific chemical based on the technological process actually used or, if the process is not yet operational, planned to be used at the relevant facility. It shall be deemed to be equal to the nameplate capacity or, if the nameplate capacity is not available, to the design capacity. The nameplate capacity is the product output under conditions optimized for maximum quantity for the production facility, as demonstrated by one or more test-runs. The design capacity is the corresponding theoretically calculated product output.

11. "Organization" means the Organization for the Prohibition of Chemical Weapons established pursuant to Article VIII of this Convention.
12. For the purposes of Article VI:
  - (a) "Production" of a chemical means its formation through chemical reaction;
  - (b) "Processing" of a chemical means a physical process, such as formulation, extraction and purification, in which a chemical is not converted into another chemical;
  - (c) "Consumption" of a chemical means its conversion into another chemical via a chemical reaction.

### ARTICLE III. DECLARATIONS

1. Each State Party shall submit to the Organization, not later than 30 days after this Convention enters into force for it, the following declarations, in which it shall:
  - (a) With respect to chemical weapons:
    - (i) Declare whether it owns or possesses any chemical weapons, or whether there are any chemical weapons located in any place under its jurisdiction or control;
    - (ii) Specify the precise location, aggregate quantity and detailed inventory of chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with Part IV (A), paragraphs 1 to 3, of the Verification Annex, except for those chemical weapons referred to in sub-subparagraph (iii);
    - (iii) Report any chemical weapons on its territory that are owned and possessed by another State and located in any place under the jurisdiction or control of another State, in accordance with Part IV (A), paragraph 4, of the Verification Annex;
    - (iv) Declare whether it has transferred or received, directly or indirectly, any chemical weapons since 1 January 1946 and specify the transfer or receipt of such weapons, in accordance with Part IV (A), paragraph 5, of the Verification Annex;
    - (v) Provide its general plan for destruction of chemical weapons that it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with Part IV (A), paragraph 6, of the Verification Annex;
  - (b) With respect to old chemical weapons and abandoned chemical weapons:
    - (i) Declare whether it has on its territory old chemical weapons and provide all available information in accordance with Part IV (B), paragraph 3, of the Verification Annex;
    - (ii) Declare whether there are abandoned chemical weapons on its territory and provide all available information in accordance with Part IV (B), paragraph 8, of the Verification Annex;

- (iii) Declare whether it has abandoned chemical weapons on the territory of other States and provide all available information in accordance with Part IV (B), paragraph 10, of the Verification Annex;
- (c) With respect to chemical weapons production facilities:
  - (i) Declare whether it has or has had any chemical weapons production facility under its ownership or possession, or that is or has been located in any place under its jurisdiction or control at any time since 1 January 1946;
  - (ii) Specify any chemical weapons production facility it has or has had under its ownership or possession or that is or has been located in any place under its jurisdiction or control at any time since 1 January 1946, in accordance with Part V, paragraph 1, of the Verification Annex, except for those facilities referred to in sub-subparagraph (iii);
  - (iii) Report any chemical weapons production facility on its territory that another State has or has had under its ownership and possession and that is or has been located in any place under the jurisdiction or control of another State at any time since 1 January 1946, in accordance with Part V, paragraph 2, of the Verification Annex;
  - (iv) Declare whether it has transferred or received, directly or indirectly, any equipment for the production of chemical weapons since 1 January 1946 and specify the transfer or receipt of such equipment, in accordance with Part V, paragraphs 3 to 5, of the Verification Annex;
  - (v) Provide its general plan for destruction of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, in accordance with Part V, paragraph 6, of the Verification Annex;
  - (vi) Specify actions to be taken for closure of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, in accordance with Part V, paragraph 1 (i), of the Verification Annex;
  - (vii) Provide its general plan for any temporary conversion of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, into chemical weapons destruction facility, in accordance with Part V, paragraph 7, of the Verification Annex;
- (d) With respect to other facilities: Specify the precise location, nature and general scope of activities of any facility or establishment under its ownership or possession, or located in any place under its jurisdiction or control, and that has been designed, constructed or used since 1 January 1946 primarily for development of chemical weapons. Such declaration shall include, *inter alia*, laboratories and test and evaluation sites;
- (e) With respect to riot control agents: Specify the chemical name, structural formula and Chemical Abstracts Service (CAS) registry number, if assigned,

of each chemical it holds for riot control purposes. This declaration shall be updated not later than 30 days after any change becomes effective.

2. The provisions of this Article and the relevant provisions of Part IV of the Verification Annex shall not, at the discretion of a State Party, apply to chemical weapons buried on its territory before 1 January 1977 and which remain buried, or which had been dumped at sea before 1 January 1985.

#### **ARTICLE IV. CHEMICAL WEAPONS**

1. The provisions of this Article and the detailed procedures for its implementation shall apply to all chemical weapons owned or possessed by a State Party, or that are located in any place under its jurisdiction or control, except old chemical weapons and abandoned chemical weapons to which Part IV (B) of the Verification Annex applies.
2. Detailed procedures for the implementation of this Article are set forth in the Verification Annex.
3. All locations at which chemical weapons specified in paragraph 1 are stored or destroyed shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments, in accordance with Part IV(A) of the Verification Annex.
4. Each State Party shall, immediately after the declaration under Article III, paragraph 1 (a), has been submitted, provide access to chemical weapons specified in paragraph 1 for the purpose of systematic verification of the declaration through on-site inspection. Thereafter, each State Party shall not remove any of these chemical weapons, except to a chemical weapons destruction facility. It shall provide access to such chemical weapons, for the purpose of systematic on-site verification.
5. Each State Party shall provide access to any chemical weapons destruction facilities and their storage areas, that it owns or possesses, or that are located in any place under its jurisdiction or control, for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments.
6. Each State Party shall destroy all chemical weapons specified in paragraph 1 pursuant to the Verification Annex and in accordance with the agreed rate and sequence of destruction (hereinafter referred to as "order of destruction"). Such destruction shall begin not later than two years after this Convention enters into force for it and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such chemical weapons at a faster rate.
7. Each State Party shall:
  - (a) Submit detailed plans for the destruction of chemical weapons specified in paragraph 1 not later than 60 days before each annual destruction period begins, in accordance with Part IV (A), paragraph 29, of the Verification Annex; the detailed plans shall encompass all stocks to be destroyed during the next annual destruction period;

- (b) Submit declarations annually regarding the implementation of its plans for destruction of chemical weapons specified in paragraph 1, not later than 60 days after the end of each annual destruction period; and
  - (c) Certify, not later than 30 days after the destruction process has been completed, that all chemical weapons specified in paragraph 1 have been destroyed.
- 8. If a State ratifies or accedes to this Convention after the 10-year period for destruction set forth in paragraph 6, it shall destroy chemical weapons specified in paragraph 1 as soon as possible. The order of destruction and procedures for stringent verification for such a State Party shall be determined by the Executive Council.
- 9. Any chemical weapons discovered by a State Party after the initial declaration of chemical weapons shall be reported, secured and destroyed in accordance with Part IV (A) of the Verification Annex.
- 10. Each State Party, during transportation, sampling, storage and destruction of chemical weapons, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall transport, sample, store and destroy chemical weapons in accordance with its national standards for safety and emissions.
- 11. Any State Party which has on its territory chemical weapons that are owned or possessed by another State, or that are located in any place under the jurisdiction or control of another State, shall make the fullest efforts to ensure that these chemical weapons are removed from its territory not later than one year after this Convention enters into force for it. If they are not removed within one year, the State Party may request the Organization and other States Parties to provide assistance in the destruction of these chemical weapons.
- 12. Each State Party undertakes to cooperate with other States Parties that request information or assistance on a bilateral basis or through the Technical Secretariat regarding methods and technologies for the safe and efficient destruction of chemical weapons.
- 13. In carrying out verification activities pursuant to this Article and Part IV (A) of the Verification Annex, the Organization shall consider measures to avoid unnecessary duplication of bilateral or multilateral agreements on verification of chemical weapons storage and their destruction among States Parties.

To this end, the Executive Council shall decide to limit verification to measures complementary to those undertaken pursuant to such a bilateral or multilateral agreement, if it considers that:

- (a) Verification provisions of such an agreement are consistent with the verification provisions of this Article and Part IV (A) of the Verification Annex;
- (b) Implementation of such an agreement provides for sufficient assurance of compliance with the relevant provisions of this Convention; and

- (c) Parties to the bilateral or multilateral agreement keep the Organization fully informed about their verification activities.
14. If the Executive Council takes a decision pursuant to paragraph 13, the Organization shall have the right to monitor the implementation of the bilateral or multilateral agreement.
  15. Nothing in paragraphs 13 and 14 shall affect the obligation of a State Party to provide declarations pursuant to Article III, this Article and Part IV (A) of the Verification Annex.
  16. Each State Party shall meet the costs of destruction of chemical weapons it is obliged to destroy. It shall also meet the costs of verification of storage and destruction of these chemical weapons unless the Executive Council decides otherwise. If the Executive Council decides to limit verification measures of the Organization pursuant to paragraph 13, the costs of complementary verification and monitoring by the Organization shall be paid in accordance with the United Nations scale of assessment, as specified in Article VIII, paragraph 7.
  17. The provisions of this Article and the relevant provisions of Part IV of the Verification Annex shall not, at the discretion of a State Party, apply to chemical weapons buried on its territory before 1 January 1977 and which remain buried, or which had been dumped at sea before 1 January 1985.

#### **ARTICLE V. CHEMICAL WEAPONS PRODUCTION FACILITIES**

1. The provisions of this Article and the detailed procedures for its implementation shall apply to any and all chemical weapons production facilities owned or possessed by a State Party, or that are located in any place under its jurisdiction or control.
2. Detailed procedures for the implementation of this Article are set forth in the Verification Annex.
3. All chemical weapons production facilities specified in paragraph 1 shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with Part V of the Verification Annex.
4. Each State Party shall cease immediately all activity at chemical weapons production facilities specified in paragraph 1, except activity required for closure.
5. No State Party shall construct any new chemical weapons production facilities or modify any existing facilities for the purpose of chemical weapons production or for any other activity prohibited under this Convention.
6. Each State Party shall, immediately after the declaration under Article III, paragraph 1 (c), has been submitted, provide access to chemical weapons production facilities specified in paragraph 1, for the purpose of systematic verification of the declaration through on-site inspection.



7. Each State Party shall:
  - (a) Close, not later than 90 days after this Convention enters into force for it, all chemical weapons production facilities specified in paragraph 1, in accordance with Part V of the Verification Annex, and give notice thereof; and
  - (b) Provide access to chemical weapons production facilities specified in paragraph 1, subsequent to closure, for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments in order to ensure that the facility remains closed and is subsequently destroyed.
8. Each State Party shall destroy all chemical weapons production facilities specified in paragraph 1 and related facilities and equipment, pursuant to the Verification Annex and in accordance with an agreed rate and sequence of destruction (hereinafter referred to as "order of destruction"). Such destruction shall begin not later than one year after this Convention enters into force for it, and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such facilities at a faster rate.
9. Each State Party shall:
  - (a) Submit detailed plans for destruction of chemical weapons production facilities specified in paragraph 1, not later than 180 days before the destruction of each facility begins;
  - (b) Submit declarations annually regarding the implementation of its plans for the destruction of all chemical weapons production facilities specified in paragraph 1, not later than 90 days after the end of each annual destruction period; and
  - (c) Certify, not later than 30 days after the destruction process has been completed, that all chemical weapons production facilities specified in paragraph 1 have been destroyed.
10. If a State ratifies or accedes to this Convention after the 10-year period for destruction set forth in paragraph 8, it shall destroy chemical weapons production facilities specified in paragraph 1 as soon as possible. The order of destruction and procedures for stringent verification for such a State Party shall be determined by the Executive Council.
11. Each State Party, during the destruction of chemical weapons production facilities, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall destroy chemical weapons production facilities in accordance with its national standards for safety and emissions.
12. Chemical weapons production facilities specified in paragraph 1 may be temporarily converted for destruction of chemical weapons in accordance with Part V, paragraphs 18 to 25, of the Verification Annex. Such a converted facility must be destroyed as soon as it is no longer in use for destruction of chemical weapons but, in any case, not later than 10 years after entry into force of this Convention.

13. A State Party may request, in exceptional cases of compelling need, permission to use a chemical weapons production facility specified in paragraph 1 for purposes not prohibited under this Convention. Upon the recommendation of the Executive Council, the Conference of the States Parties shall decide whether or not to approve the request and shall establish the conditions upon which approval is contingent in accordance with Part V, Section D, of the Verification Annex.
14. The chemical weapons production facility shall be converted in such a manner that the converted facility is not more capable of being reconverted into a chemical weapons production facility than any other facility used for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes not involving chemicals listed in Schedule 1.
15. All converted facilities shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with Part V, Section D, of the Verification Annex.
16. In carrying out verification activities pursuant to this Article and Part V of the Verification Annex, the Organization shall consider measures to avoid unnecessary duplication of bilateral or multilateral agreements on verification of chemical weapons production facilities and their destruction among States Parties.

To this end, the Executive Council shall decide to limit the verification to measures complementary to those undertaken pursuant to such a bilateral or multilateral agreement, if it considers that:

- (a) Verification provisions of such an agreement are consistent with the verification provisions of this Article and Part V of the Verification Annex;
  - (b) Implementation of the agreement provides for sufficient assurance of compliance with the relevant provisions of this Convention; and
  - (c) Parties to the bilateral or multilateral agreement keep the Organization fully informed about their verification activities.
17. If the Executive Council takes a decision pursuant to paragraph 16, the Organization shall have the right to monitor the implementation of the bilateral or multilateral agreement.
  18. Nothing in paragraphs 16 and 17 shall affect the obligation of a State Party to make declarations pursuant to Article III, this Article and Part V of the Verification Annex.
  19. Each State Party shall meet the costs of destruction of chemical weapons production facilities it is obliged to destroy. It shall also meet the costs of verification under this Article unless the Executive Council decides otherwise. If the Executive Council decides to limit verification measures of the Organization pursuant to paragraph 16, the costs of complementary verification and monitoring by the Organization shall be paid in accordance with the United Nations scale of assessment, as specified in Article VIII, paragraph 7.

**ARTICLE VI. ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION**

1. Each State Party has the right, subject to the provisions of this Convention, to develop, produce, otherwise acquire, retain, transfer and use toxic chemicals and their precursors for purposes not prohibited under this Convention.
2. Each State Party shall adopt the necessary measures to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained, transferred, or used within its territory or in any other place under its jurisdiction or control for purposes not prohibited under this Convention. To this end, and in order to verify that activities are in accordance with obligations under this Convention, each State Party shall subject toxic chemicals and their precursors listed in Schedules 1, 2 and 3 of the Annex on Chemicals, facilities related to such chemicals, and other facilities as specified in the Verification Annex, that are located on its territory or in any other place under its jurisdiction or control, to verification measures as provided in the Verification Annex.
3. Each State Party shall subject chemicals listed in Schedule 1 (hereinafter referred to as "Schedule 1 chemicals") to the prohibitions on production, acquisition, retention, transfer and use as specified in Part VI of the Verification Annex. It shall subject Schedule 1 chemicals and facilities specified in Part VI of the Verification Annex to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with that Part of the Verification Annex.
4. Each State Party shall subject chemicals listed in Schedule 2 (hereinafter referred to as "Schedule 2 chemicals") and facilities specified in Part VII of the Verification Annex to data monitoring and on-site verification in accordance with that Part of the Verification Annex.
5. Each State Party shall subject chemicals listed in Schedule 3 (hereinafter referred to as "Schedule 3 chemicals") and facilities specified in Part VIII of the Verification Annex to data monitoring and on-site verification in accordance with that Part of the Verification Annex.
6. Each State Party shall subject facilities specified in Part IX of the Verification Annex to data monitoring and eventual on-site verification in accordance with that Part of the Verification Annex unless decided otherwise by the Conference of the States Parties pursuant to Part IX, paragraph 22, of the Verification Annex.
7. Not later than 30 days after this Convention enters into force for it, each State Party shall make an initial declaration on relevant chemicals and facilities in accordance with the Verification Annex.
8. Each State Party shall make annual declarations regarding the relevant chemicals and facilities in accordance with the Verification Annex.
9. For the purpose of on-site verification, each State Party shall grant to the inspectors access to facilities as required in the Verification Annex.
10. In conducting verification activities, the Technical Secretariat shall avoid undue intrusion into the State Party's chemical activities for purposes not prohibited

under this Convention and, in particular, abide by the provisions set forth in the Annex on the Protection of Confidential Information (hereinafter referred to as “Confidentiality Annex”).

11. The provisions of this Article shall be implemented in a manner which avoids hampering the economic or technological development of States Parties, and international cooperation in the field of chemical activities for purposes not prohibited under this Convention including the international exchange of scientific and technical information and chemicals and equipment for the production, processing or use of chemicals for purposes not prohibited under this Convention.

#### **ARTICLE VII. NATIONAL IMPLEMENTATION MEASURES**

##### **General undertakings**

1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:
  - (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;
  - (b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and
  - (c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.
2. Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.
3. Each State Party, during the implementation of its obligations under this Convention, shall assign the highest priority to ensuring the safety of people and to protecting the environment, and shall cooperate as appropriate with other State Parties in this regard.

##### **Relations between the State Party and the Organization**

4. In order to fulfil its obligations under this Convention, each State Party shall designate or establish a National Authority to serve as the national focal point for effective liaison with the Organization and other States Parties. Each State Party shall notify the Organization of its National Authority at the time that this Convention enters into force for it.
5. Each State Party shall inform the Organization of the legislative and administrative measures taken to implement this Convention.

6. Each State Party shall treat as confidential and afford special handling to information and data that it receives in confidence from the Organization in connection with the implementation of this Convention. It shall treat such information and data exclusively in connection with its rights and obligations under this Convention and in accordance with the provisions set forth in the Confidentiality Annex.
7. Each State Party undertakes to cooperate with the Organization in the exercise of all its functions and in particular to provide assistance to the Technical Secretariat.

## **ARTICLE VIII. THE ORGANIZATION**

### **A. GENERAL PROVISIONS**

1. The States Parties to this Convention hereby establish the Organization for the Prohibition of Chemical Weapons to achieve the object and purpose of this Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties.
2. All States Parties to this Convention shall be members of the Organization. A State Party shall not be deprived of its membership in the Organization.
3. The seat of the Headquarters of the Organization shall be The Hague, Kingdom of the Netherlands.
4. There are hereby established as the organs of the Organization: the Conference of the States Parties, the Executive Council, and the Technical Secretariat.
5. The Organization shall conduct its verification activities provided for under this Convention in the least intrusive manner possible consistent with the timely and efficient accomplishment of their objectives. It shall request only the information and data necessary to fulfil its responsibilities under this Convention. It shall take every precaution to protect the confidentiality of information on civil and military activities and facilities coming to its knowledge in the implementation of this Convention and, in particular, shall abide by the provisions set forth in the Confidentiality Annex.
6. In undertaking its verification activities the Organization shall consider measures to make use of advances in science and technology.
7. The costs of the Organization's activities shall be paid by States Parties in accordance with the United Nations scale of assessment adjusted to take into account differences in membership between the United Nations and this Organization, and subject to the provisions of Articles IV and V. Financial contributions of States Parties to the Preparatory Commission shall be deducted in an appropriate way from their contributions to the regular budget. The budget of the Organization shall comprise two separate chapters, one relating to administrative and other costs, and one relating to verification costs.
8. A member of the Organization which is in arrears in the payment of its financial contribution to the Organization shall have no vote in the Organization if the

amount of its arrears equals or exceeds the amount of the contribution due from it for the preceding two full years. The Conference of the States Parties may, nevertheless, permit such a member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the member.

## **B. THE CONFERENCE OF THE STATES PARTIES**

### **Composition, procedures and decision-making**

9. The Conference of the States Parties (hereinafter referred to as “the Conference”) shall be composed of all members of this Organization. Each member shall have one representative in the Conference, who may be accompanied by alternates and advisers.
10. The first session of the Conference shall be convened by the depositary not later than 30 days after the entry into force of this Convention.
11. The Conference shall meet in regular sessions which shall be held annually unless it decides otherwise.
12. Special sessions of the Conference shall be convened:
  - (a) When decided by the Conference;
  - (b) When requested by the Executive Council;
  - (c) When requested by any member and supported by one third of the members;  
or
  - (d) In accordance with paragraph 22 to undertake reviews of the operation of this Convention.

Except in the case of subparagraph (d), the special session shall be convened not later than 30 days after receipt of the request by the Director-General of the Technical Secretariat, unless specified otherwise in the request.
13. The Conference shall also be convened in the form of an Amendment Conference in accordance with Article XV, paragraph 2.
14. Sessions of the Conference shall take place at the seat of the Organization unless the Conference decides otherwise.
15. The Conference shall adopt its rules of procedure. At the beginning of each regular session, it shall elect its Chairman and such other officers as may be required. They shall hold office until a new Chairman and other officers are elected at the next regular session.
16. A majority of the members of the Organization shall constitute a quorum for the Conference.
17. Each member of the Organization shall have one vote in the Conference.

18. The Conference shall take decisions on questions of procedure by a simple majority of the members present and voting. Decisions on matters of substance should be taken as far as possible by consensus. If consensus is not attainable when an issue comes up for decision, the Chairman shall defer any vote for 24 hours and during this period of deferment shall make every effort to facilitate achievement of consensus, and shall report to the Conference before the end of this period. If consensus is not possible at the end of 24 hours, the Conference shall take the decision by a two-thirds majority of members present and voting unless specified otherwise in this Convention. When the issue arises as to whether the question is one of substance or not, that question shall be treated as a matter of substance unless otherwise decided by the Conference by the majority required for decisions on matters of substance.

### **Powers and functions**

19. The Conference shall be the principal organ of the Organization. It shall consider any questions, matters or issues within the scope of this Convention, including those relating to the powers and functions of the Executive Council and the Technical Secretariat. It may make recommendations and take decisions on any questions, matters or issues related to this Convention raised by a State Party or brought to its attention by the Executive Council.
20. The Conference shall oversee the implementation of this Convention, and act in order to promote its object and purpose. The Conference shall review compliance with this Convention. It shall also oversee the activities of the Executive Council and the Technical Secretariat and may issue guidelines in accordance with this Convention to either of them in the exercise of their functions.
21. The Conference shall:
  - (a) Consider and adopt at its regular sessions the report, programme and budget of the Organization, submitted by the Executive Council, as well as consider other reports;
  - (b) Decide on the scale of financial contributions to be paid by States Parties in accordance with paragraph 7;
  - (c) Elect the members of the Executive Council;
  - (d) Appoint the Director-General of the Technical Secretariat (hereinafter referred to as "the Director-General");
  - (e) Approve the rules of procedure of the Executive Council submitted by the latter;
  - (f) Establish such subsidiary organs as it finds necessary for the exercise of its functions in accordance with this Convention;
  - (g) Foster international cooperation for peaceful purposes in the field of chemical activities;

- (h) Review scientific and technological developments that could affect the operation of this Convention and, in this context, direct the Director-General to establish a Scientific Advisory Board to enable him, in the performance of his functions, to render specialized advice in areas of science and technology relevant to this Convention, to the Conference, the Executive Council or States Parties. The Scientific Advisory Board shall be composed of independent experts appointed in accordance with terms of reference adopted by the Conference;
  - (i) Consider and approve at its first session any draft agreements, provisions and guidelines developed by the Preparatory Commission;
  - (j) Establish at its first session the voluntary fund for assistance in accordance with Article X;
  - (k) Take the necessary measures to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of this Convention, in accordance with Article XII.
22. The Conference shall not later than one year after the expiry of the fifth and the tenth year after the entry into force of this Convention, and at such other times within that time period as may be decided upon, convene in special sessions to undertake reviews of the operation of this Convention. Such reviews shall take into account any relevant scientific and technological developments. At intervals of five years thereafter, unless otherwise decided upon, further sessions of the Conference shall be convened with the same objective.

### **C. THE EXECUTIVE COUNCIL**

#### **Composition, procedure and decision-making**

23. The Executive Council shall consist of 41 members. Each State Party shall have the right, in accordance with the principle of rotation, to serve on the Executive Council. The members of the Executive Council shall be elected by the Conference for a term of two years. In order to ensure the effective functioning of this Convention, due regard being specially paid to equitable geographical distribution, to the importance of chemical industry, as well as to political and security interests, the Executive Council shall be composed as follows:
- (a) Nine States Parties from Africa to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these nine States Parties, three members shall, as a rule, be the States Parties with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these three members;
  - (b) Nine States Parties from Asia to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these nine States Parties, four members shall, as a rule, be the States Parties with the



most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these four members;

- (c) Five States Parties from Eastern Europe to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these five States Parties, one member shall, as a rule, be the State Party with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating this one member;
  - (d) Seven States Parties from Latin America and the Caribbean to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these seven States Parties, three members shall, as a rule, be the States Parties with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these three members;
  - (e) Ten States Parties from among Western European and other States to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these 10 States Parties, 5 members shall, as a rule, be the States Parties with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these five members;
  - (f) One further State Party to be designated consecutively by States Parties located in the regions of Asia and Latin America and the Caribbean. As a basis for this designation it is understood that this State Party shall be a rotating member from these regions.
- 24. For the first election of the Executive Council 20 members shall be elected for a term of one year, due regard being paid to the established numerical proportions as described in paragraph 23.
  - 25. After the full implementation of Articles IV and V the Conference may, upon the request of a majority of the members of the Executive Council, review the composition of the Executive Council taking into account developments related to the principles specified in paragraph 23 that are governing its composition.
  - 26. The Executive Council shall elaborate its rules of procedure and submit them to the Conference for approval.
  - 27. The Executive Council shall elect its Chairman from among its members.
  - 28. The Executive Council shall meet for regular sessions. Between regular sessions it shall meet as often as may be required for the fulfilment of its powers and functions.

29. Each member of the Executive Council shall have one vote. Unless otherwise specified in this Convention, the Executive Council shall take decisions on matters of substance by a two-thirds majority of all its members. The Executive Council shall take decisions on questions of procedure by a simple majority of all its members. When the issue arises as to whether the question is one of substance or not, that question shall be treated as a matter of substance unless otherwise decided by the Executive Council by the majority required for decisions on matters of substance.

### **Powers and functions**

30. The Executive Council shall be the executive organ of the Organization. It shall be responsible to the Conference. The Executive Council shall carry out the powers and functions entrusted to it under this Convention, as well as those functions delegated to it by the Conference. In so doing, it shall act in conformity with the recommendations, decisions and guidelines of the Conference and assure their proper and continuous implementation.
31. The Executive Council shall promote the effective implementation of, and compliance with, this Convention. It shall supervise the activities of the Technical Secretariat, cooperate with the National Authority of each State Party and facilitate consultations and cooperation among States Parties at their request.
32. The Executive Council shall:
- (a) Consider and submit to the Conference the draft programme and budget of the Organization;
  - (b) Consider and submit to the Conference the draft report of the Organization on the implementation of this Convention, the report on the performance of its own activities and such special reports as it deems necessary or which the Conference may request;
  - (c) Make arrangements for the sessions of the Conference including the preparation of the draft agenda.
33. The Executive Council may request the convening of a special session of the Conference.
34. The Executive Council shall:
- (a) Conclude agreements or arrangements with States and international organizations on behalf of the Organization, subject to prior approval by the Conference;
  - (b) Conclude agreements with States Parties on behalf of the Organization in connection with Article X and supervise the voluntary fund referred to in Article X;
  - (c) Approve agreements or arrangements relating to the implementation of verification activities, negotiated by the Technical Secretariat with States Parties.

35. The Executive Council shall consider any issue or matter within its competence affecting this Convention and its implementation, including concerns regarding compliance, and cases of non-compliance, and, as appropriate, inform States Parties and bring the issue or matter to the attention of the Conference.
36. In its consideration of doubts or concerns regarding compliance and cases of non-compliance, including, *inter alia*, abuse of the rights provided for under this Convention, the Executive Council shall consult with the States Parties involved and, as appropriate, request the State Party to take measures to redress the situation within a specified time. To the extent that the Executive Council considers further action to be necessary, it shall take, *inter alia*, one or more of the following measures:
  - (a) Inform all States Parties of the issue or matter;
  - (b) Bring the issue or matter to the attention of the Conference;
  - (c) Make recommendations to the Conference regarding measures to redress the situation and to ensure compliance.

The Executive Council shall, in cases of particular gravity and urgency, bring the issue or matter, including relevant information and conclusions, directly to the attention of the United Nations General Assembly and the United Nations Security Council. It shall at the same time inform all States Parties of this step.

#### **D. THE TECHNICAL SECRETARIAT**

37. The Technical Secretariat shall assist the Conference and the Executive Council in the performance of their functions. The Technical Secretariat shall carry out the verification measures provided for in this Convention. It shall carry out the other functions entrusted to it under this Convention as well as those functions delegated to it by the Conference and the Executive Council.
38. The Technical Secretariat shall:
  - (a) Prepare and submit to the Executive Council the draft programme and budget of the Organization;
  - (b) Prepare and submit to the Executive Council the draft report of the Organization on the implementation of this Convention and such other reports as the Conference or the Executive Council may request;
  - (c) Provide administrative and technical support to the Conference, the Executive Council and subsidiary organs;
  - (d) Address and receive communications on behalf of the Organization to and from States Parties on matters pertaining to the implementation of this Convention;
  - (e) Provide technical assistance and technical evaluation to States Parties in the implementation of the provisions of this Convention, including evaluation of scheduled and unscheduled chemicals.

## 39. The Technical Secretariat shall:

- (a) Negotiate agreements or arrangements relating to the implementation of verification activities with States Parties, subject to approval by the Executive Council;
  - (b) Not later than 180 days after entry into force of this Convention, coordinate the establishment and maintenance of permanent stockpiles of emergency and humanitarian assistance by States Parties in accordance with Article X, paragraphs 7 (b) and (c). The Technical Secretariat may inspect the items maintained for serviceability. Lists of items to be stockpiled shall be considered and approved by the Conference pursuant to paragraph 21(i) above;
  - (c) Administer the voluntary fund referred to in Article X, compile declarations made by the States Parties and register, when requested, bilateral agreements concluded between States Parties or between a State Party and the Organization for the purposes of Article X.
40. The Technical Secretariat shall inform the Executive Council of any problem that has arisen with regard to the discharge of its functions, including doubts, ambiguities or uncertainties about compliance with this Convention that have come to its notice in the performance of its verification activities and that it has been unable to resolve or clarify through its consultations with the State Party concerned.
  41. The Technical Secretariat shall comprise a Director-General, who shall be its head and chief administrative officer, inspectors and such scientific, technical and other personnel as may be required.
  42. The Inspectorate shall be a unit of the Technical Secretariat and shall act under the supervision of the Director-General.
  43. The Director-General shall be appointed by the Conference upon the recommendation of the Executive Council for a term of four years, renewable for one further term, but not thereafter.
  44. The Director-General shall be responsible to the Conference and the Executive Council for the appointment of the staff and the organization and functioning of the Technical Secretariat. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Only citizens of States Parties shall serve as the Director-General, as inspectors or as other members of the professional and clerical staff. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible. Recruitment shall be guided by the principle that the staff shall be kept to a minimum necessary for the proper discharge of the responsibilities of the Technical Secretariat.
  45. The Director-General shall be responsible for the organization and functioning of the Scientific Advisory Board referred to in paragraph 21 (h). The Director-General shall, in consultation with States Parties, appoint members of the Scientific Advisory Board, who shall serve in their individual capacity. The members of the

Board shall be appointed on the basis of their expertise in the particular scientific fields relevant to the implementation of this Convention. The Director-General may also, as appropriate, in consultation with members of the Board, establish temporary working groups of scientific experts to provide recommendations on specific issues. In regard to the above, States Parties may submit lists of experts to the Director-General.

46. In the performance of their duties, the Director-General, the inspectors and the other members of the staff shall not seek or receive instructions from any Government or from any other source external to the Organization. They shall refrain from any action that might reflect on their positions as international officers responsible only to the Conference and the Executive Council.
47. Each State Party shall respect the exclusively international character of the responsibilities of the Director-General, the inspectors and the other members of the staff and not seek to influence them in the discharge of their responsibilities.

#### **E. PRIVILEGES AND IMMUNITIES**

48. The Organization shall enjoy on the territory and in any other place under the jurisdiction or control of a State Party such legal capacity and such privileges and immunities as are necessary for the exercise of its functions.
49. Delegates of States Parties, together with their alternates and advisers, representatives appointed to the Executive Council together with their alternates and advisers, the Director-General and the staff of the Organization shall enjoy such privileges and immunities as are necessary in the independent exercise of their functions in connection with the Organization.
50. The legal capacity, privileges, and immunities referred to in this Article shall be defined in agreements between the Organization and the States Parties as well as in an agreement between the Organization and the State in which the headquarters of the Organization is seated. These agreements shall be considered and approved by the Conference pursuant to paragraph 21 (i).
51. Notwithstanding paragraphs 48 and 49, the privileges and immunities enjoyed by the Director-General and the staff of the Technical Secretariat during the conduct of verification activities shall be those set forth in Part II, Section B, of the Verification Annex.

#### **ARTICLE IX. CONSULTATIONS, COOPERATION AND FACT-FINDING**

1. States Parties shall consult and cooperate, directly among themselves, or through the Organization or other appropriate international procedures, including procedures within the framework of the United Nations and in accordance with its Charter, on any matter which may be raised relating to the object and purpose, or the implementation of the provisions, of this Convention.
2. Without prejudice to the right of any State Party to request a challenge inspection, States Parties should, whenever possible, first make every effort to clarify and

resolve, through exchange of information and consultations among themselves, any matter which may cause doubt about compliance with this Convention, or which gives rise to concerns about a related matter which may be considered ambiguous. A State Party which receives a request from another State Party for clarification of any matter which the requesting State Party believes causes such a doubt or concern shall provide the requesting State Party as soon as possible, but in any case not later than 10 days after the request, with information sufficient to answer the doubt or concern raised along with an explanation of how the information provided resolves the matter. Nothing in this Convention shall affect the right of any two or more States Parties to arrange by mutual consent for inspections or any other procedures among themselves to clarify and resolve any matter which may cause doubt about compliance or gives rise to a concern about a related matter which may be considered ambiguous. Such arrangements shall not affect the rights and obligations of any State Party under other provisions of this Convention.

#### **Procedure for requesting clarification**

3. A State Party shall have the right to request the Executive Council to assist in clarifying any situation which may be considered ambiguous or which gives rise to a concern about the possible non-compliance of another State Party with this Convention. The Executive Council shall provide appropriate information in its possession relevant to such a concern.
4. A State Party shall have the right to request the Executive Council to obtain clarification from another State Party on any situation which may be considered ambiguous or which gives rise to a concern about its possible non-compliance with this Convention. In such a case, the following shall apply:
  - (a) The Executive Council shall forward the request for clarification to the State Party concerned through the Director-General not later than 24 hours after its receipt;
  - (b) The requested State Party shall provide the clarification to the Executive Council as soon as possible, but in any case not later than 10 days after the receipt of the request;
  - (c) The Executive Council shall take note of the clarification and forward it to the requesting State Party not later than 24 hours after its receipt;
  - (d) If the requesting State Party deems the clarification to be inadequate, it shall have the right to request the Executive Council to obtain from the requested State Party further clarification;
  - (e) For the purpose of obtaining further clarification requested under subparagraph (d), the Executive Council may call on the Director-General to establish a group of experts from the Technical Secretariat, or if appropriate staff are not available in the Technical Secretariat, from elsewhere, to examine all available information and data relevant to the situation causing the

concern. The group of experts shall submit a factual report to the Executive Council on its findings;

- (f) If the requesting State Party considers the clarification obtained under subparagraphs (d) and (e) to be unsatisfactory, it shall have the right to request a special session of the Executive Council in which States Parties involved that are not members of the Executive Council shall be entitled to take part. In such a special session, the Executive Council shall consider the matter and may recommend any measure it deems appropriate to resolve the situation.
- 5. A State Party shall also have the right to request the Executive Council to clarify any situation which has been considered ambiguous or has given rise to a concern about its possible non-compliance with this Convention. The Executive Council shall respond by providing such assistance as appropriate.
- 6. The Executive Council shall inform the States Parties about any request for clarification provided in this Article.
- 7. If the doubt or concern of a State Party about a possible non-compliance has not been resolved within 60 days after the submission of the request for clarification to the Executive Council, or it believes its doubts warrant urgent consideration, notwithstanding its right to request a challenge inspection, it may request a special session of the Conference in accordance with Article VIII, paragraph 12 (c). At such a special session, the Conference shall consider the matter and may recommend any measure it deems appropriate to resolve the situation.

### **Procedures for challenge inspections**

- 8. Each State Party has the right to request an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the provisions of this Convention, and to have this inspection conducted anywhere without delay by an inspection team designated by the Director-General and in accordance with the Verification Annex.
- 9. Each State Party is under the obligation to keep the inspection request within the scope of this Convention and to provide in the inspection request all appropriate information on the basis of which a concern has arisen regarding possible non-compliance with this Convention as specified in the Verification Annex. Each State Party shall refrain from unfounded inspection requests, care being taken to avoid abuse. The challenge inspection shall be carried out for the sole purpose of determining facts relating to the possible non-compliance.
- 10. For the purpose of verifying compliance with the provisions of this Convention, each State Party shall permit the Technical Secretariat to conduct the on-site challenge inspection pursuant to paragraph 8.

11. Pursuant to a request for a challenge inspection of a facility or location, and in accordance with the procedures provided for in the Verification Annex, the inspected State Party shall have:
  - (a) The right and the obligation to make every reasonable effort to demonstrate its compliance with this Convention and, to this end, to enable the inspection team to fulfil its mandate;
  - (b) The obligation to provide access within the requested site for the sole purpose of establishing facts relevant to the concern regarding possible non-compliance; and
  - (c) The right to take measures to protect sensitive installations, and to prevent disclosure of confidential information and data, not related to this Convention.
12. With regard to an observer, the following shall apply:
  - (a) The requesting State Party may, subject to the agreement of the inspected State Party, send a representative who may be a national either of the requesting State Party or of a third State Party, to observe the conduct of the challenge inspection.
  - (b) The inspected State Party shall then grant access to the observer in accordance with the Verification Annex.
  - (c) The inspected State Party shall, as a rule, accept the proposed observer, but if the inspected State Party exercises a refusal, that fact shall be recorded in the final report.
13. The requesting State Party shall present an inspection request for an on-site challenge inspection to the Executive Council and at the same time to the Director-General for immediate processing.
14. The Director-General shall immediately ascertain that the inspection request meets the requirements specified in Part X, paragraph 4, of the Verification Annex, and, if necessary, assist the requesting State Party in filing the inspection request accordingly. When the inspection request fulfils the requirements, preparations for the challenge inspection shall begin.
15. The Director-General shall transmit the inspection request to the inspected State Party not less than 12 hours before the planned arrival of the inspection team at the point of entry.
16. After having received the inspection request, the Executive Council shall take cognizance of the Director-General's actions on the request and shall keep the case under its consideration throughout the inspection procedure. However, its deliberations shall not delay the inspection process.
17. The Executive Council may, not later than 12 hours after having received the inspection request, decide by a three-quarter majority of all its members against carrying out the challenge inspection, if it considers the inspection request to be frivolous, abusive or clearly beyond the scope of this Convention as described in



paragraph 8. Neither the requesting nor the inspected State Party shall participate in such a decision. If the Executive Council decides against the challenge inspection, preparations shall be stopped, no further action on the inspection request shall be taken, and the States Parties concerned shall be informed accordingly.

18. The Director-General shall issue an inspection mandate for the conduct of the challenge inspection. The inspection mandate shall be the inspection request referred to in paragraphs 8 and 9 put into operational terms, and shall conform with the inspection request.
19. The challenge inspection shall be conducted in accordance with Part X or, in the case of alleged use, in accordance with Part XI of the Verification Annex. The inspection team shall be guided by the principle of conducting the challenge inspection in the least intrusive manner possible, consistent with the effective and timely accomplishment of its mission.
20. The inspected State Party shall assist the inspection team throughout the challenge inspection and facilitate its task. If the inspected State Party proposes, pursuant to Part X, Section C, of the Verification Annex, arrangements to demonstrate compliance with this Convention, alternative to full and comprehensive access, it shall make every reasonable effort, through consultations with the inspection team, to reach agreement on the modalities for establishing the facts with the aim of demonstrating its compliance.
21. The final report shall contain the factual findings as well as an assessment by the inspection team of the degree and nature of access and cooperation granted for the satisfactory implementation of the challenge inspection. The Director-General shall promptly transmit the final report of the inspection team to the requesting State Party, to the inspected State Party, to the Executive Council and to all other States Parties. The Director-General shall further transmit promptly to the Executive Council the assessments of the requesting and of the inspected States Parties, as well as the views of other States Parties which may be conveyed to the Director-General for that purpose, and then provide them to all States Parties.
22. The Executive Council shall, in accordance with its powers and functions, review the final report of the inspection team as soon as it is presented, and address any concerns as to:
  - (a) Whether any non-compliance has occurred;
  - (b) Whether the request had been within the scope of this Convention; and
  - (c) Whether the right to request a challenge inspection had been abused.
23. If the Executive Council reaches the conclusion, in keeping with its powers and functions, that further action may be necessary with regard to paragraph 22, it shall take the appropriate measures to redress the situation and to ensure compliance with this Convention, including specific recommendations to the Conference. In the case of abuse, the Executive Council shall examine whether the requesting State Party should bear any of the financial implications of the challenge inspection.

24. The requesting State Party and the inspected State Party shall have the right to participate in the review process. The Executive Council shall inform the States Parties and the next session of the Conference of the outcome of the process.
25. If the Executive Council has made specific recommendations to the Conference, the Conference shall consider action in accordance with Article XII.

#### **ARTICLE X. ASSISTANCE AND PROTECTION AGAINST CHEMICAL WEAPONS**

1. For the purposes of this Article, "Assistance" means the coordination and delivery to States Parties of protection against chemical weapons, including, *inter alia*, the following: detection equipment and alarm systems; protective equipment; decontamination equipment and decontaminants; medical antidotes and treatments; and advice on any of these protective measures.
2. Nothing in this Convention shall be interpreted as impeding the right of any State Party to conduct research into, develop, produce, acquire, transfer or use means of protection against chemical weapons, for purposes not prohibited under this Convention.
3. Each State Party undertakes to facilitate, and shall have the right to participate in, the fullest possible exchange of equipment, material and scientific and technological information concerning means of protection against chemical weapons.
4. For the purposes of increasing the transparency of national programmes related to protective purposes, each State Party shall provide annually to the Technical Secretariat information on its programme, in accordance with procedures to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).
5. The Technical Secretariat shall establish, not later than 180 days after entry into force of this Convention and maintain, for the use of any requesting State Party, a data bank containing freely available information concerning various means of protection against chemical weapons as well as such information as may be provided by States Parties.

The Technical Secretariat shall also, within the resources available to it, and at the request of a State Party, provide expert advice and assist the State Party in identifying how its programmes for the development and improvement of a protective capacity against chemical weapons could be implemented.

6. Nothing in this Convention shall be interpreted as impeding the right of States Parties to request and provide assistance bilaterally and to conclude individual agreements with other States Parties concerning the emergency procurement of assistance.
7. Each State Party undertakes to provide assistance through the Organization and to this end to elect to take one or more of the following measures:
  - (a) To contribute to the voluntary fund for assistance to be established by the Conference at its first session;

- (b) To conclude, if possible not later than 180 days after this Convention enters into force for it, agreements with the Organization concerning the procurement, upon demand, of assistance;
  - (c) To declare, not later than 180 days after this Convention enters into force for it, the kind of assistance it might provide in response to an appeal by the Organization. If, however, a State Party subsequently is unable to provide the assistance envisaged in its declaration, it is still under the obligation to provide assistance in accordance with this paragraph.
8. Each State Party has the right to request and, subject to the procedures set forth in paragraphs 9, 10 and 11, to receive assistance and protection against the use or threat of use of chemical weapons if it considers that:
- (a) Chemical weapons have been used against it;
  - (b) Riot control agents have been used against it as a method of warfare; or
  - (c) It is threatened by actions or activities of any State that are prohibited for States Parties by Article I.
9. The request, substantiated by relevant information, shall be submitted to the Director-General, who shall transmit it immediately to the Executive Council and to all States Parties. The Director-General shall immediately forward the request to States Parties which have volunteered, in accordance with paragraphs 7 (b) and (c), to dispatch emergency assistance in case of use of chemical weapons or use of riot control agents as a method of warfare, or humanitarian assistance in case of serious threat of use of chemical weapons or serious threat of use of riot control agents as a method of warfare to the State Party concerned not later than 12 hours after receipt of the request. The Director-General shall initiate, not later than 24 hours after receipt of the request, an investigation in order to provide foundation for further action. He shall complete the investigation within 72 hours and forward a report to the Executive Council. If additional time is required for completion of the investigation, an interim report shall be submitted within the same time-frame. The additional time required for investigation shall not exceed 72 hours. It may, however, be further extended by similar periods. Reports at the end of each additional period shall be submitted to the Executive Council. The investigation shall, as appropriate and in conformity with the request and the information accompanying the request, establish relevant facts related to the request as well as the type and scope of supplementary assistance and protection needed.
10. The Executive Council shall meet not later than 24 hours after receiving an investigation report to consider the situation and shall take a decision by simple majority within the following 24 hours on whether to instruct the Technical Secretariat to provide supplementary assistance. The Technical Secretariat shall immediately transmit to all States Parties and relevant international organizations the investigation report and the decision taken by the Executive Council. When so decided by the Executive Council, the Director-General shall provide assistance immediately. For this purpose, the Director-General may cooperate with the

requesting State Party, other States Parties and relevant international organizations. The States Parties shall make the fullest possible efforts to provide assistance.

11. If the information available from the ongoing investigation or other reliable sources would give sufficient proof that there are victims of use of chemical weapons and immediate action is indispensable, the Director-General shall notify all States Parties and shall take emergency measures of assistance, using the resources the Conference has placed at his disposal for such contingencies. The Director-General shall keep the Executive Council informed of actions undertaken pursuant to this paragraph.

#### **ARTICLE XI. ECONOMIC AND TECHNOLOGICAL DEVELOPMENT**

1. The provisions of this Convention shall be implemented in a manner which avoids hampering the economic or technological development of States Parties, and international cooperation in the field of chemical activities for purposes not prohibited under this Convention including the international exchange of scientific and technical information and chemicals and equipment for the production, processing or use of chemicals for purposes not prohibited under this Convention.
2. Subject to the provisions of this Convention and without prejudice to the principles and applicable rules of international law, the States Parties shall:
  - (a) Have the right, individually or collectively, to conduct research with, to develop, produce, acquire, retain, transfer, and use chemicals;
  - (b) Undertake to facilitate, and have the right to participate in, the fullest possible exchange of chemicals, equipment and scientific and technical information relating to the development and application of chemistry for purposes not prohibited under this Convention;
  - (c) Not maintain among themselves any restrictions, including those in any international agreements, incompatible with the obligations undertaken under this Convention, which would restrict or impede trade and the development and promotion of scientific and technological knowledge in the field of chemistry for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;
  - (d) Not use this Convention as grounds for applying any measures other than those provided for, or permitted, under this Convention nor use any other international agreement for pursuing an objective inconsistent with this Convention;
  - (e) Undertake to review their existing national regulations in the field of trade in chemicals in order to render them consistent with the object and purpose of this Convention.

#### **ARTICLE XII. MEASURES TO REDRESS A SITUATION AND TO ENSURE COMPLIANCE, INCLUDING SANCTIONS**

1. The Conference shall take the necessary measures, as set forth in paragraphs 2, 3 and 4, to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of this Convention. In considering action

pursuant to this paragraph, the Conference shall take into account all information and recommendations on the issues submitted by the Executive Council.

2. In cases where a State Party has been requested by the Executive Council to take measures to redress a situation raising problems with regard to its compliance, and where the State Party fails to fulfil the request within the specified time, the Conference may, *inter alia*, upon the recommendation of the Executive Council, restrict or suspend the State Party's rights and privileges under this Convention until it undertakes the necessary action to conform with its obligations under this Convention.
3. In cases where serious damage to the object and purpose of this Convention may result from activities prohibited under this Convention, in particular by Article I, the Conference may recommend collective measures to States Parties in conformity with international law.
4. The Conference shall, in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council.

#### **ARTICLE XIII. RELATION TO OTHER INTERNATIONAL AGREEMENTS**

Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and under the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, signed at London, Moscow and Washington on 10 April 1972.

#### **ARTICLE XIV. SETTLEMENT OF DISPUTES**

1. Disputes that may arise concerning the application or the interpretation of this Convention shall be settled in accordance with the relevant provisions of this Convention and in conformity with the provisions of the Charter of the United Nations.
2. When a dispute arises between two or more States Parties, or between one or more States Parties and the Organization, relating to the interpretation or application of this Convention, the parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of the parties' choice, including recourse to appropriate organs of this Convention and, by mutual consent, referral to the International Court of Justice in conformity with the Statute of the Court. The States Parties involved shall keep the Executive Council informed of actions being taken.
3. The Executive Council may contribute to the settlement of a dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties to a dispute to start the settlement process of their choice and recommending a time-limit for any agreed procedure.
4. The Conference shall consider questions related to disputes raised by States Parties or brought to its attention by the Executive Council. The Conference shall, as it

finds necessary, establish or entrust organs with tasks related to the settlement of these disputes in conformity with Article VIII, paragraph 21 (f).

5. The Conference and the Executive Council are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Organization. An agreement between the Organization and the United Nations shall be concluded for this purpose in accordance with Article VIII, paragraph 34 (a).
6. This Article is without prejudice to Article IX or to the provisions on measures to redress a situation and to ensure compliance, including sanctions.

#### **ARTICLE XV. AMENDMENTS**

1. Any State Party may propose amendments to this Convention. Any State Party may also propose changes, as specified in paragraph 4, to the Annexes of this Convention. Proposals for amendments shall be subject to the procedures in paragraphs 2 and 3. Proposals for changes, as specified in paragraph 4, shall be subject to the procedures in paragraph 5.
2. The text of a proposed amendment shall be submitted to the Director-General for circulation to all States Parties and to the Depositary. The proposed amendment shall be considered only by an Amendment Conference. Such an Amendment Conference shall be convened if one third or more of the States Parties notify the Director-General not later than 30 days after its circulation that they support further consideration of the proposal. The Amendment Conference shall be held immediately following a regular session of the Conference unless the requesting States Parties ask for an earlier meeting. In no case shall an Amendment Conference be held less than 60 days after the circulation of the proposed amendment.
3. Amendments shall enter into force for all States Parties 30 days after deposit of the instruments of ratification or acceptance by all the States Parties referred to under subparagraph (b) below:
  - (a) When adopted by the Amendment Conference by a positive vote of a majority of all States Parties with no State Party casting a negative vote; and
  - (b) Ratified or accepted by all those States Parties casting a positive vote at the Amendment Conference.
4. In order to ensure the viability and the effectiveness of this Convention, provisions in the Annexes shall be subject to changes in accordance with paragraph 5, if proposed changes are related only to matters of an administrative or technical nature. All changes to the Annex on Chemicals shall be made in accordance with paragraph 5. Sections A and C of the Confidentiality Annex, Part X of the Verification Annex, and those definitions in Part I of the Verification Annex which relate exclusively to challenge inspections, shall not be subject to changes in accordance with paragraph 5.

5. Proposed changes referred to in paragraph 4 shall be made in accordance with the following procedures:
- (a) The text of the proposed changes shall be transmitted together with the necessary information to the Director-General. Additional information for the evaluation of the proposal may be provided by any State Party and the Director-General. The Director-General shall promptly communicate any such proposals and information to all States Parties, the Executive Council and the Depositary;
  - (b) Not later than 60 days after its receipt, the Director-General shall evaluate the proposal to determine all its possible consequences for the provisions of this Convention and its implementation and shall communicate any such information to all States Parties and the Executive Council;
  - (c) The Executive Council shall examine the proposal in the light of all information available to it, including whether the proposal fulfils the requirements of paragraph 4. Not later than 90 days after its receipt, the Executive Council shall notify its recommendation, with appropriate explanations, to all States Parties for consideration. States Parties shall acknowledge receipt within 10 days;
  - (d) If the Executive Council recommends to all States Parties that the proposal be adopted, it shall be considered approved if no State Party objects to it within 90 days after receipt of the recommendation. If the Executive Council recommends that the proposal be rejected, it shall be considered rejected if no State Party objects to the rejection within 90 days after receipt of the recommendation;
  - (e) If a recommendation of the Executive Council does not meet with the acceptance required under subparagraph (d), a decision on the proposal, including whether it fulfils the requirements of paragraph 4, shall be taken as a matter of substance by the Conference at its next session;
  - (f) The Director-General shall notify all States Parties and the Depositary of any decision under this paragraph;
  - (g) Changes approved under this procedure shall enter into force for all States Parties 180 days after the date of notification by the Director-General of their approval unless another time period is recommended by the Executive Council or decided by the Conference.

#### **ARTICLE XVI. DURATION AND WITHDRAWAL**

- 1. This Convention shall be of unlimited duration.
- 2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention if it decides that extraordinary events, related to the subject-matter of this Convention, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal 90 days in advance to all other States Parties, the Executive Council, the Depositary and the United Nations Security Council. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

3. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law, particularly the Geneva Protocol of 1925.

#### **ARTICLE XVII. STATUS OF THE ANNEXES**

The Annexes form an integral part of this Convention. Any reference to this Convention includes the Annexes.

#### **ARTICLE XVIII. SIGNATURE**

This Convention shall be open for signature for all States before its entry into force.

#### **ARTICLE XIX. RATIFICATION**

This Convention shall be subject to ratification by States Signatories according to their respective constitutional processes.

#### **ARTICLE XX. ACCESSION**

Any State which does not sign this Convention before its entry into force may accede to it at any time thereafter.

#### **ARTICLE XXI. ENTRY INTO FORCE**

1. This Convention shall enter into force 180 days after the date of the deposit of the 65<sup>th</sup> instrument of ratification, but in no case earlier than two years after its opening for signature.
2. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the 30<sup>th</sup> day following the date of deposit of their instrument of ratification or accession.

#### **ARTICLE XXII. RESERVATIONS**

The Articles of this Convention shall not be subject to reservations. The Annexes of this Convention shall not be subject to reservations incompatible with its object and purpose.

#### **ARTICLE XXIII. DEPOSITARY**

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention and shall, *inter alia*:

- (a) Promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession and the date of the entry into force of this Convention, and of the receipt of other notices;
- (b) Transmit duly certified copies of this Convention to the Governments of all signatory and acceding States; and
- (c) Register this Convention pursuant to Article 102 of the Charter of the United Nations.



**ARTICLE XXIV. AUTHENTIC TEXTS**

This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

**IN WITNESS WHEREOF** the undersigned, being duly authorized to that effect, have signed this Convention.

**DONE** at Paris on the thirteenth day of January, one thousand nine hundred and ninety-three.

**Case No. 22, Convention on the Safety of UN Personnel****A. Convention on the Safety of United Nations and Associated Personnel**

[Source: Convention on the Safety of United Nations and Associated Personnel, UN Doc. Annex to Resolution 49/59, New York, 9 December, 1994; available at [untreaty.un.org](http://untreaty.un.org)]

**Convention on the Safety of United Nations  
and Associated Personnel**

*The States Parties to this Convention,*

*Deeply concerned* over the growing number of deaths and injuries resulting from deliberate attacks against United Nations and associated personnel,

*Bearing in mind* that attacks against, or other mistreatment of, personnel who act on behalf of the United Nations are unjustifiable and unacceptable, by whomsoever committed, [...]

*Acknowledging* that the effectiveness and safety of United Nations operations are enhanced where such operations are conducted with the consent and cooperation of the host State, [...]

*Have agreed* as follows:

**Article 1: Definitions**

For the purposes of this Convention:

(a) “United Nations personnel” means:

- (i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;
- (ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted;

(b) “Associated personnel” means:

- (i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;
- (ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;
- (iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic

Energy Agency, to carry out activities in support of the fulfilment of the mandate of a United Nations operation;

- (c) "United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control:
  - (i) Where the operation is for the purpose of maintaining or restoring international peace and security; or
  - (ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation;
- (d) "Host State" means a State in whose territory a United Nations operation is conducted; [...]

#### **Article 2: Scope of application**

1. This Convention applies in respect of United Nations and associated personnel and United Nations operations, as defined in article 1.
2. This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies. [...]

#### **Article 6: Respect for laws and regulations**

1. Without prejudice to such privileges and immunities as they may enjoy or to the requirements of their duties, United Nations and associated personnel shall:
  - (a) Respect the laws and regulations of the host State and the transit State; and
  - (b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.
2. The Secretary-General of the United Nations shall take all appropriate measures to ensure the observance of these obligations.

#### **Article 7: Duty to ensure the safety and security of United Nations and associated personnel**

1. United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.
2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in article 9.
3. States Parties shall cooperate with the United Nations and other States Parties, as appropriate, in the implementation of this Convention, particularly in any case where the host State is unable itself to take the required measures.

**Article 8: Duty to release or return United Nations  
and associated personnel captured or detained**

Except as otherwise provided in an applicable status-of-forces agreement, if United Nations or associated personnel are captured or detained in the course of the performance of their duties and their identification has been established, they shall not be subjected to interrogation and they shall be promptly released and returned to United Nations or other appropriate authorities. Pending their release such personnel shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.

**Article 9: Crimes against United Nations and associated personnel**

1. The intentional commission of:
  - (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;
  - (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
  - (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;
  - (d) An attempt to commit any such attack; and
  - (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law.
2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature.

**Article 10: Establishment of jurisdiction**

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in the following cases: [...]

**Article 13: Measures to ensure prosecution or extradition**

1. Where the circumstances so warrant, the State Party in whose territory the alleged offender is present shall take the appropriate measures under its national law to ensure that person's presence for the purpose of prosecution or extradition. [...]

**Article 14: Prosecution of alleged offenders**

[...]

**Article 15: Extradition of alleged offenders**

[...]

**Article 16: Mutual assistance in criminal matters**

[...]

**Article 17: Fair treatment**

1. Any person regarding whom investigations or proceedings are being carried out in connection with any of the crimes set out in article 9 shall be guaranteed fair

treatment, a fair trial and full protection of his or her rights at all stages of the investigations or proceedings.

2. Any alleged offender shall be entitled:

- (a) To communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights; and
- (b) To be visited by a representative of that State or those States. [...]

**Article 19: Dissemination**

The States Parties undertake to disseminate this Convention as widely as possible and, in particular, to include the study thereof, as well as relevant provisions of international humanitarian law, in their programmes of military instruction.

**Article 20: Savings clauses**

Nothing in this Convention shall affect:

- (a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards;
- (b) The rights and obligations of States, consistent with the Charter of the United Nations, regarding the consent to entry of persons into their territories;
- (c) The obligation of United Nations and associated personnel to act in accordance with the terms of the mandate of a United Nations operation;
- (d) The right of States which voluntarily contribute personnel to a United Nations operation to withdraw their personnel from participation in such operation; or
- (e) The entitlement to appropriate compensation payable in the event of death, disability, injury or illness attributable to peace-keeping service by persons voluntarily contributed by States to United Nations operations.

**Article 21: Right of self-defence**

Nothing in this Convention shall be construed so as to derogate from the right to act in self-defence. [...]

## B. Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel

[Source: Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, New York, 8 December 2005; available at [untreaty.un.org](http://untreaty.un.org)]

### OPTIONAL PROTOCOL TO THE CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL

*The States Parties to this Protocol,*

*Recalling* the terms of the Convention on the Safety of United Nations and Associated Personnel, done at New York on 9 December 1994,

*Deeply concerned* over the continuing pattern of attacks against United Nations and associated personnel,

*Recognizing* that United Nations operations conducted for the purposes of delivering humanitarian, political or development assistance in peacebuilding and of delivering emergency humanitarian assistance which entail particular risks for United Nations and associated personnel require the extension of the scope of legal protection under the Convention to such personnel,

*Convinced* of the need to have in place an effective regime to ensure that the perpetrators of attacks against United Nations and associated personnel engaged in United Nations operations are brought to justice,

*Have agreed* as follows:

#### **Article 1: Relationship**

This Protocol supplements the Convention on the Safety of United Nations and Associated Personnel, done at New York on 9 December 1994 (hereinafter referred to as “the Convention”), and as between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as a single instrument.

#### **Article 2: Application of the Convention to United Nations operations**

1. The Parties to this Protocol shall, in addition to those operations as defined in article 1 (c) of the Convention, apply the Convention in respect of all other United Nations operations established by a competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control for the purposes of:
  - (a) Delivering humanitarian, political or development assistance in peacebuilding, or
  - (b) Delivering emergency humanitarian assistance.
2. Paragraph 1 does not apply to any permanent United Nations office, such as headquarters of the Organization or its specialized agencies established under an agreement with the United Nations.

3. A host State may make a declaration to the Secretary-General of the United Nations that it shall not apply the provisions of this Protocol with respect to an operation under article II(1)(b) which is conducted for the sole purpose of responding to a natural disaster. Such a declaration shall be made prior to the deployment of the operation.

**Article 3: Duty of a State Party with respect to Article 8 of the Convention**

The duty of a State Party to this Protocol with respect to the application of article 8 of the Convention to United Nations operations defined in article II of this Protocol shall be without prejudice to its right to take action in the exercise of its national jurisdiction over any United Nations or associated personnel who violates the laws and regulations of that State, provided that such action is not in violation of any other international law obligation of the State Party.

[...]

### DISCUSSION

1. Are this UN Convention and its Optional Protocol instruments of IHL? Are they more treaties of *jus ad bellum*? Or of international criminal law?
2. When is the UN Convention applicable? When is IHL applicable? Can both apply at the same time? On which issues do this Convention and IHL contradict each other?
3.
  - a. Which types of UN operations does the Convention apply to? Why was the scope of application limited to such operations? Does the Optional Protocol extend the scope of application of the Convention to all UN operations?
  - b. What does Art. 2(2) of the Convention mean? In which cases is the Convention not applicable? Does Art. 2(2) mean that the Convention is not applicable when UN forces are acting under Chapter VII of the UN Charter and fighting against organized armed forces, because the IHL of international armed conflicts applies in that case, or does it mean that the Convention does not apply only when the IHL of international armed conflicts applies? In other words, are the applicability of the IHL of international armed conflicts, on the one hand, and the involvement of UN forces acting under Chapter VII of the UN Charter and fighting against organized armed forces, on the other hand, cumulative conditions for the non-applicability of the Convention?
  - c. Why does Art. 2(2) explicitly refer to the IHL of international armed conflict? Are there situations where UN forces are acting under Chapter VII of the UN Charter and fighting against organized armed forces but to which the IHL of international armed conflict does not apply? Does it mean that UN forces involved in a non-international armed conflict are protected by the Convention?
  - d. Could the Convention apply to UN forces taking part in a non-international armed conflict? Would not the protection offered by the Convention contradict the provisions of the IHL of non-international armed conflict?
  - e. Does the Optional Protocol extend the scope of application of the Convention to Chapter VII operations? Should UN forces involved in an armed conflict be protected by the Convention?
4.
  - a. In which circumstances does IHL apply to UN forces? To what kind of UN forces?
  - b. Is the UN party to the Geneva Conventions and Protocols? Can the UN conceivably be a party to an international armed conflict in the sense of Art. 2 common to those Conventions?

- c. Which rules of IHL can the UN, not being a State and not having either legislation or a territory, by definition not respect?
  - d. What do you think of the argument that IHL cannot formally apply to UN operations, because they are not armed conflicts between equal partners but law enforcement actions by the international community authorized by the Security Council representing international legality, and their aim is not to make war but to enforce peace?
  - e. What do you think of the practical arguments that UN forces do not have the means to respect IHL, e.g. that their medical personnel are assigned in sufficient number to care for UN forces only, and cannot possibly collect and care for the wounded or sick of other armed forces encountered in the area of operations (as they should under GC I, Arts 3(2) and 12)?
  - f. Can the UN forces, for purposes of the applicability of IHL, be considered as armed forces of the contributing States (which are party to the Geneva Conventions), and can any hostilities be considered an armed conflict between those States and the party responsible for the opposing forces?
  - g. To what extent does IHL apply to UN forces? When does the IHL of international armed conflicts apply to UN forces? When does the IHL of non-international armed conflicts apply?
  - h. Can you imagine why the UN and its Member States do not want to recognize the *de jure* applicability of IHL to UN operations or to establish precisely which “principles and spirit” (*UN Convention, Art. 8*) of IHL they recognize as being applicable to UN operations?
5. a. Is a member of UN forces attacked by armed forces of a State a combatant or a civilian? Does he or she fall within a third category? Does such an attack constitute the war crime of deliberately attacking civilians or only a crime under the UN Convention? (P I, Arts 50(1), 51(2), and 85(3)(a); ICC Statute, Art. 8(2)(b)(iii) and (e)(iii) [See **Case No. 23**, The International Criminal Court])
- b. If a member of UN forces is attacked and reacts by attacking those who attack him or her, is he or she a civilian directly participating in hostilities, losing protection against attacks? What if the member of the UN forces uses force first? May such a civilian be punished for having directly participated in hostilities? Under IHL? Under the UN Convention? (P I, Art. 51(3); P II, Art. 13(3); [See also **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities])
6. a. Do UN military personnel captured by armed forces of a State during a hostile encounter have prisoner-of-war status? Do members of the armed forces of a State captured by UN military forces during a hostile encounter have prisoner-of-war status? Is it conceivable that the answers to these two questions could differ? (GC III, Arts 2 and 4)
- b. Which provisions of the UN Convention are incompatible with prisoner-of-war status and the treatment GC III prescribes for prisoners of war? Why does Art. 8 refer to the principles and spirit of the Geneva Conventions and not to those Conventions themselves?
- c. If you were a military member of UN forces captured during a hostile armed encounter by armed forces of the country where the UN operation is deployed, would you prefer to be treated as a prisoner of war under GC III or protected under this UN Convention? What are the advantages and disadvantages of both options from the point of view of your treatment, repatriation and the chances that your status will be accepted and respected by the enemy?
7. a. Are the crimes mentioned in Art. 9 of the UN Convention grave breaches of IHL? Do they always constitute violations of IHL? (GC III, Arts 2, 4, 21, 118 and 130; GC IV, Arts 2, 4, 42, 78 and 147; P I, Art. 85(3)(a)(e) and (4)(b), CIHL, Rule 156)



- b. Is it compatible with IHL to punish members of a State's armed forces for attacking UN military forces pursuant to the instructions of the authorities of that State? Does such an attack fall under Art. 9 of the UN Convention? (P I, Preamble, para. 5, and Art. 43(2))
  - c. If a soldier forcefully resists a UN use of force in response e.g. to the shelling of safety zones, is he committing a crime under Art. 9 of this Convention? If so, is punishment for such a crime compatible with IHL? (P I, Preamble, para. 5, and Art. 43(2))
- 8. Does this Convention and/or its Optional Protocol protect ICRC delegates as associated personnel? If so, in what circumstances?
- 9. What implementation mechanisms are provided for by this Convention?

**Case No. 23, The International Criminal Court**

[See also **Case No. 165**, Sudan, Arrest Warrant for Omar Al-Bashir and **Case No. 237**, ICC, the Prosecutor v. Thomas Lubanga Dyilo]

**A. The Statute**

[Source: A/CONF.183/9, 17 July 1998 and also reprinted in ILM, vol. 37, 1998, pp. 1002-1069, available on <http://www.icrc.org>]

**ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT**

[adopted by the Diplomatic Conference of the plenipotentiaries to the United Nations on the creation of an International Criminal Court, 17 July 1998]

[as corrected by the procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002]

**PREAMBLE**

*The States Parties to this Statute,*

*Conscious* that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

*Mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

*Recognizing* that such grave crimes threaten the peace, security and well-being of the world,

*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

*Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

*Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

*Reaffirming* the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

*Emphasizing* in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

*Determined* to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with

the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

*Resolved* to guarantee lasting respect for and the enforcement of international justice,

*Have agreed* as follows

## **PART 1. ESTABLISHMENT OF THE COURT**

### **Article 1: The Court**

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

### **Article 2: Relationship of the Court with the United Nations**

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

### **Article 3: Seat of the Court**

The seat of the Court shall be established at The Hague in the Netherlands ("the host State").

The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

### **Article 4: Legal status and powers of the Court**

The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

## **PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW**

### **Article 5: Crimes within the jurisdiction of the Court**

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;

- (b) Crimes against humanity;
  - (c) War crimes;
  - (d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

#### **Article 6: Genocide**

For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

#### **Article 7: Crimes against humanity**

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
- (a) Murder;
  - (b) Extermination;
  - (c) Enslavement;
  - (d) Deportation or forcible transfer of population;
  - (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
  - (f) Torture;
  - (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
  - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts

of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.

#### **Article 8: War crimes**

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, “war crimes” means:
  - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
    - (i) Wilful killing;
    - (ii) Torture or inhuman treatment, including biological experiments;
    - (iii) Wilfully causing great suffering, or serious injury to body or health;
    - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
    - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
    - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
    - (vii) Unlawful deportation or transfer or unlawful confinement;
    - (viii) Taking of hostages.
  - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
    - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
    - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
    - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
    - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material

- and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
  - (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
  - (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
  - (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
  - (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
  - (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
  - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
  - (iii) Taking of hostages;
  - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:



- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
  - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
  - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
  - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
  - (v) Pillaging a town or place, even when taken by assault;
  - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
  - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
  - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
  - (ix) Killing or wounding treacherously a combatant adversary;
  - (x) Declaring that no quarter will be given;
  - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
  - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

#### **Article 9: Elements of Crimes**

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Elements of Crimes may be proposed by:
  - (a) Any State Party;
  - (b) The judges acting by an absolute majority;
  - (c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

#### **Article 10**

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

#### **Article 11: Jurisdiction *ratione temporis***

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

#### **Article 12: Preconditions to the exercise of jurisdiction**

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
  - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
  - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the

exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

### **Article 13: Exercise of jurisdiction**

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

### **Article 14: Referral of a situation by a State Party**

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

### **Article 15: Prosecutor**

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice

to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

#### **Article 16: Deferral of investigation or prosecution**

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

#### **Article 17: Issues of admissibility**

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
  - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
  - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
  - (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
  - (d) The case is not of sufficient gravity to justify further action by the Court.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
  - (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
  - (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
- 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

**Article 18: Preliminary rulings regarding admissibility**

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.
2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.
3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.
4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.
5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.
6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

**Article 19: Challenges to the jurisdiction of the Court  
or the admissibility of a case**

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
  - (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
  - (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
  - (c) A State from which acceptance of jurisdiction is required under article 12.
3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.
4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).
5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.
6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.
7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.
8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:
  - (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

- (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
  - (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.
9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.
10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.
11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

**Article 20: *Ne bis in idem***

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
  - (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

**Article 21: Applicable law**

1. The Court shall apply:
- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
  - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
  3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

### **PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW**

#### **Article 22: *Nullum crimen sine lege***

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

#### **Article 23: *Nulla poena sine lege***

A person convicted by the Court may be punished only in accordance with this Statute.

#### **Article 24: Non-retroactivity *ratione personae***

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

#### **Article 25: Individual criminal responsibility**

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.



3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
  - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
  - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
  - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
  - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
    - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
    - (ii) Be made in the knowledge of the intention of the group to commit the crime;
  - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
  - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

**Article 26: Exclusion of jurisdiction over persons under eighteen**

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

**Article 27: Irrelevance of official capacity**

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

**Article 28: Responsibility of commanders and other superiors**

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
  - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
  - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
  - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
  - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
  - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

**Article 29: Non-applicability of statute of limitations**

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

**Article 30: Mental element**

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - (a) In relation to conduct, that person means to engage in the conduct;
  - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

**Article 31: Grounds for excluding criminal responsibility**

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:
  - (a) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
  - (b) The person is in a state of intoxication that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
  - (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
  - (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
    - (i) Made by other persons; or
    - (ii) Constituted by other circumstances beyond that person’s control.
2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.
3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

**Article 32: Mistake of fact or mistake of law**

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

**Article 33: Superior orders and prescription of law**

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
  - (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
  - (b) The person did not know that the order was unlawful; and
  - (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

**PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT****Article 34: Organs of the Court**

The Court shall be composed of the following organs:

- (a) The Presidency;
- (b) An Appeals Division, a Trial Division and a Pre-Trial Division;
- (c) The Office of the Prosecutor;
- (d) The Registry.

**Article 35: Service of judges**

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.
2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.
3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.
4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

**Article 36: Qualifications, nomination and election of judges**

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.
2.
  - (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.
  - (b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.
  - (c)
    - (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;
    - (ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.
3.
  - (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.
  - (b) Every candidate for election to the Court shall:
    - (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
    - (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;
  - (c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
4.
  - (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:
    - (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

- (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

- (b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.
  - (c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.
5. For the purposes of the election, there shall be two lists of candidates:
- List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and
  - List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).
- A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.
6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.
- (b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.
7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.
8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:
- (i) The representation of the principal legal systems of the world;
  - (ii) Equitable geographical representation; and
  - (iii) A fair representation of female and male judges.

- (b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.
- 9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.
- (b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.
- (c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.
- 10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

#### **Article 37: Judicial vacancies**

- 1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.
- 2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

#### **Article 38: The Presidency**

- 1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.
- 2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.
- 3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:
  - (a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and
  - (b) The other functions conferred upon it in accordance with this Statute.
- 4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

**Article 39: Chambers**

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.
2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.
  - (b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;
  - (ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;
  - (iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;
  - (c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.
3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.
  - (b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.
4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

**Article 40: Independence of the judges**

1. The judges shall be independent in the performance of their functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.



4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

#### **Article 41: Excusing and disqualification of judges**

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.
2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.  
(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.  
(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

#### **Article 42: The Office of the Prosecutor**

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.
2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.
3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the

Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.
6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.
7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, *inter alia*, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.
8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.
  - (a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;
  - (b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;
9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

#### **Article 43: The Registry**

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.
2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.
3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.
5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold

office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

#### **Article 44: Staff**

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.
2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis*, to the criteria set forth in article 36, paragraph 8.
3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.
4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

#### **Article 45: Solemn undertaking**

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

#### **Article 46: Removal from office**

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:
  - (a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or
  - (b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:
  - (a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;
  - (b) In the case of the Prosecutor, by an absolute majority of the States Parties;
  - (c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.
3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.
4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

#### **Article 47: Disciplinary measures**

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

#### **Article 48: Privileges and immunities**

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.
2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.
3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.
4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.
5. The privileges and immunities of:
  - (a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

- (b) The Registrar may be waived by the Presidency;
- (c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;
- (d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

#### **Article 49: Salaries, allowances and expenses**

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

#### **Article 50: Official and working languages**

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.
2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.
3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

#### **Article 51: Rules of Procedure and Evidence**

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Rules of Procedure and Evidence may be proposed by:
  - (a) Any State Party;
  - (b) The judges acting by an absolute majority; or
  - (c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.
5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

#### **Article 52: Regulations of the Court**

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.
2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.
3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

### **PART 5. INVESTIGATION AND PROSECUTION**

#### **Article 53: Initiation of an investigation**

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
  - (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
  - (b) The case is or would be admissible under article 17; and
  - (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
  - (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
  - (b) The case is inadmissible under article 17; or

- (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.
- 3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.
  - (b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.
- 4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

**Article 54: Duties and powers of the Prosecutor with respect to investigations**

- 1. The Prosecutor shall:
  - (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
  - (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
  - (c) Fully respect the rights of persons arising under this Statute.
- 2. The Prosecutor may conduct investigations on the territory of a State:
  - (a) In accordance with the provisions of Part 9; or
  - (b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).
- 3. The Prosecutor may:
  - (a) Collect and examine evidence;
  - (b) Request the presence of and question persons being investigated, victims and witnesses;
  - (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;

- (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
- (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
- (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

**Article 55: Rights of persons during an investigation**

1. In respect of an investigation under this Statute, a person:
  - (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
  - (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
  - (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
  - (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.
2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
  - (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
  - (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
  - (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
  - (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.



**Article 56: Role of the Pre-Trial Chamber in relation to a unique investigative opportunity**

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.  
(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.  
(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.
2. The measures referred to in paragraph 1 (b) may include:
  - (a) Making recommendations or orders regarding procedures to be followed;
  - (b) Directing that a record be made of the proceedings;
  - (c) Appointing an expert to assist;
  - (d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;
  - (e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;
  - (f) Taking such other action as may be necessary to collect or preserve evidence.
3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.  
(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.
4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

**Article 57: Functions and powers of the Pre-Trial Chamber**

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.
2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.  
(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.
3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:
  - (a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;
  - (b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;
  - (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;
  - (d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9;
  - (e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

**Article 58: Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear**

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
  - (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

- (b) The arrest of the person appears necessary:
  - (i) To ensure the person's appearance at trial;
  - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
  - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.
- 2. The application of the Prosecutor shall contain:
  - (a) The name of the person and any other relevant identifying information;
  - (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;
  - (c) A concise statement of the facts which are alleged to constitute those crimes;
  - (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and
  - (e) The reason why the Prosecutor believes that the arrest of the person is necessary.
- 3. The warrant of arrest shall contain:
  - (a) The name of the person and any other relevant identifying information;
  - (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and
  - (c) A concise statement of the facts which are alleged to constitute those crimes.
- 4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.
- 5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.
- 6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.
- 7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:
  - (a) The name of the person and any other relevant identifying information;
  - (b) The specified date on which the person is to appear;

- (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and
- (d) A concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person.

**Article 59: Arrest proceedings in the custodial State**

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.
2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:
  - (a) The warrant applies to that person;
  - (b) The person has been arrested in accordance with the proper process; and
  - (c) The person's rights have been respected.
3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.
4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).
5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.
6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.
7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

**Article 60: Initial proceedings before the Court**

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.
3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.
4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.
5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

**Article 61: Confirmation of the charges before trial**

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.
2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:
  - (a) Waived his or her right to be present; or
  - (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.
3. Within a reasonable time before the hearing, the person shall:
  - (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
  - (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.
6. At the hearing, the person may:
  - (a) Object to the charges;
  - (b) Challenge the evidence presented by the Prosecutor; and
  - (c) Present evidence.
7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:
  - (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
  - (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
  - (c) Adjourn the hearing and request the Prosecutor to consider:
    - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
    - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.
8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.
9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.
10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.
11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

## **PART 6. THE TRIAL**

### **Article 62: Place of trial**

Unless otherwise decided, the place of the trial shall be the seat of the Court.

### **Article 63: Trial in the presence of the accused**

1. The accused shall be present during the trial.
2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

### **Article 64: Functions and powers of the Trial Chamber**

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
  - (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
  - (b) Determine the language or languages to be used at trial; and
  - (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.
4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.
5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.
6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
  - (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;
  - (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;
  - (c) Provide for the protection of confidential information;

- (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;
  - (e) Provide for the protection of the accused, witnesses and victims; and
  - (f) Rule on any other relevant matters.
7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.
8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.
- (b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.
9. The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:
- (a) Rule on the admissibility or relevance of evidence; and
  - (b) Take all necessary steps to maintain order in the course of a hearing.
10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

**Article 65: Proceedings on an admission of guilt**

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:
- (a) The accused understands the nature and consequences of the admission of guilt;
  - (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
  - (c) The admission of guilt is supported by the facts of the case that are contained in:
    - (i) The charges brought by the Prosecutor and admitted by the accused;
    - (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and
    - (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.



2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.
3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.
4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:
  - (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or
  - (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.
5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

#### **Article 66: Presumption of innocence**

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

#### **Article 67: Rights of the accused**

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
  - (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
  - (c) To be tried without undue delay;
  - (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to

have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

- (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
  - (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;
  - (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
  - (h) To make an unsworn oral or written statement in his or her defence; and
  - (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

**Article 68: Protection of the victims and witnesses  
and their participation in the proceedings**

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.
4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.
5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

#### **Article 69: Evidence**

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.
2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.
3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.
4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.
5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.
7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
  - (a) The violation casts substantial doubt on the reliability of the evidence; or
  - (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.
8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

**Article 70: Offences against the administration of justice**

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:
  - (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
  - (b) Presenting evidence that the party knows is false or forged;
  - (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
  - (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
  - (e) Retaliating against an official of the Court on account of duties performed by that or another official;
  - (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.
2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.
3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.
4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

- (b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

**Article 71: Sanctions for misconduct before the Court**

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.
2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

**Article 72: Protection of national security information**

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.
2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.
3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.
4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.
5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:
  - (a) Modification or clarification of the request;
  - (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though

- relevant, could be or has been obtained from a source other than the requested State;
- (c) Obtaining the information or evidence from a different source or in a different form; or
  - (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of *in camera* or *ex parte* proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.
6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.
7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:
- (a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:
    - (i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings *in camera* and *ex parte*;
    - (ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and
    - (iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or
  - (b) In all other circumstances:
    - (i) Order disclosure; or
    - (ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

**Article 73: Third-party information or documents**

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

**Article 74: Requirements for the decision**

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.
2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.
3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.
4. The deliberations of the Trial Chamber shall remain secret.
5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

**Article 75: Reparations to victims**

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

#### **Article 76: Sentencing**

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.
2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.
3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.
4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

### **PART 7. PENALTIES**

#### **Article 77: Applicable penalties**

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
  - (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
  - (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
2. In addition to imprisonment, the Court may order:
  - (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
  - (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

#### **Article 78: Determination of the sentence**

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.



2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.
3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

**Article 79: Trust Fund**

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

**Article 80: Non-prejudice to national application of penalties and national laws**

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

**PART 8. APPEAL AND REVISION**

**Article 81: Appeal against decision of acquittal or conviction or against sentence**

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:
  - (a) The Prosecutor may make an appeal on any of the following grounds:
    - (i) Procedural error,
    - (ii) Error of fact, or
    - (iii) Error of law;
  - (b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
    - (i) Procedural error,
    - (ii) Error of fact,
    - (iii) Error of law, or
    - (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;
- (b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;
- (c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).
3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;
- (b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;
- (c) In case of an acquittal, the accused shall be released immediately, subject to the following:
  - (i) Under exceptional circumstances, and having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;
  - (ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.
4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

#### **Article 82: Appeal against other decisions**

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:
  - (a) A decision with respect to jurisdiction or admissibility;
  - (b) A decision granting or denying release of the person being investigated or prosecuted;
  - (c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;
  - (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for

which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.
3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.
4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

#### **Article 83: Proceedings on appeal**

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.
2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:
  - (a) Reverse or amend the decision or sentence; or
  - (b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.
4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.
5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

#### **Article 84: Revision of conviction or sentence**

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

- (a) New evidence has been discovered that:
    - (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and
    - (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;
  - (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;
  - (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.
2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:
- (a) Reconvene the original Trial Chamber;
  - (b) Constitute a new Trial Chamber; or
  - (c) Retain jurisdiction over the matter,
- with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

**Article 85: Compensation to an arrested or convicted person**

- 1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
- 2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.
- 3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

**PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE**

**Article 86: General obligation to cooperate**

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

**Article 87: Requests for cooperation: general provisions**

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

- (b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.
2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession. Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.
3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.
4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.
5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis.
  - (b) Where a State not party to this Statute, which has entered into an *ad hoc* arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.
6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.
7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that

effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

**Article 88: Availability of procedures under national law**

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

**Article 89: Surrender of persons to the Court**

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.
2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.
3.
  - (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.
  - (b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:
    - (i) A description of the person being transported;
    - (ii) A brief statement of the facts of the case and their legal characterization; and
    - (iii) The warrant for arrest and surrender;
  - (c) A person being transported shall be detained in custody during the period of transit;
  - (d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;
  - (e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

**Article 90: Competing requests**

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.
2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:
  - (a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or
  - (b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.
3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.
4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.
5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.
6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:
  - (a) The respective dates of the requests;
  - (b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

- (c) The possibility of subsequent surrender between the Court and the requesting State.
- 7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:
  - (a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;
  - (b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.
- 8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

**Article 91: Contents of request for arrest and surrender**

- 1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).
- 2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:
  - (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
  - (b) A copy of the warrant of arrest; and
  - (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.
- 3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:
  - (a) A copy of any warrant of arrest for that person;
  - (b) A copy of the judgement of conviction;



- (c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and
  - (d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.
4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

#### **Article 92: Provisional arrest**

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.
2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:
  - (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
  - (b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;
  - (c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and
  - (d) A statement that a request for surrender of the person sought will follow.
3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.
4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

#### **Article 93: Other forms of cooperation**

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
  - (a) The identification and whereabouts of persons or the location of items;

- (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
  - (c) The questioning of any person being investigated or prosecuted;
  - (d) The service of documents, including judicial documents;
  - (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
  - (f) The temporary transfer of persons as provided in paragraph 7;
  - (g) The examination of places or sites, including the exhumation and examination of grave sites;
  - (h) The execution of searches and seizures;
  - (i) The provision of records and documents, including official records and documents;
  - (j) The protection of victims and witnesses and the preservation of evidence;
  - (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
  - (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.
2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.
  3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.
  4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.
  5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.
7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:
  - (i) The person freely gives his or her informed consent to the transfer; and
  - (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.
- (b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.
8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.
- (b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.
- (c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.
9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.
- (ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.
- (b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.
10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.
- (b) (i) The assistance provided under subparagraph (a) shall include, *inter alia*:
  - a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

- b. The questioning of any person detained by order of the Court;
- (ii) In the case of assistance under subparagraph (b) (i) a:
  - a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;
  - b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.
- (c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

**Article 94: Postponement of execution of a request in respect  
of ongoing investigation or prosecution**

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.
2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

**Article 95: Postponement of execution of a request in respect  
of an admissibility challenge**

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

**Article 96: Contents of request for other forms of assistance under article 93**

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).
2. The request shall, as applicable, contain or be supported by the following:
  - (a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;
  - (b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

- (c) A concise statement of the essential facts underlying the request;
  - (d) The reasons for and details of any procedure or requirement to be followed;
  - (e) Such information as may be required under the law of the requested State in order to execute the request; and
  - (f) Any other information relevant in order for the assistance sought to be provided.
3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.
  4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

#### **Article 97: Consultations**

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, *inter alia*:

- (a) Insufficient information to execute the request;
- (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or
- (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

#### **Article 98: Cooperation with respect to waiver of immunity and consent to surrender**

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

**Article 99: Execution of requests under articles 93 and 96**

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.
2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.
3. Replies from the requested State shall be transmitted in their original language and form.
4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:
  - (a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;
  - (b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.
5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

**Article 100: Costs**

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:
  - (a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;
  - (b) Costs of translation, interpretation and transcription;
  - (c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

- (d) Costs of any expert opinion or report requested by the Court;
  - (e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and
  - (f) Following consultations, any extraordinary costs that may result from the execution of a request.
2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

#### **Article 101: Rule of speciality**

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.
2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

#### **Article 102: Use of terms**

For the purposes of this Statute:

- (a) “surrender” means the delivering up of a person by a State to the Court, pursuant to this Statute.
- (b) “extradition” means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

### **PART 10. ENFORCEMENT**

#### **Article 103: Role of States in enforcement of sentences of imprisonment**

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.
- (b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.
- (c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court’s designation.
2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days’ notice of any such known or foreseeable circumstances.

During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

- (b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.
3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:
    - (a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;
    - (b) The application of widely accepted international treaty standards governing the treatment of prisoners;
    - (c) The views of the sentenced person;
    - (d) The nationality of the sentenced person;
    - (e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.
  4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

#### **Article 104: Change in designation of State of enforcement**

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.
2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

#### **Article 105: Enforcement of the sentence**

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.
2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

#### **Article 106: Supervision of enforcement of sentences and conditions of imprisonment**

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.



2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.
3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

**Article 107: Transfer of the person upon completion of sentence**

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.
2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.
3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

**Article 108: Limitation on the prosecution or punishment of other offences**

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.
2. The Court shall decide the matter after having heard the views of the sentenced person.
3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

**Article 109: Enforcement of fines and forfeiture measures**

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.
2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

**Article 110: Review by the Court concerning reduction of sentence**

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.
2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.
3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.
4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:
  - (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
  - (b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
  - (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.
5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

**Article 111: Escape**

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

**PART 11. ASSEMBLY OF STATES PARTIES**

**Article 112: Assembly of States Parties**

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:
  - (a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;
  - (b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;
  - (c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;
  - (d) Consider and decide the budget for the Court;
  - (e) Decide whether to alter, in accordance with article 36, the number of judges;
  - (f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;
  - (g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.
3.
  - (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.
  - (b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.
  - (c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.
4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.
5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.
6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.
7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:
  - (a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;
  - (b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.
9. The Assembly shall adopt its own rules of procedure.
10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

## **PART 12. FINANCING**

### **Article 113: Financial Regulations**

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

### **Article 114: Payment of expenses**

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

### **Article 115: Funds of the Court and of the Assembly of States Parties**

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

- (a) Assessed contributions made by States Parties;
- (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

### **Article 116: Voluntary contributions**

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

### **Article 117: Assessment of contributions**

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

**Article 118: Annual audit**

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

**PART 13. FINAL CLAUSES****Article 119: Settlement of disputes**

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

**Article 120: Reservations**

No reservations may be made to this Statute.

**Article 121: Amendments**

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.
2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.
3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.
4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.
6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127,

paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

#### **Article 122: Amendments to provisions of an institutional nature**

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.
2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

#### **Article 123: Review of the Statute**

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.
2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.
3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

#### **Article 124: Transitional Provision**

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time.

#### **Article 125: Signature, ratification, acceptance, approval or accession**

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998.

Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.
3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

#### **Article 126: Entry into force**

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

#### **Article 127: Withdrawal**

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

#### **Article 128: Authentic texts**

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

**In Witness Whereof**, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

**Done** at Rome, this 17<sup>th</sup> day of July 1998.

## **B. United States, American Service-members' Protection Act of 2002 (ASPA)**

[Source: "Title II-American Service members' Protection Act", in 2002 *Supplemental Appropriations Act for Further Recovery From and Response To Terrorist Attacks on the United States*, HR 4775, signed by President G.W. Bush on 2 August 2002; available on <http://thomas.loc.gov>]

### **HR 4775**

#### **2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States [...]**

#### **TITLE II – AMERICAN SERVICE-MEMBERS' PROTECTION ACT**

##### **SEC. 2001. SHORT TITLE**

This title may be cited as the 'American Service members' Protection Act of 2002'.

##### **SEC. 2002. FINDINGS**

Congress makes the following findings:

- (1) On July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, meeting in Rome, Italy, adopted the 'Rome Statute of the International Criminal Court'. [...]
- (5) Ambassador Scheffer went on to tell the Congress that: 'Multinational peacekeeping forces operating in a country that has joined the treaty can be exposed to the Court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty. Thus, the treaty purports to establish an arrangement whereby United States armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives. Other contributors to peacekeeping operations will be similarly exposed.'
- (6) Notwithstanding these concerns, President Clinton directed that the United States sign the Rome Statute on December 31, 2000. In a statement issued that day, he stated that in view of the unremedied deficiencies of the Rome Statute, 'I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied'. [...]
- (8) Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States. The United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by the International Criminal Court.



- (9) In addition to exposing members of the Armed Forces of the United States to the risk of international criminal prosecution, the Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court. Particularly if the Preparatory Commission agrees on a definition of the Crime of Aggression over United States objections, senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression. No less than members of the Armed Forces of the United States, senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States. [...]
- (11) It is a fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for nonparties without their consent to be bound. The United States is not a party to the Rome Statute and will not be bound by any of its terms. The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals.

### **SEC. 2003. WAIVER AND TERMINATION OF PROHIBITIONS OF THIS TITLE [...]**

- (c) **AUTHORITY TO WAIVE SECTIONS 4 AND 6 WITH RESPECT TO AN INVESTIGATION OR PROSECUTION OF A NAMED INDIVIDUAL** – The President is authorized to waive the prohibitions and requirements of sections 2004 and 2006 to the degree such prohibitions and requirements would prevent United States cooperation with an investigation or prosecution of a named individual by the International Criminal Court. A waiver under this subsection may be issued only if the President at least 15 days in advance of exercising such authority [...]
- (2) determines and reports to the appropriate congressional committees that [...]
- (b) there is reason to believe that the named individual committed the crime or crimes that are the subject of the International Criminal Court's investigation or prosecution;
  - (c) it is in the national interest of the United States for the International Criminal Court's investigation or prosecution of the named individual to proceed; and
  - (d) in investigating events related to actions by the named individual, none of the following persons will be investigated, arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court with respect to actions undertaken by them in an official capacity:
    - (i) Covered United States persons. [under the present law]
    - (ii) Covered allied persons.
    - (iii) Individuals who were covered United States persons or covered allied persons. [...]

**SEC. 2004. PROHIBITION ON COOPERATION  
WITH THE INTERNATIONAL CRIMINAL COURT**

- (a) APPLICATION – The provisions of this section –
  - (1) apply only to cooperation with the International Criminal Court and shall not apply to cooperation with an *ad hoc* international criminal tribunal established by the United Nations Security Council [...].
  - (2) shall not prohibit
    - (a) any action permitted under section 2008; [...]
- (b) PROHIBITION ON RESPONDING TO REQUESTS FOR COOPERATION – Notwithstanding section 1782 of title 28, United States Code [<http://uscode.house.gov>], or any other provision of law, no United States Court, and no agency or entity of any State or local government, including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute.
- (c) PROHIBITION ON TRANSMITTAL OF LETTERS ROGATORY FROM THE INTERNATIONAL CRIMINAL COURT [...]
- (d) PROHIBITION ON EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT [...]
- (e) PROHIBITION ON PROVISION OF SUPPORT TO THE INTERNATIONAL CRIMINAL COURT [...]
- (f) PROHIBITION ON USE OF APPROPRIATED FUNDS TO ASSIST THE INTERNATIONAL CRIMINAL COURT [...]
- (g) RESTRICTION ON ASSISTANCE PURSUANT TO MUTUAL LEGAL ASSISTANCE TREATIES – The United States shall exercise its rights to limit the use of assistance provided under all treaties and executive agreements for mutual legal assistance in criminal matters, multilateral conventions with legal assistance provisions, and extradition treaties, to which the United States is a party, and in connection with the execution or issuance of any letter rogatory, to prevent the transfer to, or other use by, the International Criminal Court of any assistance provided by the United States under such treaties and letters rogatory.
- (h) PROHIBITION ON INVESTIGATIVE ACTIVITIES OF AGENTS – No agent of the International Criminal Court may conduct, in the United States or any territory subject to the jurisdiction of the United States, any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other proceeding at the International Criminal Court.

**SEC. 2005. RESTRICTION ON UNITED STATES PARTICIPATION  
IN CERTAIN UNITED NATIONS PEACEKEEPING OPERATIONS**

- (a) POLICY – Effective beginning on the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute, the President should use the voice and vote of the United States in the United Nations Security Council to

ensure that each resolution of the Security Council authorizing any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations permanently exempts, at a minimum, members of the Armed Forces of the United States participating in such operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by such personnel in connection with the operation.

- (b) RESTRICTION – Members of the Armed Forces of the United States may not participate in any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations, the creation of which is authorized by the United Nations Security Council on or after the date that the Rome Statute enters into effect pursuant to Article 126 of the Rome Statute, unless the President has submitted to the appropriate congressional committees a certification described in subsection (c) with respect to such operation.
- (c) CERTIFICATION – The certification referred to in subsection (b) is a certification by the President that -
  - (1) members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court [...] or
  - (3) the national interests of the United States justify participation by members of the Armed Forces of the United States in the peacekeeping or peace enforcement operation.

**SEC. 2006. PROHIBITION ON DIRECT OR INDIRECT TRANSFER OF  
CLASSIFIED NATIONAL SECURITY INFORMATION AND LAW ENFORCEMENT  
INFORMATION TO THE INTERNATIONAL CRIMINAL COURT**

- (a) IN GENERAL – Not later than the date on which the Rome Statute enters into force, the President shall ensure that appropriate procedures are in place to prevent the transfer of classified national security information and law enforcement information to the International Criminal Court for the purpose of facilitating an investigation, apprehension, or prosecution. [...]

**SEC. 2007. PROHIBITION OF UNITED STATES MILITARY ASSISTANCE  
TO PARTIES TO THE INTERNATIONAL CRIMINAL COURT**

- (a) PROHIBITION OF MILITARY ASSISTANCE – Subject to subsections (b) and (c), and effective 1 year after the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute, no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.

- (b) NATIONAL INTEREST WAIVER – The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition.
- (c) ARTICLE 98 WAIVER – The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that such country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal court from proceeding against United States personnel present in such country.
- (d) EXEMPTION – The prohibition of subsection (a) shall not apply to the government of
  - (1) a NATO member country;
  - (2) a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand); or
  - (3) Taiwan.

**SEC. 2008. AUTHORITY TO FREE MEMBERS OF THE ARMED FORCES  
OF THE UNITED STATES AND CERTAIN OTHER PERSONS DETAINED OR  
IMPRISONED BY OR ON BEHALF OF THE INTERNATIONAL CRIMINAL COURT**

- (a) AUTHORITY – The President is authorized to use all means necessary and appropriate to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.
- (b) PERSONS AUTHORIZED TO BE FREED – The authority of subsection (a) shall extend to the following persons:
  - (1) Covered United States persons.
  - (2) Covered allied persons.
  - (3) Individuals detained or imprisoned for official actions taken while the individual was a covered United States person or a covered allied person, and in the case of a covered allied person, upon the request of such government.  
[...]

**SEC. 2013. DEFINITIONS [...]**

- (3) COVERED ALLIED PERSONS – The term ‘covered allied persons’ means military personnel, elected or appointed officials, and other persons employed by or working on behalf of the government of a NATO member country, a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), or Taiwan, for so long as that

government is not a party to the International Criminal Court and wishes its officials and other persons working on its behalf to be exempted from the jurisdiction of the International Criminal Court.

- (4) COVERED UNITED STATES PERSONS – The term ‘covered United States persons’ means members of the Armed Forces of the United States, elected or appointed officials of the United States Government, and other persons employed by or working on behalf of the United States Government, for so long as the United States is not a party to the International Criminal Court. [...]
- (12) SUPPORT – The term ‘support’ means assistance of any kind, including financial support, transfer of property or other material support, services, intelligence sharing, law enforcement cooperation, the training or detail of personnel, and the arrest or detention of individuals. [...]

## **C. Amnesty International, “No double standards on international justice”**

[Source: Amnesty International, Security Council: No double standards on international justice, Press Release IOR 40/013/2002, 1 July 2002; available on <http://www.amnesty.org>]

### **AI INDEX: IOR 40/013/2002 1 July 2002**

#### **Security Council: No double standards on international justice**

Amnesty International believes that there should be no double standards in international justice and no immunity for anyone, under any circumstances, for crimes such as genocide, war crimes and crimes against humanity. The organization today called on the USA to reconsider its position seeking immunity for its own personnel from the jurisdiction of the International Criminal Court (ICC). The Rome Statute of the ICC enters into force today.

At the Security Council on 30 June, the USA vetoed the extension of the United Nations Mission in Bosnia and Herzegovina (UNMBIH) as it did not get support for such immunity. It then agreed to a 72-hour extension of UNMBIH’s mandate to allow for further discussion.

“We welcome the fact that the other members of the Security Council have stood firm. We call on them and on all other countries committed to the struggle against impunity for the worst possible crimes to continue to give full support to the ICC,” Amnesty International said.

“The US position threatens the integrity of the international system of justice as a whole and challenges the universal applicability of one of its most fundamental principles: no immunity for crimes such as genocide, war crimes and crimes against humanity,” Amnesty International said as it stressed that the issue goes beyond the fate of UNMBIH or even beyond the ICC.

The 1949 Geneva Conventions already require any country to search for perpetrators of the most serious war crimes, regardless of their rank or nationality, and allow states to bring them to justice before their own courts. These Conventions have long enjoyed nearly universal ratification, including by the USA. The 1948 Convention on Genocide also provides no immunity for suspects of such a crime. Amnesty International believes that the same principle applies to crimes against humanity.

"The concerns expressed by the USA are utterly misplaced," Amnesty International stated.

The Rome Statute of the ICC has strong safeguards against politically-motivated, unfounded prosecutions. These include an independent Prosecutor elected by the state parties. The Prosecutor will need authorization from a panel of judges before starting an investigation. The Security Council has the authority to defer of any investigation. The ICC will only act if national courts are unable or unwilling to take action. [...]

So far 74 countries – including Bosnia and Herzegovina – have ratified the Rome Statute, and further ratifications are expected in the coming days. Countries that have ratified the Rome Statute will elect the first Prosecutor and 18 judges of the court.

## **D. United Nations, Security Council Resolution 1487 (2003)**

[Source: United Nations, S/RES/1487 (2003), 12 June 2003; available on <http://www.un.org>]

### **Resolution 1487 (2003)**

#### **Adopted by the Security Council at its 4772<sup>nd</sup> meeting, on 12 June 2003**

*The Security Council,*

*Taking note* of the entry into force on 1 July 2002, of the Statute of the International Criminal Court (ICC), done at Rome 17 July 1998 (the Rome Statute),

*Emphasizing* the importance to international peace and security of United Nations operations,

*Noting* that not all States are parties to the Rome Statute,

*Noting* that States Parties to the Rome Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity,

*Noting* that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes,

*Determining* that operations established or authorized by the United Nations Security Council are deployed to maintain or restore international peace and security,

*Determining further* that it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council,

*Acting under Chapter VII of the Charter of the United Nations,*

1. *Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a 12-month period starting 1 July 2003 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;
2. *Expresses* the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary; [Note: No such renewal was adopted in 2004]
3. *Decides* that Member States shall take no action inconsistent with paragraph 1 and with their international obligations;
4. *Decides* to remain seized of the matter.

## DISCUSSION

1. (*Statute, Art. 7*)
  - a. What innovative elements concerning crimes against humanity are introduced in the ICC Statute?
  - b. Can crimes against humanity be perpetrated in peacetime?
  - c. The Nuremberg trials established that for an accusation of crimes against humanity, there must be a nexus between the accused and a State engaged in an armed conflict. Does this nexus still exist under the ICC Statute? Can a non-State actor be punished and prosecuted under the Statute for crimes against humanity? Can a member of a rebel group that controls part of a territory be punished for crimes against humanity if inhumane acts were committed? Did the drafters of the ICC Statute draw on the ICTY and ICTR judgements to reach the solution they chose?
  - d. Does the Statute's definition of crimes against humanity include new elements? Which ones? Could it be argued that the expanded list of inhumane acts further clarifies the definition of crimes against humanity? Does this list have to be interpreted as being exhaustive, or only as illustrative of elements of crimes against humanity?
  - e. To consider one specific element, when do rape and forced pregnancy constitute crimes against humanity? Is this a new rule?
2. (*Statute, Art. 8*)
  - a. Is the Court competent for all war crimes? For all grave breaches of IHL? (GC I-IV, Arts 50/51/130/147 respectively; P I, Arts 11(4) and 85)
  - b. Does the Statute clarify for which grave breaches of IHL the Court is competent? Is Art. 8(1) of the Statute compatible with the principle of *nullum crimen sine lege*?
  - c. Does the definition of war crimes correspond to the detailed provisions of the Hague and Geneva Conventions? Does the Statute's definition of war crimes add innovative elements? Which ones?

- d. Does the Statute include war crimes in non-international armed conflicts? Are they the same as those covered in international armed conflicts? Are the differences in terms of the threshold of applicability between the crimes defined in Art. 8(2)(c) and those defined in Art. 8(2)(e) necessary under IHL? Are those differences reasonable? Does the threshold of applicability for war crimes in non-international armed conflicts listed in Art. 8(2)(e) correspond to that of Protocol II? Do you think that this threshold of applicability is too high? Among the twelve war crimes listed under this provision, starvation of the civilian population is not mentioned. Why not? Are any of the twelve crimes listed not prohibited by Protocol I?
  - e. Could it be argued that war crimes as defined in the Statute are customary international law? For which crimes do you have doubts? Must the Statute codify customary law in the definition of crimes in order to respect the principle of *nullum crimen sine lege*? Or may the Statute add new crimes? May it add new war crimes to the list in the Geneva Conventions and Protocols even though they may not be crimes under customary law?
  - f. May the Court try a person for a crime which falls under the formulation of a crime according to Art. 8 of the Statute but not under the formulation of that same crime by Protocol I, even though Protocol I is applicable to it? In view of Art. 21(1)(b), may the Court conversely try a person for a crime that falls under the formulation of Protocol I, but not under the Statute? At least if the act concerned has become a crime under customary law?
  - g. Does Art. 10 bar an accused from arguing that a provision of Art. 8 has been abrogated by a new rule of customary law?
3. (Statute, Art. 9)
- a. Are the elements of crimes to be defined under Art. 9 binding for the Court? At least in the sense that the Court may not sentence a person who does not fulfil them? Why did States want to define such elements?
  - b. Is the definition of elements of crimes according to Art. 9 useful? Will it develop IHL? May it criminalize further forms of behaviour?
4. (Statute, Arts 11-19)
- a. Who may trigger the Court's jurisdiction with regard to a specific crime? A State? An individual? The Prosecutor? The UN Security Council?
  - b. Who decides that an alleged crime needs to be investigated? The Prosecutor? The Court? The Security Council? What are the powers of each body in investigating a specific crime?
  - c. Concerning the role of the Prosecutor, would you qualify his powers as being too broad? May the Prosecutor initiate an investigation independently of the Security Council? Does the Prosecutor need the formal approval of the Pre-trial Chamber to proceed with an investigation?
  - d. What are the checks and balances of his powers? What are the exact terms and conditions in that regard? Do you consider that Art. 16 of the Statute is a check on the powers of the Prosecutor? Which concerns do you think some States have expressed in that regard? What could have prompted the inclusion of Art. 16? Is it justifiable? Is Resolution 1487 (2003) an example of the application of Art. 16 (*see also* question 19)? Is the Court independent in spite of Art. 16? If a person who has allegedly committed a grave breach of IHL is captured by a State, but the Security Council under Art. 16 adopts a resolution releasing the alleged offender, may or must the State bring him or her before its own courts? Could a resolution adopted by the Security Council under Chapter VII of the UN Charter also oblige or allow a State party to the Geneva Conventions not to prosecute an alleged perpetrator of a grave breach? (GC I-IV, Arts 49(2)/50(2)/129(2)/146(2) respectively; UN Charter, Art. 103 [see <http://www.un.org>])



- e. Concerning the issue of admissibility, to what extent may the Court investigate an individual who has committed a crime which has already been investigated and prosecuted by a State? Does Art. 17(1)(b) of the Statute provide a safeguard against “mock trials”?
  - f. Can an accused expect to be tried without undue delay under Art. 67(1)(c), in spite of Arts 15-19?
5.
    - a. Is the non-retroactivity of the Court’s jurisdiction over crimes committed before ratification of the Statute necessary under international law? Is it a consequence of the principle of *nullum crimen sine lege*? Could it be a *sine qua non* condition for certain States to ratify the Statute?
    - b. Is the “opting-out clause” in Art. 124 of the Statute acceptable under IHL? For which reasons could it have been introduced? May a national of a State that has opted out be tried by the Court if the State on the territory of which he or she has committed the crime has not opted out? What are the obligations of States party to the Conventions when a grave breach has been committed on the territory of a State, or by a national of a State, that has opted out? (GC I-IV, Arts 49(2)/50(2)/129(2)/146(2) respectively)
  6.
    - a. Is Art. 12(2) of the Statute compatible with IHL? Is the agreement of the State on whose territory the crime has been committed, or of the State of which the accused is a national, necessary under IHL? Or under other rules of international law? May or must a national court prosecute a person accused of grave breaches of IHL even if both the State on whose territory the grave breaches allegedly occurred and the State of nationality of the accused object? (GC I-IV, Arts 49(2)/50(2)/129(2)/146(2) respectively) What is the consequence of this limitation for war crimes committed in non-international armed conflicts?
    - b. Is the fact that even a national of a non-party State or a crime committed on the territory of a non-party State may be brought before the Court (if the other State concerned is party to the Statute), compatible with international law? Is it a violation of the principle that only States Parties are bound by a treaty? Is a non-party State bound by it if one of its nationals commits a crime on the territory of a State Party and is prosecuted by the Court? Are the Geneva Conventions binding on a national from a non-party State with regard to his actions on the territory of a State Party? May (must) the latter institute proceedings for grave breaches, in accordance with its own penal procedures? May it extradite him to a third State under an extradition treaty concluded between the two States, but non-binding on the remand prisoner’s State of origin?
    - c. Has a State a right to exclude its soldiers from being brought before international or foreign courts for war crimes, or a legitimate interest in doing so? When is this interest legitimate? Does the Statute take this interest into account? Has an accused a human right to be brought before the court competent under national or international law to prosecute for his or her crime at the time of the crime?
  7. What is the exact progression of a case through the system, from the first emergence of information that a war crime has been committed to trial and judgement? Please try to draw a flow chart.
  8. (*Statute, Arts 27 and 98*)
    - a. Does the Statute provide immunity to heads of States from prosecution? Can the Court prosecute an incumbent head of State? Can it obtain that person’s transfer from a third State? Even without the agreement of the State of which he or she is the head? May the Security Council overrule Art. 98?
    - b. If a non-party State concludes, with a State party to the Statute, a treaty providing immunity for its nationals acting on the latter’s territory, has it achieved immunity for its nationals before the

Court, despite Art. 12(2) of its Statute, for crimes committed on the territory of the State Party? Even if the treaty was agreed to after the ratification of the Statute? Do all “Agreements on the Status of Forces” concluded with a country for the deployment of international forces have this effect?

9. Do Arts 22-25 and 30-32 reflect the general principles of criminal law? Should a person accused of war crimes before a national court benefit from the same guarantees? Would those principles also apply before the courts of your country? (GC I-IV, Arts 49(4)/50(4)/129(4)/146(4) respectively)
10. Does Art. 28 of the Statute correspond to the rules of Arts 86 and 87 of Protocol I? Can its application by the Court ever be incompatible with Protocol I? May the Court in that case apply Art. 28?
11.
  - a. Could the grounds for excluding criminal responsibility listed in Art. 31 also be applied by a national court without violating the obligation to prosecute perpetrators of grave breaches of IHL? Do all those grounds exist in the national legislation of your country?
  - b. Does the ground for excluding responsibility formulated in Art. 31(1)(c), despite the last sentence of the paragraph, allow *jus ad bellum* arguments to be invoked? Or is this defence only available against a use of force unlawful under IHL? May a soldier commit a war crime to defend his life? To defend the lives of comrades? To defend the lives of civilians? May a soldier violate IHL in response to a violation of IHL threatening him or another person? Is there a difference between this defence and the IHL prohibition of reprisals? (GC I, Art. 46; GC II, Art. 47; GC III, Art. 43; GC IV, Art. 33; P I, Art. 51(6))
  - c. Does the ground for excluding responsibility formulated in Art. 31(1)(d) imply that a state of necessity may justify war crimes? That a soldier may commit war crimes if this is necessary to save the lives of fellow citizens? That an interrogator may torture a suspect thought to have information about an imminent attack?
12. Does Art. 33 fairly codify the rules of IHL on superior orders?
13. Has the Statute changed or developed substantive IHL? Has it added an implementation mechanism? Is the prosecution of war crimes before an international court provided for in IHL? Is it compatible with IHL? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 88)
14. Why is the establishment of the Court important for IHL? Will the Court's existence eliminate the necessity to try war crimes before national courts? When should a case be brought before the Court? Is your answer in line with Art. 17 of the Statute?
15. What is your overall assessment of the Statute from the point of view of IHL?
16.
  - a. Why did the United States adopt a law (ASPA) which protects their personnel from possible penal action by the Court?
  - b. As the United States is not party to the Rome Statute, may cases concerning its nationals, and more specifically soldiers, still be referred to the Court? Is this possibility changed by the United States' position as a permanent member of the UN Security Council? Is the situation different for US nationals who are members of UN forces?
  - c. Is the law applicable only to US nationals and allies engaged in operations decided or authorized by the Security Council?
  - d. May the United States, under international law, “protect” Egyptian, Israeli or Taiwanese allied nationals (to give just a few examples of allied nationals of States not party to the Statute) who have allegedly committed war crimes on the territory of a State Party?

17. Under Section 2008 of the ASPA the US President is granted the authority to order, if necessary, a military intervention to set free US nationals held in the Netherlands following an indictment or a sentence by the Court. Is this authority compatible with international law?
18. In which conditions are soldiers of UN forces and nationals of a State not party to the Rome Statute liable to be prosecuted by the Court?
19.
  - a. What do you think of Security Council Resolution 1487 in light of general international law? In light of the United Nations Charter [see [www.un.org](http://www.un.org)]? In light of the Court's Statute, and specifically of Art. 16?
  - b. Did Resolution 1487 cover the members of forces which were not under UN command and control, but for which the use of force was authorized by the Security Council (such as the Coalition forces during the 1990-91 Gulf war)? The members of KFOR in Kosovo? [See **Case No. 203**, Case Study, Armed Conflicts in the former Yugoslavia]
  - c. How do you explain that Resolution 1487 was adopted by the Security Council acting under Chapter VII of the United Nations Charter, as stipulated by Art. 16 of the Rome Statute, when that chapter applies to cases of "threats to the peace, breaches of the peace, and acts of aggression"?

**Document No. 24, Optional Protocol to the Convention on the Rights of the Child,  
on the Involvement of Children in Armed Conflict**

[Source: Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000; available at [www.icrc.org](http://www.icrc.org)]

**Optional Protocol to the Convention on the Rights of the Child on the involvement  
of children in armed conflict****25 May 2000**

*The States Parties to the present Protocol,*

*Encouraged* by the overwhelming support for the Convention on the Rights of the Child, demonstrating the widespread commitment that exists to strive for the promotion and protection of the rights of the child,

*Reaffirming* that the rights of children require special protection, and calling for continuous improvement of the situation of children without distinction, as well as for their development and education in conditions of peace and security,

*Disturbed* by the harmful and widespread impact of armed conflict on children and the long-term consequences it has for durable peace, security and development,

*Condemning* the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places that generally have a significant presence of children, such as schools and hospitals,

*Noting* the adoption of the Rome Statute of the International Criminal Court, in particular, the inclusion therein as a war crime, of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts,

*Considering* therefore that to strengthen further the implementation of rights recognized in the Convention on the Rights of the Child there is a need to increase the protection of children from involvement in armed conflict,

*Noting* that article 1 of the Convention on the Rights of the Child specifies that, for the purposes of that Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier,

*Convinced* that an optional protocol to the Convention that raises the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children,

*Noting* that the twenty-sixth International Conference of the Red Cross and Red Crescent in December 1995 recommended, *inter alia*, that parties to conflict take every feasible step to ensure that children below the age of 18 years do not take part in hostilities,

*Welcoming* the unanimous adoption, in June 1999, of International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which prohibits, *inter alia*, forced or compulsory recruitment of children for use in armed conflict,

*Condemning with the gravest concern* the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recognizing the responsibility of those who recruit, train and use children in this regard,

*Recalling* the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law,

*Stressing* that the present Protocol is without prejudice to the purposes and principles contained in the Charter of the United Nations, including Article 51, and relevant norms of humanitarian law,

*Bearing in mind* that conditions of peace and security based on full respect of the purposes and principles contained in the Charter and observance of applicable human rights instruments are indispensable for the full protection of children, in particular during armed conflicts and foreign occupation,

*Recognizing* the special needs of those children who are particularly vulnerable to recruitment or use in hostilities contrary to the present Protocol owing to their economic or social status or gender,

*Mindful* of the necessity of taking into consideration the economic, social and political root causes of the involvement of children in armed conflicts,

*Convinced* of the need to strengthen international cooperation in the implementation of the present Protocol, as well as the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict,

*Encouraging* the participation of the community and, in particular, children and child victims in the dissemination of informational and educational programmes concerning the implementation of the Protocol,

*Have agreed* as follows:

#### **ARTICLE 1**

States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

#### **ARTICLE 2**

States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

#### **ARTICLE 3**

1. States Parties shall raise in years the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the

principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.

2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.
3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:
  - (a) Such recruitment is genuinely voluntary;
  - (b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;
  - (c) Such persons are fully informed of the duties involved in such military service;
  - (d) Such persons provide reliable proof of age prior to acceptance into national military service.
4. Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.
5. The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.

#### **ARTICLE 4**

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
3. The application of the present article shall not affect the legal status of any party to an armed conflict.

#### **ARTICLE 5**

Nothing in the present Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law that are more conducive to the realization of the rights of the child.

#### **ARTICLE 6**

1. Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction.

2. States Parties undertake to make the principles and provisions of the present Protocol widely known and promoted by appropriate means, to adults and children alike.
3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

#### **ARTICLE 7**

1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations.
2. States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes or, *inter alia*, through a voluntary fund established in accordance with the rules of the General Assembly.

#### **ARTICLE 8**

1. Each State Party shall, within two years following the entry into force of the present Protocol for that State Party, submit a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment.
2. Following the submission of the comprehensive report, each State Party shall include in the reports it submits to the Committee on the Rights of the Child, in accordance with article 44 of the Convention, any further information with respect to the implementation of the Protocol. Other States Parties to the Protocol shall submit a report every five years.
3. The Committee on the Rights of the Child may request from States Parties further information relevant to the implementation of the present Protocol.

#### **ARTICLE 9**

1. The present Protocol is open for signature by any State that is a party to the Convention or has signed it.
2. The present Protocol is subject to ratification and is open to accession by any State. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.
3. The Secretary-General, in his capacity as depositary of the Convention and the Protocol, shall inform all States Parties to the Convention and all States that have signed the Convention of each instrument of declaration pursuant to article 3.

**ARTICLE 10**

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after its entry into force, the Protocol shall enter into force one month after the date of the deposit of its own instrument of ratification or accession.

**ARTICLE 11**

1. Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the Convention and all States that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General. If, however, on the expiry of that year the denouncing State Party is engaged in armed conflict, the denunciation shall not take effect before the end of the armed conflict.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter that is already under consideration by the Committee on the Rights of the Child prior to the date on which the denunciation becomes effective.

**ARTICLE 12**

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly and accepted by a two-thirds majority of States Parties.
3. When an amendment enters into force, it shall be binding on those States Parties that have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments they have accepted.

**ARTICLE 13**

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.



2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States Parties to the Convention and all States that have signed the Convention.

**Document No. 25, Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa**

[Source: Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969, available at [www.africa-union.org](http://www.africa-union.org)]

**CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA**

**PREAMBLE**

We, the Heads of State and Government assembled in the city of Addis Ababa, from 6-10 September 1969,

1. Noting with concern the constantly increasing numbers of refugees in Africa and desirous of finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future,
2. Recognizing the need for and essentially humanitarian approach towards solving the problems of refugees,
3. Aware, however, that refugee problems are a source of friction among many Member States, and desirous of eliminating the source of such discord,
4. Anxious to make a distinction between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside,
5. Determined that the activities of such subversive elements should be discouraged, in accordance with the Declaration on the Problem of Subversion and Resolution on the Problem of Refugees adopted at Accra in 1965,
6. Bearing in mind that the Charter of the United Nations and the Universal Declaration of Human Rights have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,
7. Recalling Resolution 2312 (XXII) of 14 December 1967 of the United Nations General Assembly, relating to the Declaration on Territorial Asylum,
8. Convinced that all the problems of our continent must be solved in the spirit of the Charter of the Organization of African Unity and in the African context,
9. Recognizing that the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment,
10. Recalling Resolutions 26 and 104 of the OAU Assemblies of Heads of State and Government, calling upon Member States of the Organization who had not already done so to accede to the United Nations Convention of 1951 and to the

Protocol of 1967 relating to the Status of Refugees, and meanwhile to apply their provisions to refugees in Africa,

11. Convinced that the efficiency of the measures recommended by the present Convention to solve the problem of refugees in Africa necessitates close and continuous collaboration between the Organization of African Unity and the Office of the United Nations High Commissioner for Refugees,

Have agreed as follows:

**ARTICLE 1. Definition of the term "Refugee"**

1. For the purposes of this Convention, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.
2. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.
3. In the case of a person who has several nationalities, the term "a country of which he is a national" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of which he is a national if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.
4. This Convention shall cease to apply to any refugee if: (a) he has voluntarily re-availed himself of the protection of the country of his nationality, or, (b) having lost his nationality, he has voluntarily reacquired it, or, (c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality, or, (d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or, (e) he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, or, (f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or, (g) he has seriously infringed the purposes and objectives of this Convention.
5. The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that:
  - (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

- (b) he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
  - (c) he has been guilty of acts contrary to the purposes and principles of the Organization of African Unity;
  - (d) he has been guilty of acts contrary to the purposes and principles of the United Nations.
6. For the purposes of this Convention, the Contracting State of Asylum shall determine whether an applicant is a refugee.

#### **ARTICLE 2. Asylum**

1. Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.
2. The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.
3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.
4. Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.
5. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.
6. For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.

#### **ARTICLE 3. Prohibition of Subversive Activities**

1. Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.
2. Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.

**ARTICLE 4 . Non-Discrimination**

Member States undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions.

**ARTICLE 5. Voluntary Repatriation**

1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.
2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.
3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.
4. Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.
5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organizations, to facilitate their return.

**ARTICLE 6 . Travel Documents**

1. Subject to Article III, Member States shall issue to refugees lawfully staying in their territories travel documents in accordance with the United Nations Convention relating to the Status of Refugees and the Schedule and Annex thereto, for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require. Member States may issue such a travel document to any other refugee in their territory.
2. Where an African country of second asylum accepts a refugee from a country of first asylum, the country of first asylum may be dispensed from issuing a document with a return clause.
3. Travel documents issued to refugees under previous international agreements by States Parties thereto shall be recognized and treated by Member States in the same way as if they had been issued to refugees pursuant to this Article.

**ARTICLE 7. Co-operation of the National Authorities with the Organization of African Unity**

In order to enable the Administrative Secretary-General of the Organization of African Unity to make reports to the competent organs of the Organization of African Unity, Member States undertake to provide the Secretariat in the appropriate form with information and statistical data requested concerning:

- (a) the condition of refugees;
- (b) the implementation of this Convention, and
- (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

**ARTICLE 8. Cooperation with the Office of the United Nations High Commissioner for Refugees**

1. Member States shall co-operate with the Office of the United Nations High Commissioner for Refugees.
2. The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees.

**ARTICLE 9. Settlement of Disputes**

Any dispute between States signatories to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the Commission for Mediation, Conciliation and Arbitration of the Organization of African Unity, at the request of any one of the Parties to the dispute.

**ARTICLE 10. Signature and Ratification**

1. This Convention is open for signature and accession by all Member States of the Organization of African Unity and shall be ratified by signatory States in accordance with their respective constitutional processes. The instruments of ratification shall be deposited with the Administrative Secretary-General of the Organization of African Unity.
2. The original instrument, done if possible in African languages, and in English and French, all texts being equally authentic, shall be deposited with the Administrative Secretary-General of the Organization of African Unity.
3. Any independent African State, Member of the Organization of African Unity, may at any time notify the Administrative Secretary-General of the Organization of African Unity of its accession to this Convention.

**ARTICLE 11. Entry into force**

This Convention shall come into force upon deposit of instruments of ratification by one-third of the Member States of the Organization of African Unity.

**ARTICLE 12. Amendment**

This Convention may be amended or revised if any member State makes a written request to the Administrative Secretary-General to that effect, provided however that the proposed amendment shall not be submitted to the Assembly of Heads of State

and Government for consideration until all Member States have been duly notified of it and a period of one year has elapsed. Such an amendment shall not be effective unless approved by at least two-thirds of the Member States Parties to the present Convention.

#### **ARTICLE 13. Denunciation**

1. Any Member State Party to this Convention may denounce its provisions by a written notification to the Administrative Secretary-General.
2. At the end of one year from the date of such notification, if not withdrawn, the Convention shall cease to apply with respect to the denouncing State.

#### **ARTICLE 14**

Upon entry into force of this Convention, the Administrative Secretary-General of the OAU shall register it with the Secretary-General of the United Nations, in accordance with Article 102 of the Charter of the United Nations.

#### **ARTICLE 15. Notifications by the Administrative Secretary-General of the Organization of African Unity**

The Administrative Secretary-General of the Organization of African Unity shall inform all Members of the Organization: (a) of signatures, ratifications and accessions in accordance with Article X; (b) of entry into force, in accordance with Article XI; (c) of requests for amendments submitted under the terms of Article XII; (d) of denunciations, in accordance with Article XIII.

**In witness whereof** we, the Heads of African State and Government, have signed this Convention.

**Done** in the City of Addis Ababa this 10<sup>th</sup> day of September 1969.

**Document No. 26, African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa**

[Source: African Union, Convention for the Protection and Assistance of Internationally Displaced Persons in Africa, Kampala, 22 October 2009; available at [www.africa-union.org](http://www.africa-union.org)]

**AFRICAN UNION CONVENTION FOR THE PROTECTION  
AND ASSISTANCE OF INTERNALLY DISPLACED  
PERSONS IN AFRICA  
(KAMPALA CONVENTION)**

**Preamble**

We, the Heads of State and Government of the Member States of the African Union;

CONSCIOUS of the gravity of the situation of internally displaced persons as a source of continuing instability and tension for African states;

ALSO CONSCIOUS of the suffering and specific vulnerability of internally displaced persons;

REITERATING the inherent African custom and tradition of hospitality by local host communities for persons in distress and support for such communities;

COMMITTED to sharing our common vision of providing durable solutions to situations of internally displaced persons by establishing an appropriate legal framework for their protection and assistance;

DETERMINED to adopt measures aimed at preventing and putting an end to the phenomenon of internal displacement by eradicating the root causes, especially persistent and recurrent conflicts as well as addressing displacement caused by natural disasters, which have a devastating impact on human life, peace, stability, security, and development;

CONSIDERING the 2000 Constitutive Act of the African Union and the 1945 Charter of the United Nations;

REAFFIRMING the principle of the respect of the sovereign equality of States Parties, their territorial integrity and political independence as stipulated in the Constitutive Act of the African Union and the United Nations Charter;

RECALLING the 1948 Universal Declaration of Human Rights, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Four Geneva Conventions and the 1977 Additional Protocols to the Geneva Conventions, the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, the 1981 African Charter on Human and Peoples' Rights and the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the 1990 African Charter on the Rights



and Welfare of the Child, the 1994 Addis Ababa Document on Refugees and Forced Population Displacement in Africa, and other relevant United Nations and African Union human rights instruments, and relevant Security Council Resolutions;

MINDFUL that Member States of the African Union have adopted democratic practices and adhere to the principles of non-discrimination, equality and equal protection of the law under the 1981 African Charter on Human and Peoples' Rights, as well as under other regional and international human rights law instruments;

RECOGNISING the inherent rights of internally displaced persons as provided for and protected in international human rights and humanitarian law and as set out in the 1998 United Nations Guiding Principles on Internal Displacement, which are recognized as an important international framework for the protection of internally displaced persons;

AFFIRMING our primary responsibility and commitment to respect, protect and fulfill the rights to which internally displaced persons are entitled, without discrimination of any kind;

NOTING the specific roles of international Organizations and agencies within the framework of the United Nations inter-agency collaborative approach to internally displaced persons, especially the protection expertise of the Office of the United Nations High Commissioner for Refugees (UNHCR) and the invitation extended to it by the Executive Council of the African Union in Decision EX/CL.413 (XIII) of July 2008 at Sharm El Sheikh, Egypt, to continue and reinforce its role in the protection of and assistance to internally displaced persons, within the United Nations coordination mechanism; and noting also the mandate of the International Committee of the Red Cross to protect and assist persons affected by armed conflict and other situations of violence, as well as the work of civil society organizations, in conformity with the laws of the country in which they exercise such roles and mandates;

RECALLING the lack of a binding African and international legal and institutional framework specifically, for the prevention of internal displacement and the protection of and assistance to internally displaced persons;

REAFFIRMING the historical commitment of the AU Member States to the protection of and assistance to refugees and displaced persons and, in particular, the implementation of Executive Council Decision EX/CL/127 of July 2004 in Addis Ababa to collaborate with relevant cooperating partners and other stakeholders to ensure that internally displaced persons are provided with an appropriate legal framework to ensure their adequate protection and assistance as well as with durable solutions;

CONVINCED that the present Convention for the Protection and Assistance of Internally Displaced Persons presents such a legal framework;

HAVE AGREED AS FOLLOWS:

**Article 1****Definitions**

For the purpose of the present Convention:

- a. “African Charter” means the African Charter on Human and Peoples’ Rights;
- b. “African Commission” means the African Commission on Human and Peoples’ Rights;
- c. “African Court of Justice and Human Rights” means the African Court of Justice and Human Rights;
- d. “Arbitrary displacement” means arbitrary displacement as referred to in Article 4 (4) (a) to (h);
- e. “Armed Groups” means dissident armed forces or other organized armed groups that are distinct from the armed forces of the state;
- f. “AU” means the African Union;
- g. “AU Commission” means the Secretariat of the African Union, which is the depository of the regional instruments;
- h. “Child” means every human being below the age of 18 years;
- i. “Constitutive Act” means the Constitutive Act of the African Union;
- j. “Harmful Practices” means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of persons, such as but not limited to their right to life, health, dignity, education, mental and physical integrity and education;
- k. “Internally Displaced Persons” means persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border;
- l. “Internal displacement” means the involuntary or forced movement, evacuation or relocation of persons or groups of persons within internationally recognized state borders;
- m. “Member State” means a Member State of the African Union;
- n. “Non-state actors” means private actors who are not public officials of the State, including other armed groups not referred to in article 1(d) above, and whose acts cannot be officially attributed to the State;
- o. “OAU” means the Organization of African Unity;
- p. “Women” mean persons of the female gender, including girls;

- q. "Sphere standards" mean standards for monitoring and evaluating the effectiveness and impact of humanitarian assistance; and
- r. "States Parties" means African States which have ratified or acceded to this Convention.

## **Article 2**

### **Objectives**

The objectives of this Convention are to:

- a. Promote and strengthen regional and national measures to prevent or mitigate, prohibit and eliminate root causes of internal displacement as well as provide for durable solutions;
- b. Establish a legal framework for preventing internal displacement, and protecting and assisting internally displaced persons in Africa;
- c. Establish a legal framework for solidarity, cooperation, promotion of durable solutions and mutual support between the States Parties in order to combat displacement and address its consequences;
- d. Provide for the obligations and responsibilities of States Parties, with respect to the prevention of internal displacement and protection of, and assistance, to internally displaced persons;
- e. Provide for the respective obligations, responsibilities and roles of armed groups, non-state actors and other relevant actors, including civil society organizations, with respect to the prevention of internal displacement and protection of, and assistance to, internally displaced persons;

## **Article 3**

### **General Obligations Relating to States Parties**

1. States Parties undertake to respect and ensure respect for the present Convention. In particular, States Parties shall:

- a. Refrain from, prohibit and prevent arbitrary displacement of populations;
- b. Prevent political, social, cultural and economic exclusion and marginalisation, that are likely to cause displacement of populations or persons by virtue of their social identity, religion or political opinion;
- c. Respect and ensure respect for the principles of humanity and human dignity of internally displaced persons;
- d. Respect and ensure respect and protection of the human rights of internally displaced persons, including humane treatment, non-discrimination, equality and equal protection of law;

- e. Respect and ensure respect for international humanitarian law regarding the protection of internally displaced persons;;
  - f. Respect and ensure respect for the humanitarian and civilian character of the protection of and assistance to internally displaced persons, including ensuring that such persons do not engage in subversive activities;
  - g. Ensure individual responsibility for acts of arbitrary displacement, in accordance with applicable domestic and international criminal law;
  - h. Ensure the accountability of non-State actors concerned, including multinational companies and private military or security companies, for acts of arbitrary displacement or complicity in such acts;
  - i. Ensure the accountability of non-State actors involved in the exploration and exploitation of economic and natural resources leading to displacement;
  - j. Ensure assistance to internally displaced persons by meeting their basic needs as well as allowing and facilitating rapid and unimpeded access by humanitarian organizations and personnel;
  - k. Promote self-reliance and sustainable livelihoods amongst internally displaced persons, provided that such measures shall not be used as a basis for neglecting the protection of and assistance to internally displaced persons, without prejudice to other means of assistance;
2. States Parties shall:
- a. Incorporate their obligations under this Convention into domestic law by enacting or amending relevant legislation on the protection of, and assistance to, internally displaced persons in conformity with their obligations under international law;
  - b. Designate an authority or body, where needed, responsible for coordinating activities aimed at protecting and assisting internally displaced persons and assign responsibilities to appropriate organs for protection and assistance, and for cooperating with relevant international organizations or agencies, and civil society organizations, where no such authority or body exists;
  - c. Adopt other measures as appropriate, including strategies and policies on internal displacement at national and local levels, taking into account the needs of host communities;
  - d. Provide, to the extent possible, the necessary funds for protection and assistance without prejudice to receiving international support;
  - e. Endeavour to incorporate the relevant principles contained in this Convention into peace negotiations and agreements for the purpose of finding sustainable solutions to the problem of internal displacement.

## **Article 4**

### **Obligations of States Parties relating to Protection from Internal Displacement**

1. States Parties shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, so as to prevent and avoid conditions that might lead to the arbitrary displacement of persons;
2. States Parties shall devise early warning systems, in the context of the continental early warning system, in areas of potential displacement, establish and implement disaster risk reduction strategies, emergency and disaster preparedness and management measures and, where necessary, provide immediate protection and assistance to internally displaced persons;
3. States Parties may seek the cooperation of international organizations or humanitarian agencies, civil society organizations and other relevant actors;
4. All persons have a right to be protected against arbitrary displacement. The prohibited categories of arbitrary displacement include but are not limited to:
  - a. Displacement based on policies of racial discrimination or other similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the population;
  - b. Individual or mass displacement of civilians in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand, in accordance with international humanitarian law;
  - c. Displacement intentionally used as a method of warfare or due to other violations of international humanitarian law in situations of armed conflict;
  - d. Displacement caused by generalized violence or violations of human rights;
  - e. Displacement as a result of harmful practices;
  - f. Forced evacuations in cases of natural or human made disasters or other causes if the evacuations are not required by the safety and health of those affected;
  - g. Displacement used as a collective punishment;
  - h. Displacement caused by any act, event, factor, or phenomenon of comparable gravity to all of the above and which is not justified under international law, including human rights and international humanitarian law.
5. States Parties shall endeavour to protect communities with special attachment to, and dependency, on land due to their particular culture and spiritual values from being displaced from such lands, except for compelling and overriding public interests;
6. States Parties shall declare as offences punishable by law acts of arbitrary displacement that amount to genocide, war crimes or crimes against humanity.

## Article 5

### Obligations of States Parties relating to Protection and Assistance

1. States Parties shall bear the primary duty and responsibility for providing protection of and humanitarian assistance to internally displaced persons within their territory or jurisdiction without discrimination of any kind.
2. States Parties shall cooperate with each other upon the request of the concerned State Party or the Conference of State Parties in protecting and assisting internally displaced persons.
3. States Parties shall respect the mandates of the African Union and the United Nations, as well as the roles of international humanitarian organizations in providing protection and assistance to internally displaced persons, in accordance with international law.
4. States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change.
5. States Parties shall assess or facilitate the assessment of the needs and vulnerabilities of internally displaced persons and of host communities, in cooperation with international organizations or agencies.
6. States Parties shall provide sufficient protection and assistance to internally displaced persons, and where available resources are inadequate to enable them to do so, they shall cooperate in seeking the assistance of international organizations and humanitarian agencies, civil society organizations and other relevant actors. Such organizations may offer their services to all those in need.
7. States Parties shall take necessary steps to effectively organize, relief action that is humanitarian, and impartial in character, and guarantee security. States Parties shall allow rapid and unimpeded passage of all relief consignments, equipment and personnel to internally displaced persons. States Parties shall also enable and facilitate the role of local and international organizations and humanitarian agencies, civil society organizations and other relevant actors, to provide protection and assistance to internally displaced persons. States Parties shall have the right to prescribe the technical arrangements under which such passage is permitted.
8. States Parties shall uphold and ensure respect for the humanitarian principles of humanity, neutrality, impartiality and independence of humanitarian actors.
9. States Parties shall respect the right of internally displaced persons to peacefully request or seek protection and assistance, in accordance with relevant national and international laws, a right for which they shall not be persecuted, prosecuted or punished.
10. States Parties shall respect, protect and not attack or otherwise harm humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons.

11. States Parties shall take measures aimed at ensuring that armed groups act in conformity with their obligations under Article 7.
12. Nothing in this Article shall prejudice the principles of sovereignty and territorial integrity of states.

## **Article 6**

### **Obligations Relating to International Organizations and Humanitarian Agencies**

1. International organizations and humanitarian agencies shall discharge their obligations under this Convention in conformity with international law and the laws of the country in which they operate.
2. In providing protection and assistance to Internally Displaced Persons, international organizations and humanitarian agencies shall respect the rights of such persons in accordance with international law.
3. International organizations and humanitarian agencies shall be bound by the principles of humanity, neutrality, impartiality and independence of humanitarian actors, and ensure respect for relevant international standards and codes of conduct.

## **Article 7**

### **Protection and Assistance to Internally Displaced Persons in Situations of Armed Conflict**

1. The provisions of this Article shall not, in any way whatsoever, be construed as affording legal status or legitimizing or recognizing armed groups and are without prejudice to the individual criminal responsibility of the members of such groups under domestic or international criminal law.
2. Nothing in this Convention shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
3. The protection and assistance to internally displaced persons under this Article shall be governed by international law and in particular international humanitarian law.
4. Members of Armed groups shall be held criminally responsible for their acts which violate the rights of internally displaced persons under international law and national law.
5. Members of armed groups shall be prohibited from:
  - a. Carrying out arbitrary displacement;
  - b. Hampering the provision of protection and assistance to internally displaced persons under any circumstances;

- c. Denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter; and separating members of the same family;
- d. Restricting the freedom of movement of internally displaced persons within and outside their areas of residence;
- e. Recruiting children or requiring or permitting them to take part in hostilities under any circumstances;
- f. Forcibly recruiting persons, kidnapping, abduction or hostage taking, engaging in sexual slavery and trafficking in persons especially women and children;
- g. Impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons;
- h. Attacking or otherwise harming humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons and shall not destroy, confiscate or divert such materials; and
- i. Violating the civilian and humanitarian character of the places where internally displaced persons are sheltered and shall not infiltrate such violations.

## **Article 8**

### **Obligations relating to the African Union**

1. The African Union shall have the right to intervene in a Member State pursuant to a decision of the Assembly in accordance with Article 4(h) of the Constitutive Act in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity;
2. The African Union shall respect the right of States Parties to request intervention from the Union in order to restore peace and security in accordance with Article 4(j) of the Constitutive Act and thus contribute to the creation of favourable conditions for finding durable solutions to the problem of internal displacement;
3. The African Union shall support the efforts of the States Parties to protect and assist internally displaced persons under this Convention. In particular, the Union shall:
  - a. Strengthen the institutional framework and capacity of the African Union with respect to protection and assistance to internally displaced persons;
  - b. Coordinate the mobilisation of resources for protection and assistance to internally displaced persons;
  - c. Collaborate with international organizations and humanitarian agencies, civil society organizations and other relevant actors in accordance with their mandates, to support measures taken by States Parties to protect and assist internally displaced persons;



- d. Cooperate directly with African States and international organizations and humanitarian agencies, civil society organizations and other relevant actors, with respect to appropriate measures to be taken in relation to the protection of and assistance to internally displaced persons;
- e. Share information with the African Commission on Human and Peoples' Rights on the situation of displacement, and the protection and assistance accorded to internally displaced persons in Africa; and,
- f. Cooperate with the Special Rapporteur of the African Commission on Human and Peoples' Rights for Refugees, Returnees, IDPs and Asylum Seekers in addressing issues of internally displaced persons.

### **Article 9**

#### **Obligations of States Parties Relating to Protection and Assistance During Internal Displacement**

1. States Parties shall protect the rights of internally displaced persons regardless of the cause of displacement by refraining from, and preventing, the following acts, amongst others:
  - a. Discrimination against such persons in the enjoyment of any rights or freedoms on the grounds that they are internally displaced persons;
  - b. Genocide, crimes against humanity, war crimes and other violations of international humanitarian law against internally displaced persons;
  - c. Arbitrary killing, summary execution, arbitrary detention, abduction, enforced disappearance or torture and other forms of cruel, inhuman or degrading treatment or punishment;
  - d. Sexual and gender based violence in all its forms, notably rape, enforced prostitution, sexual exploitation and harmful practices, slavery, recruitment of children and their use in hostilities, forced labour and human trafficking and smuggling; and
  - e. Starvation.
2. States Parties shall:
  - a. Take necessary measures to ensure that internally displaced persons are received, without discrimination of any kind and live in satisfactory conditions of safety, dignity and security;
  - b. Provide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services, and where appropriate, extend such assistance to local and host communities;

- c. Provide special protection for and assistance to internally displaced persons with special needs, including separated and unaccompanied children, female heads of households, expectant mothers, mothers with young children, the elderly, and persons with disabilities or with communicable diseases;
- d. Take special measures to protect and provide for the reproductive and sexual health of internally displaced women as well as appropriate psycho-social support for victims of sexual and other related abuses;
- e. Respect and ensure the right to seek safety in another part of the State and to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk;
- f. Guarantee the freedom of movement and choice of residence of internally displaced persons, except where restrictions on such movement and residence are necessary, justified and proportionate to the requirements of ensuring security for internally displaced persons or maintaining public security, public order and public health;
- g. Respect and maintain the civilian and humanitarian character of the places where internally displaced persons are sheltered and safeguard such locations against infiltration by armed groups or elements and disarm and separate such groups or elements from internally displaced persons;
- h. Take necessary measures, including the establishment of specialized mechanisms, to trace and reunify families separated during displacement and otherwise facilitate the re-establishment of family ties;
- i. Take necessary measures to protect individual, collective and cultural property left behind by displaced persons as well as in areas where internally displaced persons are located, either within the jurisdiction of the State Parties, or in areas under their effective control;
- j. Take necessary measures to safeguard against environmental degradation in areas where internally displaced persons are located, either within the jurisdiction of the State Parties, or in areas under their effective control;
- k. States Parties shall consult internally displaced persons and allow them to participate in decisions relating to their protection and assistance;
- l. Take necessary measures to ensure that internally displaced persons who are citizens in their country of nationality can enjoy their civic and political rights, particularly public participation, the right to vote and to be elected to public office; and
- m. Put in place measures for monitoring and evaluating the effectiveness and impact of the humanitarian assistance delivered to internally displaced persons in accordance with relevant practice, including the Sphere Standards.

3. States Parties shall discharge these obligations, where appropriate, with assistance from international organizations and humanitarian agencies, civil society organizations, and other relevant actors.

## **Article 10**

### **Displacement induced by Projects**

1. States Parties, as much as possible, shall prevent displacement caused by projects carried out by public or private actors;
2. States Parties shall ensure that the stakeholders concerned will explore feasible alternatives, with full information and consultation of persons likely to be displaced by projects;
3. States parties shall carry out a socio-economic and environmental impact assessment of a proposed development project prior to undertaking such a project.

## **Article 11**

### **Obligations of States Parties relating to Sustainable Return, Local Integration or Relocation**

1. States Parties shall seek lasting solutions to the problem of displacement by promoting and creating satisfactory conditions for voluntary return, local integration or relocation on a sustainable basis and in circumstances of safety and dignity.
2. States Parties shall enable internally displaced persons to make a free and informed choice on whether to return, integrate locally or relocate by consulting them on these and other options and ensuring their participation in finding sustainable solutions.
3. States Parties shall cooperate, where appropriate, with the African Union and international organizations or humanitarian agencies and civil society organizations, in providing protection and assistance in the course of finding and implementing solutions for sustainable return, local integration or relocation and long-term reconstruction.
4. States Parties shall establish appropriate mechanisms providing for simplified procedures where necessary, for resolving disputes relating to the property of internally displaced persons.
5. States Parties shall take all appropriate measures, whenever possible, to restore the lands of communities with special dependency and attachment to such lands upon the communities' return, reintegration, and reinsertion.

## **Article 12**

### **Compensation**

1. States Parties shall provide persons affected by displacement with effective remedies.

2. States Parties shall establish an effective legal framework to provide just and fair compensation and other forms of reparations, where appropriate, to internally displaced persons for damage incurred as a result of displacement, in accordance with international standards.
3. A State Party shall be liable to make reparation to internally displaced persons for damage when such a State Party refrains from protecting and assisting internally displaced persons in the event of natural disasters.

### **Article 13**

#### **Registration and Personal Documentation**

1. States Parties shall create and maintain an up-dated register of all internally displaced persons within their jurisdiction or effective control. In doing so, States Parties may collaborate with international organizations or humanitarian agencies or civil society organizations.
2. States Parties shall ensure that internally displaced persons shall be issued with relevant documents necessary for the enjoyment and exercise of their rights, such as passports, personal identification documents, civil certificates, birth certificates and marriage certificates.
3. States Parties shall facilitate the issuance of new documents or the replacement of documents lost or destroyed in the course of displacement, without imposing unreasonable conditions, such as requiring return to one's area of habitual residence in order to obtain these or other required documents. The failure to issue internally displaced persons with such documents shall not in any way impair the exercise or enjoyment of their human rights.
4. Women and men as well as separated and unaccompanied children shall have equal rights to obtain such necessary identity documents and shall have the right to have such documentation issued in their own names.

### **Article 14**

#### **Monitoring Compliance**

1. States Parties agree to establish a Conference of States Parties to this Convention to monitor and review the implementation of the objectives of this Convention.
2. States Parties shall enhance their capacity for cooperation and mutual support under the auspices of the Conference of the States Parties.
3. States Parties agree that the Conference of the States Parties shall be convened regularly and facilitated by the African Union.
4. States Parties shall, when presenting their reports under Article 62 of the African Charter on Human and Peoples' Rights as well as, where applicable, under the African Peer Review Mechanism indicate the legislative and other measures that have been taken to give effect to this Convention.

## **Final Provisions**

### **Article 15**

#### **Application**

1. States Parties agree that except where expressly stated in this Convention, its provisions apply to all situations of internal displacement regardless of its causes.
2. States Parties agree that nothing in this Convention shall be construed as affording legal status or legitimizing or recognizing armed groups and that its provisions are without prejudice to the individual criminal responsibility of their members under domestic or international criminal law.

### **Article 16**

#### **Signature, ratification and membership**

1. This Convention shall be open to signature, ratification or accession by Member States of the AU in accordance with their respective constitutional procedures.
2. The instruments of ratification or accession shall be deposited with the Chairperson of the African Union Commission.

### **Article 17**

#### **Entry into force**

1. This Convention shall enter into force thirty (30) days after the deposit of the instruments of ratification or accession by fifteen (15) Member States.
2. The Chairperson of the AU Commission shall notify Member States of the coming into force of this Convention.

### **Article 18**

#### **Amendment and Revision**

1. States Parties may submit proposals for the amendment or revision of this Convention.
2. Proposals for amendment or revision shall be submitted, in writing, to the Chairperson of the Commission of the AU who shall transmit the same to the States Parties within thirty (30) days of receipt thereof.
3. The Conference of States Parties, upon advice of the Executive Council, shall examine these proposals within a period of one (1) year following notification of States Parties, in accordance with the provisions of paragraph 2 of this Article.
4. Amendments or revision shall be adopted by the Conference of States Parties by a simple majority of the States Parties present and voting.

5. Amendments shall come into force thirty (30) days following the depositing of the fifteenth (15) instrument of ratification by the States Parties with the Chairperson of the AU Commission.

### **Article 19**

#### **Denunciation**

1. A State Party may denounce this Convention by sending a written notification addressed to the Chairperson of the AU Commission, while indicating the reasons for such a denunciation.
2. The denunciation shall take effect one (1) year from the date when the notification was received by the Chairperson of the AU Commission, unless a subsequent date has been specified.

### **Article 20**

#### **Saving Clause**

1. No provision in this Convention shall be interpreted as affecting or undermining the right of internally displaced persons to seek and be granted asylum within the framework of the African Charter on Human and Peoples' Rights, and to seek protection, as a refugee, within the purview of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa or the 1951 U.N Convention Relating to the Status of Refugees as well as the 1967 Protocol Relating to the Status of Refugees.
2. This Convention shall be without prejudice to the human rights of internally displaced persons under the African Charter on Human and Peoples' Rights and other applicable instruments of international human rights law or international humanitarian law. Similarly, it shall in no way be understood, construed or interpreted as restricting, modifying or impeding existing protection under any of the instruments mentioned herein.
3. The right of internally displaced persons to lodge a complaint with the African Commission on Human and Peoples' Rights or the African Court of Justice and Human Rights, or any other competent international body shall in no way be affected by this Convention.
4. The provisions of this Convention shall be without prejudice to the individual criminal responsibility of internally displaced persons, within the framework of national or international criminal law and their duties by virtue of the African Charter on Human and Peoples' Rights.

## **Article 21**

### **Reservations**

States Parties shall not make or enter reservations to this Convention that are incompatible with the object and purpose of this Convention.

## **Article 22**

### **Settlement of Disputes**

1. Any dispute or differences arising between the States Parties with regard to the interpretation or application of this Convention shall be settled amicably through direct consultations between the States Parties concerned. In the event of failure to settle the dispute or differences, either State may refer the dispute to the African Court of Justice and Human Rights.
2. Until such time as and when the latter shall have been established, the dispute or differences shall be submitted to the Conference of the States Parties, which will decide by consensus or, failing which, by a two-third (2/3) majority of the States Parties present and voting.

## **Article 23**

### **Depository**

1. This Convention shall be deposited with the Chairperson of the AU Commission, who shall transmit a certified true copy of the Convention to the Government of each signatory State.
2. The Chairperson of the AU Commission shall register this Convention with the United-Nations Secretary-General as soon as it comes into force.
3. This Convention is drawn up in four (4) original texts; in the Arabic, English, French and Portuguese languages, all four (4) being equally authentic.

BY VIRTUE OF WHICH, WE, the Heads of State and Government of the African Union (AU), have signed this Convention.

Adopted by the Special Summit of the Union held in Kampala on the 22<sup>nd</sup> day of October 2009.

**Document No. 27, Agreement between the ICRC and Switzerland**

[Source: "Agreement between the International Committee of the Red Cross and the Swiss Federal Council", *IRRC*, No. 293, 1993, pp. 152-160; footnotes omitted]

**Agreement between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland**

The International Committee of the Red Cross,  
on the one hand,  
and  
the Swiss Federal Council,  
on the other,

wishing to determine the legal status of the Committee in Switzerland and, to that end, to  
regulate their relations in a headquarters agreement,

have agreed on the following provisions:

**I. STATUS, PRIVILEGES AND IMMUNITIES OF THE ICRC****ARTICLE 1. Personality**

The Federal Council recognizes the international juridical personality and the legal capacity in Switzerland of the International Committee of the Red Cross (hereinafter referred to as the Committee or the ICRC), whose functions are laid down in the Geneva Conventions of 1949 and the Additional Protocols of 1977 and in the Statutes of the International Red Cross and Red Crescent Movement.

**ARTICLE 2. Freedom of action of the ICRC**

The Swiss Federal Council guarantees the ICRC independence and freedom of action.

**ARTICLE 3. Inviolability of premises**

The buildings or parts of buildings and the adjoining ground used for the purposes of the ICRC, by whomsoever they may be owned, shall be inviolable. No agent of the Swiss public authority may enter them without the express consent of the Committee. Only the President or his duly authorized representative shall be competent to waive this right of inviolability.

**ARTICLE 4. Inviolability of archives**

The archives of the ICRC and, in general, all documents and data media belonging to it or in its possession shall be inviolable at all times, wherever they may be.

**ARTICLE 5. Immunity from legal process and execution**

1. In the conduct of its business, the ICRC shall enjoy immunity from legal process and execution, except:
  - a) in so far as this immunity is formally waived, in a specific case, by the President of the ICRC or his duly authorized representative;



- b) in respect of civil liability proceedings brought against the ICRC for damage caused by any vehicle belonging to it or circulating on its behalf;
  - c) in respect of a dispute, on relations of service, between the Committee and its staff, former staff or their rightful claimants;
  - d) in respect of seizure, by court order, of salaries, wages and other emoluments owed by the ICRC to a member of its staff;
  - e) in respect of a dispute between the ICRC and the pension fund or provident fund referred to in Article 10, paragraph 1, of the present agreement;
  - f) in respect of a counter-claim directly related to principal proceedings brought by the ICRC; and
  - g) in respect of execution of a settlement by arbitration pursuant to Article 22 of the present agreement.
2. The buildings or parts of buildings, the adjoining ground and the assets owned by the ICRC or used by it for its purposes, wherever they may be and by whomsoever they may be held, shall be immune from any measure of execution, expropriation or requisition.

#### **ARTICLE 6. Fiscal position**

1. The ICRC, its assets, income and other property shall be exempt from direct federal, cantonal and communal taxation. With regard to immovable property, however, such exemption shall apply only to that which is owned by the Committee and which is occupied by its services, and to income derived therefrom.
2. The ICRC shall be exempt from indirect federal, cantonal and communal taxation. Exemption from federal purchase tax shall be granted only for purchases intended for the official use of the Committee, and in so far as the amount invoiced for one same and single purchase exceeds five hundred Swiss francs.
3. The ICRC shall be exempt from all federal, cantonal and communal charges which do not represent charges for specific services rendered.
4. If necessary, the exemptions mentioned above may be applied by way of reimbursement at the request of the ICRC and in accordance with a procedure to be determined by the ICRC and the competent Swiss authorities.

#### **ARTICLE 7. Customs position**

The customs clearance of articles intended for the official use of the ICRC shall be governed by the Ordinance of 13 November 1985 on the customs privileges of international organizations, of the States in their relations with such organizations and of special Missions of foreign States.

#### **ARTICLE 8. Free disposal of funds**

The Committee may receive, hold, convert and transfer funds of any kind, gold, any currency, specie and other securities, and may dispose of them freely both within Switzerland and in its relations with other countries.

**ARTICLE 9. Communications**

1. The ICRC shall enjoy for its official communications treatment not less favourable than that accorded to the international organizations in Switzerland, to the extent compatible with the International Telecommunication Convention of 6 November 1982.
2. The ICRC shall have the right to dispatch and receive its correspondence, including data media, by duly identified courier or bags which shall have the same privileges and immunities as diplomatic couriers and bags.
3. No censorship shall be applied to the duly authenticated official correspondence and other official communications of the ICRC.
4. Operation of telecommunication installations must be coordinated from the technical standpoint with the Swiss PTT [*Post, Telegraph and Telephones*].

**ARTICLE 10. Pension fund**

1. Any pension fund or provident fund established by the ICRC and officially operating on behalf of the President, the members of the Committee or ICRC staff shall, with or without separate legal status, be accorded the same exemptions, privileges and immunities as the ICRC itself with regard to its movable property.
2. Funds and foundations, with or without separate legal status, administered under the auspices of the ICRC and devoted to its official purposes, shall be given the benefit of the same exemptions, privileges and immunities as the ICRC itself with regard to their movable property. Funds set up after the entry into force of the present agreement shall enjoy the same privileges and immunities, subject to the agreement of the competent Federal authorities.

**II. PRIVILEGES AND IMMUNITIES GRANTED TO PERSONS SERVING  
THE ICRC IN AN OFFICIAL CAPACITY****ARTICLE 11. Privileges and immunities granted to the President  
and the members of the Committee and to ICRC staff and experts**

The President and the members of the Committee, and ICRC staff and experts, irrespective of nationality, shall enjoy the following privileges and immunities:

- a) immunity from legal process, even when they are no longer in office, in respect of words spoken or written and acts performed in the exercise of their functions;
- b) inviolability for all papers and documents.

**ARTICLE 12. Privileges and immunities granted to staff not of Swiss nationality**

In addition to the privileges and immunities mentioned in Article 11, ICRC staff who are not of Swiss nationality shall:

- a) be exempt from national service obligations in Switzerland;
- b) be immune, together with their spouses and relatives dependent on them, from immigration restrictions and aliens' registration;

- c) be accorded the same privileges in respect of exchange and transfer facilities for their assets in Switzerland and in other countries as are accorded to officials of the other international organizations;
- d) be given, together with their relatives dependent on them and their domestic staff, the same repatriation facilities as are accorded to officials of the international organizations;
- e) remain subject to the law on old-age and survivors' insurance and continue to pay AVS/AI/APG [*Old-age, survivors' disability and loss of earnings insurance*] contributions and unemployment and accident insurance contributions.

#### **ARTICLE 13. Exceptions to immunity from legal process and execution**

The persons referred to in Article 11 of the present agreement shall not enjoy immunity from legal process in the event of civil liability proceedings brought against them for damage caused by any vehicle belonging to them or driven by them or in the event of offences under federal road traffic regulations punishable by fine.

#### **ARTICLE 14. Military service of Swiss staff**

1. In a limited number of cases, leave of absence from military service (leave for foreign countries) may be granted to Swiss staff holding executive office at ICRC headquarters; persons granted such leave shall be dispensed from compulsory training service, inspections and shooting practice.
2. For the other Swiss staff of the ICRC, applications for dispensation from or rescheduling of training service, providing all due reasons and counter-signed by the staff member concerned, may be submitted by the ICRC to the Federal Department of Foreign Affairs for transmission to the Federal Military Department, which will give them favourable consideration.
3. Finally, a limited number of dispensations from active service will be granted to ICRC staff in order to enable the institution to continue its work even during a period of mobilization.

#### **ARTICLE 15. Object of immunities**

1. The privileges and immunities provided for in the present agreement are not designed to confer any personal benefits on those concerned. They are established solely to ensure, at all times, the free functioning of the ICRC and the complete independence of the persons concerned in discharging their duties.
2. The President of the ICRC must waive the immunity of any staff member or expert in any case where he considers that such immunity would impede the course of justice and could be waived without prejudice to the interests of the ICRC. The Assembly of the Committee shall have the power to waive the immunity of the President or of the Committee members.

**ARTICLE 16. Entry, stay and departure**

The Swiss authorities shall take all necessary measures to facilitate the entry into, the stay in, and the departure from Swiss territory of persons, irrespective of their nationality, serving the ICRC in an official capacity.

**ARTICLE 17. Identity cards**

1. The Federal Department of Foreign Affairs shall give the ICRC, for the President, each member of the Committee and each staff member, an identity card bearing the photograph of the holder. This card, authenticated by the Federal Department of Foreign Affairs and the ICRC, shall serve to identify the holder vis-à-vis all federal, cantonal and communal authorities.
2. The ICRC shall transmit regularly to the Federal Department of Foreign Affairs a list of the members of the Committee and staff of the ICRC who are assigned to the organization's headquarters on a lasting basis, indicating for each person the date of birth, nationality, residence in Switzerland or in another country, and the post held.

**ARTICLE 18. Prevention of abuses**

The ICRC and the Swiss authorities shall cooperate at all times to facilitate the proper administration of justice, secure the observance of police regulations and prevent any abuse in connection with the privileges and immunities provided for in this agreement.

**ARTICLE 19. Disputes of a private nature**

The ICRC shall make provision for appropriate modes of settlement of:

- a) disputes arising out of contracts to which the ICRC is or becomes party and other disputes of a private law character;
- b) disputes involving any ICRC staff member who by reason of his or her official position enjoys immunity, if such immunity has not been waived under the provisions of Article 15.

**III. NON-RESPONSIBILITY OF SWITZERLAND****ARTICLE 20. Non-responsibility of Switzerland**

Switzerland shall not incur, by reason of the activity of the ICRC on its territory any international responsibility for acts or omissions of the ICRC or its staff.

**IV. FINAL PROVISIONS****ARTICLE 21. Execution**

The Federal Department of Foreign Affairs is the Swiss authority which is entrusted with the execution of this agreement.

**ARTICLE 22. Settlement of disputes**

1. Any divergence of opinion concerning the application or interpretation of this agreement which has not been settled by direct negotiations between the parties

may be submitted by either party to an arbitral tribunal composed of three members, including the chairman thereof.

2. The Swiss Federal Council and the ICRC shall each appoint one member of the tribunal.
3. The members so appointed shall choose their chairman.
4. In the event of disagreement between the members on the choice of chairman, the chairman shall be chosen, at the request of the members of the tribunal, by the President of the International Court of Justice or, if the latter is unavailable, by the Vice-President, or if he in turn is unavailable, by the longest-serving member of the Court.
5. The tribunal shall be seized of a dispute by either party by petition.
6. The tribunal shall lay down its own procedure.
7. The arbitration award shall be binding on the parties to the dispute.

#### **ARTICLE 23. Revision**

1. The present agreement may be revised at the request of either party.
2. In this event, the two parties shall consult each other concerning the amendments to be made to its provisions.

#### **ARTICLE 24. Denunciation**

The present agreement may be denounced by either party, giving two years' notice in writing.

#### **ARTICLE 25. Entry into force**

The present agreement enters into force on the date of its signature.

Done at Berne, on 19 March 1993, in two copies in French.

For the International  
Committee of the Red Cross  
*The President*

Cornelio Sommaruga

For the Swiss Federal Council  
*The Head of the Federal  
Department of Foreign Affairs*

René Felber

**Document No. 28, Agreement Between the ICRC and the ICTY  
Concerning Persons Awaiting Trials Before the Tribunals**

[Source: "Agreement Between the ICRC and the ICTY Concerning Persons Awaiting Trials Before the Tribunals," *IRRC*, No. 311, 1996, pp. 238-242]

**Agreement between the International Criminal Tribunal for the former Yugoslavia  
and the ICRC on procedures for visiting persons  
held on the authority of the Tribunal**

**Letter from Antonio Cassese,  
President of the International Criminal Tribunal for the former Yugoslavia,  
to Cornelio Sommaruga, President of the  
International Committee of the Red Cross,  
of 28 April 1995**

Dear President,

I have the honour to refer to resolution 827 (1993) of 25 May 1993 by which the Security Council established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the "Tribunal").

I also have the honour to refer to the Rules of Procedure and Evidence adopted by the Judges of the Tribunal in February 1994, as subsequently amended, and in particular to Rule 24(v) which provides that the Judges of the Tribunal shall determine or supervise the conditions of detention.

I further have the honour to refer to the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal (the "Rules of Detention"). Rule 6 of the Rules of Detention provides for regular and unannounced inspections of the detention unit by qualified and experienced inspectors appointed by the Tribunal, to examine the manner in which detainees are treated.

With reference to these legal provisions and to our previous discussions, I propose that the International Committee of the Red Cross (the "ICRC"), being an independent and impartial humanitarian organization of long-standing experience in inspecting conditions of detention in all kinds of armed conflicts and internal strife throughout the world, undertake, in accordance with the modalities set out below, the inspection of conditions of detention and the treatment of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the Tribunal in the Penitentiary Complex or in the holding cells located at the premises of the Tribunal (the "Detention Unit").

1. The role of the ICRC shall be to inspect and report upon all aspects of conditions of detention, including the treatment of persons held at the Detention Unit, to ensure their compliance with internationally accepted standards of human rights or humanitarian law.

2. The Tribunal shall provide the ICRC with the following facilities to carry out its inspections:
  - a. full information on the operation and practice of the Detention Unit;
  - b. unlimited access to the Detention Unit including the right to move inside the Detention Unit without restriction and
  - c. other information which is available to the Tribunal and necessary for the ICRC to carry out its inspections, in particular the notification of the detention of persons.
3. Each detainee may freely communicate with the ICRC. During an inspection of the Detention Unit, the detainee shall have the opportunity to talk to members of the ICRC delegation out of the sight and hearing of the staff of the Detention Unit.
4. The ICRC may communicate freely with any person whom it believes can supply relevant information.
5. The inspections shall take place on a periodic basis. The frequency with which visits will occur will be determined by the ICRC.
6. Inspections of the Detention Unit shall be unannounced. Copies of this Exchange of Letters and a specific written request to allow inspections without notice at any time will be provided by the Tribunal to the Dutch prison authorities and United Nations security personnel.
7. All costs associated with an inspection visit will be borne by the ICRC. The provision of inspections is to be considered a donation to the Tribunal by the ICRC.
8. After each visit, the ICRC shall draw up a confidential report on the facts found during the visit, taking account of any observations which may have been submitted by the Registrar or the President. The report, containing any recommendations which the ICRC considers necessary, shall be transmitted to the Tribunal.
9. The ICRC may, if it deems necessary, communicate its observations to the Commanding Officer (as defined in the Rules of Detention) and the Registrar of the Tribunal immediately after the visit. The Registrar shall immediately pass along any such communication to the President.
10. The information gathered by the ICRC in relating to an inspection visit and the ICRC's consultations with the Tribunal shall be confidential.
11. The Tribunal may, after securing the ICRC's agreement, have the report, together with the comments of the Tribunal, made public. In no event shall personal data relating to the detainees be published without the express written consent of the person concerned.
12. The Registrar of the Tribunal shall be the authority competent to receive communications from the ICRC. The Registrar shall inform the ICRC of the name of the liaison officer for the Detention Unit when such a person is appointed by the Tribunal.

13. The President of the ICRC shall be the authority competent to receive communications from the Tribunal.

If the above provisions meet with your approval, I would propose that this letter and your reply thereto constitute an Agreement between the Tribunal and the ICRC on inspection of conditions of detention of persons held in the Detention Unit, with immediate effect.

Accept, Sir, the assurance of my highest consideration.

(signature)

**Letter from Cornelio Sommaruga,  
President of the International Committee of the Red Cross,  
to Antonio Cassese, President of the International Criminal Tribunal  
for the former Yugoslavia, 5 May 1995**

Dear President,

I have the honour to refer to your letter of 28 April 1995 regarding visits of the International Committee of the Red Cross (the "ICRC") to detainees held under the authority of the International Criminal Tribunal for the former Yugoslavia ("the Tribunal").

It is indeed within the mandate of the ICRC to visit persons detained in relation to armed conflicts and internal strife. Therefore, the ICRC is ready to carry out visits to detainees held under the authority of the Tribunal in its Detention Unit in accordance with the conditions outlined in your letter of 28 April 1995. Those conditions correspond to the traditional modalities under which the ICRC assesses the conditions of detention and the treatment of detainees, in particular by interviewing them in private, and makes the appropriate recommendations to the authorities concerned.

As you proposed, our respective letters shall constitute with immediate effect an agreement between the Tribunal and the ICRC on the inspection of the conditions of detention and treatment of persons held in the Detention Unit. I noted that the ICRC will be provided with the necessary facilities, including the notification of the detention of persons.

Our detention division will contact the Commanding Officer and the Registrar of the Tribunal to arrange details of the visits.

On behalf of the ICRC, I thank you for your support for the humanitarian activities of the ICRC.

Trusting in the success of the Tribunal's endeavour to play an essential role to improve respect for international humanitarian law, I remain,

Yours very respectfully,

(signature)



**Document No. 29, European Union Guidelines  
on Promoting Compliance with International Humanitarian Law**

[Source: European Union, Guidelines on Promoting Compliance with International Humanitarian Law, 23 December 2005; available at [eur-lex.europa.eu](http://eur-lex.europa.eu). Footnotes omitted.]

**European Union Guidelines  
on promoting compliance with international humanitarian law (IHL)**

(2005/C 327/04)

**I. PURPOSE**

1. The purpose of these Guidelines is to set out operational tools for the European Union and its institutions and bodies to promote compliance with international humanitarian law (IHL). They underline the European Union's commitment to promote such compliance in a visible and consistent manner. The Guidelines are addressed to all those taking action within the framework of the European Union to the extent that the matters raised fall within their areas of responsibility and competence. They are complementary to Guidelines and other Common Positions already adopted within the EU in relation to matters such as human rights, torture and the protection of civilians.
2. These Guidelines are in line with the commitment of the EU and its Member States to IHL, and aim to address compliance with IHL by third States, and, as appropriate, non-State actors operating in third States. Whilst the same commitment extends to measures taken by the EU and its Member States to ensure compliance with IHL in their own conduct, including by their own forces, such measures are not covered by these Guidelines.

**II. INTERNATIONAL HUMANITARIAN LAW (IHL)****Introduction**

3. The European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. This includes the goal of promoting compliance with IHL.
4. International Humanitarian Law (IHL) – also known as the Law of Armed Conflict or the Law of War – is intended to alleviate the effects of armed conflict by protecting those not, or no longer taking part in conflict and by regulating the means and methods of warfare.
5. States are obliged to comply with the rules of IHL to which they are bound by treaty or which form part of customary international law. They may also apply to non-State actors. Such compliance is a matter of international concern. In addition, the suffering and destruction caused by violations of IHL render post-conflict

settlements more difficult. There is therefore a political, as well as a humanitarian interest, in improving compliance with IHL throughout the world.

### **Evolution and Sources of IHL**

6. The rules of IHL have evolved as a result of balancing military necessity and humanitarian concerns. IHL comprises rules that seek to protect persons who are not, or are no longer, taking direct part in hostilities – such as civilians, prisoners of war and other detainees, and the injured and sick – as well as to restrict the means and methods of warfare – including tactics and weaponry – in order to avoid unnecessary suffering and destruction.
7. As with other parts of international law, IHL has two main sources: international conventions (treaties) and customary international law. Customary international law is formed by the practice of States, which they accept as binding upon them. Judicial decisions and writings of leading authors are subsidiary means for determining the law.
8. The principal IHL Conventions are listed in the Annex to these Guidelines. The most important are the 1907 Hague Regulations, the four Geneva Conventions from 1949 and their 1977 Additional Protocols. The Hague Regulation and most of the provisions of the Geneva Conventions and the 1977 Additional Protocols are generally recognised as customary law.

### **Scope of application**

9. IHL is applicable to any armed conflicts, both international and non-international and irrespective of the origin of the conflict. It also applies to situations of occupation arising from an armed conflict. Different legal regimes apply to international armed conflicts, which are between States, and non-international (or internal) armed conflicts, which take place within a State.
10. Whether situation amounts to an armed conflict and whether it is an international or non-international armed conflict are mixed questions of fact and law, the answers to which depend on a range of factors. Appropriate legal advice, together with sufficient information about the particular context, should always be sought in determining whether a situation amounts to an armed conflict, and thus whether international humanitarian law is applicable.
11. The treaty provisions on international armed conflicts are more detailed and extensive. Non-international armed conflicts are subject to the provisions in Article 3 common to the Geneva Conventions and, where the State concerned is a Party, in the 1977 Additional Protocol II. Rules of customary international law apply to both international and internal armed conflicts but again there are differences between the two regimes.

**International Human Rights Law and IHL**

12. It is important to distinguish between international human rights law and IHL. They are distinct bodies of law and, while both are principally aimed at protecting individuals, there are important differences between them. In particular IHL is applicable in time of armed conflict and occupation. Conversely, human rights law is applicable to everyone within the jurisdiction of the State concerned in time of peace as well as in time of armed conflict. Thus while distinct, the two sets of rules may both be applicable to a particular situation and it is therefore sometimes necessary to consider the relationship between them. However these Guidelines do not deal with human rights law.

**Individual responsibility**

13. Certain serious violations of IHL are defined as war crimes. War crimes may occur in the same circumstances as genocide and crimes against humanity but the latter, unlike war crimes, are not linked to the existence of an armed conflict.
14. Individuals bear personal responsibility for war crimes. States must, in accordance with their national law, ensure that alleged perpetrators are brought before their own domestic courts or handed over for trial by the courts of another State or by an international criminal tribunal, such as the International Criminal Court.

**III. OPERATIONAL GUIDELINES****A. REPORTING, ASSESSMENT AND RECOMMENDATIONS FOR ACTION**

15. Action under this heading includes:
  - (a) In order to enable effective action, situations where IHL may apply must be identified without delay. The responsible EU bodies, including appropriate Council Working Groups, should monitor situations within their areas of responsibility where IHL may be applicable, drawing on advice, as necessary, regarding IHL and its applicability. Where appropriate they should identify and recommend action to promote compliance with IHL in accordance with these Guidelines. Consultations and exchange of information with knowledgeable actors, including the ICRC and other relevant organisations such as the UN and regional organisations, should be considered when appropriate. Consideration should also be given, where appropriate, to drawing on the services of the International Humanitarian Fact-Finding Commission (IHFFC) established under Article 90 of the Additional Protocol I to the Geneva Conventions of 1949, which can assist in promoting respect for IHL through its fact-finding capacity and its good offices function.
  - (b) Whenever relevant, EU Heads of Mission, and appropriate EU representatives, including Heads of EU Civilian Operations, Commanders of EU Military Operations and EU Special Representatives, should include an assessment of the IHL situation in their reports about a given State or conflict. Special attention should be given to information that indicates that serious violations of IHL may

have been committed. Where feasible, such reports should also include an analysis and suggestions of possible measures to be taken by the EU.

- (c) Background papers for EU meetings should include, where appropriate, an analysis on the applicability of IHL and Member States participating in such meetings should also ensure that they are able to draw on advice as necessary on IHL issues arising. In a situation where an armed conflict may be at hand, the Council Working Group on International Law (COJUR) should be informed along with other relevant Working Groups. If appropriate and feasible, COJUR could be tasked to make suggestions of future EU action to relevant EU bodies.

#### **B. MEANS OF ACTION AT THE DISPOSAL OF THE EU IN ITS RELATIONS WITH THIRD COUNTRIES**

16. The EU has a variety of means of action at its disposal. These include, but are not limited to, the following:
  - (a) Political dialogue: Where relevant the issue of compliance with IHL should be brought up in dialogues with third States. This is particularly important in the context of on-going armed conflicts where there have been reports of widespread IHL violations. However, the EU should also, in peace-time, call upon States that have not yet done so to adhere to, and fully implement, important IHL instruments, such as the 1977 Additional Protocols and the ICC Statute. Full implementation includes enactment of any necessary implementing legislation and training of relevant personnel in IHL.
  - (b) General public statements: In public statements on issues related to IHL, the EU should, whenever appropriate, emphasise the need to ensure compliance with IHL.
  - (c) Demarches and/or public statements about specific conflicts: When violations of IHL are reported the EU should consider making demarches and issuing public statements, as appropriate, condemning such acts and demanding that the parties fulfil their obligations under IHL and undertake effective measures to prevent further violations.
  - (d) Restrictive measures/sanctions: The use of restrictive measures (sanctions) may be an effective means of promoting compliance with IHL. Such measures should therefore be considered against State and non-state parties to a conflict, as well as individuals, when they are appropriate and in accordance with international law.
  - (e) Cooperation with other international bodies: Where appropriate, the EU should cooperate with the UN and relevant regional organisations for the promotion of compliance with IHL. EU Member States should also, whenever appropriate, act towards that goal as members in other organisations, including the United Nations. The International Committee of the Red Cross (ICRC) has a treaty-based, recognised and long-established role as a neutral, independent humanitarian organisation, in promoting compliance with IHL.

- (f) Crisis-management operations: The importance of preventing and suppressing violations of IHL by third parties should be considered, where appropriate, in the drafting of mandates of EU crisis-management operations. In appropriate cases, this may include collecting information which may be of use for the ICC or in other investigations of war crimes.
- (g) Individual responsibility: While, in post-conflict situations it is sometimes difficult to balance the overall aim of establishing peace and the need to combat impunity, the European Union should ensure that there is no impunity for war crimes. To have a deterrent effect during an armed conflict the prosecution of war crimes must be visible, and should, if possible, take place in the State where the violations have occurred. The EU should therefore encourage third States to enact national penal legislation to punish violations of IHL. The EU's support of the ICC and measures to prosecute war criminals should also be seen in this context.
- (h) Training: Training in IHL is necessary to ensure compliance with IHL in time of armed conflict. Training and education must also be undertaken in peacetime. This applies to the whole population, although special attention should be given to relevant groups such as law enforcement officials. Additional obligations apply to the training of military personnel. The EU should consider providing or funding training and education in IHL in third countries including within the framework of wider programmes to promote the rule of law.
- (i) Export of arms: The European Code of Conduct on Arms Export provides that an importing country's compliance with IHL should be considered before licences to export to that country are granted.

**Document No. 30, Montreux Document on Private Military and Security Companies**

[Source: United Nations, "Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict," Doc. A/63/467-S/2008/636, 6 October 2008; available at [www.un.org](http://www.un.org)]

**Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict**

**Montreux, 17 September 2008**

**INFORMAL SUMMARY OF THE MONTREUX DOCUMENT BY SWITZERLAND**

1. Private military and security companies (PMSCs) are nowadays often relied on in areas of armed conflict – by individuals, companies, and governments. They are contracted for a range of services, from the operation of weapon systems to the protection of diplomatic personnel. Recent years have seen an increase in the use of PMSCs, and with it the demand for a clarification of pertinent legal obligations under international humanitarian law and human rights law.
2. The Montreux Document seeks to meet this demand. The result of a joint initiative by Switzerland and the International Committee of the Red Cross (ICRC) launched in 2006, it recalls existing obligations of States, PMSCs and their personnel under international law whenever PMSCs – for whatever reason – are present during armed conflict. In a second part, it contains a set of over 70 good practices designed to assist States in complying with these obligations. Neither parts are legally binding, nor are they intended to legitimize the use of PMSCs in any particular circumstance. They were developed by governmental experts from seventeen States [Footnote: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America] with a particular interest in the issue of PMSCs or international humanitarian law. Representatives of civil society and of the PMSC industry were also consulted.
3. Part I differentiates between contracting States, territorial States and home States. For each category of States, Part I recalls pertinent international legal obligations according to international humanitarian law and human rights law. The question of attribution of private conduct to the State under with customary international law is also addressed. In addition, Part I devotes sections to the pertinent international legal obligations of "all other States", to the duties of PMSCs and their personnel, as well as to questions of superior responsibility.
4. Like Part I, Part II also differentiates between contracting States, territorial States and home States. The good practices draw largely from existing practices of States not only directly with regard to PMSCs but also, for instance, from existing regulations for arms and armed services. They range from introducing transparent

licensing regimes to ensuring better supervision and accountability – so that only PMSCs which are likely to respect international humanitarian law and human rights law, through appropriate training, internal procedures and supervision, can provide services during armed conflict.

5. In the preface of the Montreux Document, the participating States invite other States and international organisations to communicate their support for the document to the Federal Department of Foreign Affairs of Switzerland.

### **PREFACE**

This document is the product of an initiative launched cooperatively by the Government of Switzerland and the International Committee of the Red Cross. It was developed with the participation of governmental experts from Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America in meetings convened in January and November 2006, November 2007, and April and September 2008. Representatives of civil society and of the private military and security industry were consulted.

The following understandings guided the development of this document:

- 1 That certain well-established rules of international law apply to States in their relations with private military and security companies (PMSCs) and their operation during armed conflict, in particular under international humanitarian law and human rights law;
- 2 That this document recalls existing legal obligations of States and PMSCs and their personnel (Part One), and provides States with good practices to promote compliance with international humanitarian law and human rights law during armed conflict (Part Two);
- 3 That this document is not a legally binding instrument and does not affect existing obligations of States under customary international law or under international agreements to which they are parties, in particular their obligations under the Charter of the United Nations (especially its articles 2(4) and 51);
- 4 That this document should therefore not be interpreted as limiting, prejudicing or enhancing in any manner existing obligations under international law, or as creating or developing new obligations under international law;
- 5 That existing obligations and good practices may also be instructive for post-conflict situations and for other, comparable situations; however, that international humanitarian law is applicable only during armed conflict;
- 6 That cooperation, information sharing and assistance between States, commensurate with each State's capacities, is desirable in order to achieve full respect for international humanitarian law and human rights law; as is cooperative implementation with the private military and security industry and other relevant actors;

- 7 That this document should not be construed as endorsing the use of PMSCs in any particular circumstance but seeks to recall legal obligations and to recommend good practices if the decision has been made to contract PMSCs;
- 8 That while this document is addressed to States, the good practices may be of value for other entities such as international organisations, NGOs and companies that contract PMSCs, as well as for PMSCs themselves;
- 9 That for the purposes of this document:
  - a) “PMSCs” are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.
  - b) “Personnel of a PMSC” are persons employed by, through direct hire or under a contract with, a PMSC, including its employees and managers.
  - c) “Contracting States” are States that directly contract for the services of PMSCs, including, as appropriate, where such a PMSC subcontracts with another PMSC.
  - d) “Territorial States” are States on whose territory PMSCs operate.
  - e) “Home States” are States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the “Home State”.

The participating States commend this document to the attention of other States, international organisations, NGOs, the private military and security industry and other relevant actors, which are invited to adopt those good practices that they consider appropriate for their operations. The participating States invite other States and international organisations to communicate their support for this document to the Federal Department of Foreign Affairs of Switzerland. The participating States also declare their readiness to review and, if necessary, to revise this document in order to take into account new developments.

## **PART ONE**

### **PERTINENT INTERNATIONAL LEGAL OBLIGATIONS RELATING TO PRIVATE MILITARY AND SECURITY COMPANIES**

#### **INTRODUCTION**

The following statements aim to recall certain existing international legal obligations of States regarding private military and security companies. The statements are drawn from various international humanitarian and human rights agreements and customary international law. This document, and the statements herein, do not create legal obligations. Each State is responsible for complying with the obligations it has undertaken



pursuant to international agreements to which it is a party, subject to any reservations, understandings and declarations made, and to customary international law.

### **A. CONTRACTING STATES**

1. Contracting States retain their obligations under international law, even if they contract PMSCs to perform certain activities. If they are occupying powers, they have an obligation to take all measures in their power to restore, and ensure, as far as possible, public order and safety, i.e. exercise vigilance in preventing violations of international humanitarian law and human rights law.
2. Contracting States have an obligation not to contract PMSCs to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner of war camps or places of internment of civilians in accordance with the Geneva Conventions.
3. Contracting States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs they contract, in particular to:
  - a) ensure that PMSCs that they contract and their personnel are aware of their obligations and trained accordingly;
  - b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
  - c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means, such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.
4. Contracting States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.
5. Contracting States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.
6. Contracting States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under

international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

7. Although entering into contractual relations does not in itself engage the responsibility of Contracting States, the latter are responsible for violations of international humanitarian law, human rights law, or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, consistent with customary international law, in particular if they are:
  - a) incorporated by the State into its regular armed forces in accordance with its domestic legislation;
  - b) members of organised armed forces, groups or units under a command responsible to the State;
  - c) empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorised by law or regulation to carry out functions normally conducted by organs of the State); or
  - d) in fact acting on the instructions of the State (i.e. the State has specifically instructed the private actor's conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor's conduct).
8. Contracting States have an obligation to provide reparations for violations of international humanitarian law and human rights law caused by wrongful conduct of the personnel of PMSCs when such conduct is attributable to the Contracting States in accordance with the customary international law of State responsibility.

## **B. TERRITORIAL STATES**

9. Territorial States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs operating on their territory, in particular to:
  - a) disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;
  - b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
  - c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.
10. Territorial States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.

11. Territorial States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.
12. Territorial States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.
13. In situations of occupation, the obligations of Territorial States are limited to areas in which they are able to exercise effective control.

### **C. HOME STATES**

14. Home States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs of their nationality, in particular to:
  - a) disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;
  - b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
  - c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as administrative or other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.
15. Home States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.
16. Home States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons,

regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.

17. Home States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

#### **D. ALL OTHER STATES**

18. All other States have an obligation, within their power, to ensure respect for international humanitarian law. They have an obligation to refrain from encouraging or assisting in violations of international humanitarian law by any party to an armed conflict.
19. All other States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations.
20. All other States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.
21. All other States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

#### **E. PMSCS AND THEIR PERSONNEL**

22. PMSCs are obliged to comply with international humanitarian law or human rights law imposed upon them by applicable national law, as well as other applicable national law such as criminal law, tax law, immigration law, labour law, and specific regulations on private military or security services.
23. The personnel of PMSCs are obliged to respect the relevant national law, in particular the national criminal law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality.

24. The status of the personnel of PMSCs is determined by international humanitarian law, on a case by case basis, in particular according to the nature and circumstances of the functions in which they are involved.
25. If they are civilians under international humanitarian law, the personnel of PMSCs may not be the object of attack, unless and for such time as they directly participate in hostilities.
26. The personnel of PMSCs:
  - a) are obliged, regardless of their status, to comply with applicable international humanitarian law;
  - b) are protected as civilians under international humanitarian law, unless they are incorporated into the regular armed forces of a State or are members of organised armed forces, groups or units under a command responsible to the State; or otherwise lose their protection as determined by international humanitarian law;
  - c) are entitled to prisoner of war status in international armed conflict if they are persons accompanying the armed forces meeting the requirements of article 4A(4) of the Third Geneva Convention;
  - d) to the extent they exercise governmental authority, have to comply with the State's obligations under international human rights law;
  - e) are subject to prosecution if they commit conduct recognised as crimes under applicable national or international law.

## **F. SUPERIOR RESPONSIBILITY**

27. Superiors of PMSC personnel, such as
  - a) governmental officials, whether they are military commanders or civilian superiors, or
  - b) directors or managers of PMSCs,may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law. Superior responsibility is not engaged solely by virtue of a contract.

## **PART TWO**

### **GOOD PRACTICES RELATING TO PRIVATE MILITARY AND SECURITY COMPANIES**

#### **INTRODUCTION**

This Part contains a description of good practices that aims to provide guidance and assistance to States in ensuring respect for international humanitarian law and human rights law and otherwise promoting responsible conduct in their relationships with

PMSCs operating in areas of armed conflict. They may also provide useful guidance for States in their relationships with PMSCs operating outside of areas of armed conflict.

The good practices do not have legally binding effect and are not meant to be exhaustive. It is understood that a State may not have the capacity to implement all the good practices, and that no State has the legal obligation to implement any particular good practice, whether that State is a Contracting State, a Territorial State, or a Home State. States are invited to consider these good practices in defining their relationships with PMSCs, recognising that a particular good practice may not be appropriate in all circumstances and emphasising that this Part is not meant to imply that States should necessarily follow all these practices as a whole.

The good practices are intended, *inter alia*, to assist States to implement their obligations under international humanitarian law and human rights law. However, in considering regulation, States may also need to take into account obligations they have under other branches of international law, including as members of international organisations such as the United Nations, and under international law relating to trade and government procurement. They may also need to take into account bilateral agreements between Contracting States and Territorial States. Moreover, States are encouraged to fully implement relevant provisions of international instruments to which they are Parties, including anti-corruption, anti-organised crime and firearms conventions. Furthermore, any of these good practices will need to be adapted in practice to the specific situation and the State's legal system and capacity.

### **A. GOOD PRACTICES FOR CONTRACTING STATES**

States contemplating to contract PMSCs should evaluate whether their legislation, as well as procurement and contracting practices, are adequate for contracting PMSCs. This is particularly relevant where Contracting States use the services of a PMSC in a State where law enforcement or regulatory capacities are compromised.

In many instances, the good practices for Contracting States may also indicate good practices for other clients of PMSCs, such as international organisations, NGOs and companies.

In this sense, good practices for Contracting States include the following:

#### **I. Determination of services**

1. To determine which services may or may not be contracted out to PMSCs; in determining which services may not be contracted out, Contracting States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

#### **II. Procedure for the selection and contracting of PMSCs**

2. To assess the capacity of the PMSC to carry out its activities in conformity with relevant national law, international humanitarian law and international human

rights law, taking into account the inherent risk associated with the services to be performed, for instance by:

- a) acquiring information relating to the principal services the PMSC has provided in the past;
  - b) obtaining references from clients for whom the PMSC has previously provided similar services to those the Contracting State is seeking to acquire;
  - c) acquiring information relating to the PMSC's ownership structure and conducting background checks on the PMSC and its superior personnel, taking into account relations with subcontractors, subsidiary corporations and ventures.
3. To provide adequate resources and draw on relevant expertise for selecting and contracting PMSCs.
  4. To ensure transparency and supervision in the selection and contracting of PMSCs. Relevant mechanisms may include:
    - a) public disclosure of PMSC contracting regulations, practices and processes;
    - b) public disclosure of general information about specific contracts, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
    - c) publication of an overview of incident reports or complaints, and sanctions taken where misconduct has been proven; if necessary redacted to address national security, privacy and commercial confidentiality requirements;
    - d) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies.

### **III. Criteria for the selection of PMSCs**

5. To adopt criteria that include quality indicators relevant to ensuring respect for relevant national law, international humanitarian law and human rights law, as set out in good practices 6 to 13. Contracting States should consider ensuring that lowest price not be the only criterion for the selection of PMSCs.
6. To take into account, within available means, the past conduct of the PMSC and its personnel, which includes ensuring that the PMSC has:
  - a) no reliably attested record of involvement in serious crime (including organised crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately remedied such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and, where appropriate and consistent with findings of wrong-doing, providing individuals injured by their conduct with appropriate reparation;

- b) conducted comprehensive inquiries within applicable law regarding the extent to which any of its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;
  - c) not previously been rejected from a contract due to misconduct of the PMSC or its personnel.
7. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.
  8. To take into account whether it and its personnel possess or are in the process of obtaining requisite registrations, licenses or authorisations.
  9. To take into account whether it maintains accurate and up to date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by the Contracting State and other appropriate authorities.
  10. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardisation of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:
    - a) rules on the use of force and firearms;
    - b) international humanitarian law and human rights law;
    - c) religious, gender, and cultural issues, and respect for the local population;
    - d) handling complaints by the civilian population, in particular by transmitting them to the appropriate authority;
    - e) measures against bribery, corruption, and other crimes.Contracting States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.
  11. To take into account whether the PMSC:
    - a) acquires its equipment, in particular its weapons, lawfully;
    - b) uses equipment, in particular weapons, that is not prohibited by international law;
    - c) has complied with contractual provisions concerning return and/or disposition of weapons and ammunition.
  12. To take into account the PMSC's internal organisation and regulations, such as:



- a) the existence and implementation of policies relating to international humanitarian law and human rights law, especially on the use of force and firearms, as well as policies against bribery, corruption, and other crimes;
  - b) the existence of monitoring and supervisory as well as internal accountability mechanisms, such as:
    - i. internal investigation and disciplinary arrangements in case of allegations of wrong-doing by its personnel;
    - ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaint mechanisms and whistle-blower protection arrangements; and
    - iii. regular performance reporting, specific incident reporting, and reporting on demand to the Contracting State and under certain circumstances other appropriate authorities;
    - iv. requiring PMSC personnel and its subcontracted personnel to report any misconduct to the PMSC's management or a competent authority.
13. To consider the respect of the PMSC for the welfare of its personnel, as protected by labour law and other relevant national law. Relevant factors may include:
- a) providing personnel a copy of any contract to which they are party in a language they understand;
  - b) providing personnel with adequate pay and remuneration arrangements commensurate to their responsibilities and working conditions;
  - c) adopting operational safety and health policies;
  - d) ensuring personnel unrestricted access to their own travel documents; and
  - e) preventing unlawful discrimination in employment.

#### **IV. Terms of contract with PMSCs**

14. To include contractual clauses and performance requirements that ensure respect for relevant national law, international humanitarian law and human rights law by the contracted PMSC. Such clauses, reflecting and implementing the quality indicators referred to above as selection criteria, may include:
- a) past conduct (good practice 6);
  - b) financial and economic capacity (good practice 7);
  - c) possession of required registration, licenses or authorisations (good practice 8);
  - d) personnel and property records (good practice 9);
  - e) training (good practice 10);
  - f) lawful acquisition and use of equipment, in particular weapons (good practice 11);

- g) internal organisation and regulation and accountability (good practice 12);
- h) welfare of personnel (good practice 13);

Contractual clauses may also provide for the Contracting State's ability to terminate the contract for failure to comply with contractual provisions. They may also specify the weapons required for contract performance, that PMSCs obtain appropriate visas or other authorizations from the Territorial State, and that appropriate reparation be provided to those harmed by the misconduct of PMSCs and their personnel.

15. To require by contract that the conduct of any subcontracted PMSC is in conformity with relevant national law, international humanitarian law and international human rights law, including by:
  - a) establishing the criteria and qualifications for the selection and ongoing employment of subcontracted PMSCs and personnel;
  - b) requiring the PMSC to demonstrate that subcontractors comply with equivalent requirements as the PMSC initially contracted by the Contracting State;
  - c) ensuring that the PMSC is liable, as appropriate and within applicable law, for the conduct of its subcontractors.
16. To require, if consistent with force protection requirements and safety of the assigned mission, that the personnel of the PMSC be personally identifiable whenever they are carrying out activities in discharge of their responsibilities under a contract. Identification should:
  - a) be visible from a distance where mission and context allow, or consist of a non-transferable identification card that is shown upon demand;
  - b) allow for a clear distinction between a PMSC's personnel and the public authorities in the State where the PMSC operates.

The same should apply to all means of transport used by PMSCs.

17. To consider pricing and duration of a specific contract as a way to promote relevant international humanitarian law and human rights law. Relevant mechanisms may include:
  - a) securities or bonds for contractual performance;
  - b) financial rewards or penalties and incentives;
  - c) opportunities to compete for additional contracts.
18. To require, in consultation with the Territorial State, respect of relevant regulations and rules of conduct by PMSCs and their personnel, including rules on the use of force and firearms, such as:
  - a) using force and firearms only when necessary in self-defence or defence of third persons;

- b) immediate reporting to and cooperation with competent authorities, including the appropriate contracting official, in the case of use of force and firearms.

#### **V. Monitoring compliance and ensuring accountability**

19. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing:
  - a) corporate criminal responsibility for crimes committed by the PMSC, consistent with the Contracting State's national legal system;
  - b) criminal jurisdiction over serious crimes committed by PMSC personnel abroad.
20. To provide for non-criminal accountability mechanisms for improper or unlawful conduct of PMSCs and their personnel, including:
  - a) contractual sanctions commensurate to the conduct, including :
    - i. immediate or graduated termination of the contract;
    - ii. financial penalties;
    - iii. removal from consideration for future contracts, possibly for a set time period;
    - iv. removal of individual wrongdoers from the performance of the contract;
  - b) referral of the matter to competent investigative authorities;
  - c) providing for civil liability, as appropriate.
21. To provide for, in addition to the measures in good practices 19 and 20, appropriate administrative and other monitoring mechanisms to ensure the proper execution of the contract and the accountability of contracted PMSCs and their personnel for their improper and unlawful conduct; in particular to:
  - a) ensure that those mechanisms are adequately resourced and have independent audit and investigation capacity;
  - b) provide Contracting State government personnel on-site with the capacity and authority to oversee proper execution of the contract by the PMSC and the PMSC's subcontractors;
  - c) train relevant government personnel, such as military personnel, for foreseeable interactions with PMSC personnel;
  - d) collect information concerning PMSCs and personnel contracted and deployed, and on violations and investigations concerning their alleged improper and unlawful conduct;
  - e) establish control arrangements, allowing it to veto or remove particular PMSC personnel during contractual performance;

- f) engage PMSCs, Territorial States, Home States, trade associations, civil society and other relevant actors to foster information sharing and develop such mechanisms.
22. When negotiating agreements with Territorial States which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel:
- a) to consider the impact of the agreements on the compliance with national laws and regulations;
  - b) to address the issue of jurisdiction and immunities to ascertain proper coverage and appropriate civil, criminal, and administrative remedies for misconduct, in order to ensure accountability of PMSCs and their personnel.
23. To cooperate with investigating or regulatory authorities of Territorial and Home States, as appropriate, in matters of common concern regarding PMSCs.

## **B. GOOD PRACTICES FOR TERRITORIAL STATES**

The following good practices aim to provide guidance to Territorial States for governing the supply of military and security services by PMSCs and their personnel on their territory. Territorial States should evaluate whether their domestic legal framework is adequate to ensure that the conduct of PMSCs and their personnel is in conformity with relevant national law, international humanitarian law and human rights law or whether it needs to establish further arrangements to regulate the activities of PMSCs.

Acknowledging the particular challenges faced by Territorial States in armed conflict, Territorial States may accept information provided by the Contracting State concerning the ability of a PMSC to carry out its activities in conformity with international humanitarian law, human rights law and relevant good practices.

In this sense, good practices for Territorial States include the following:

### **I. Determination of services**

24. To determine which services may or may not be carried out on their territory by PMSCs or their personnel; in determining which services may not be carried out, Territorial States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

### **II. Authorisation to provide military and security services**

25. To require PMSCs to obtain an authorisation to provide military and security services in their territory ("authorisation"), including by requiring:
- a) PMSCs to obtain an operating license valid for a limited and renewable period ("corporate operating license"), or for specific services ("specific operating license"), taking into account the fulfilment of the quality criteria set out in good practices 31 to 38; and/or;

- b) individuals to register or obtain a license in order to carry out military or security services for PMSCs.

### **III. Procedure with regard to authorisations**

- 26. To designate a central authority competent for granting authorisations.
- 27. To allocate adequate resources and trained personnel to handle authorisations properly and timely.
- 28. To assess, in determining whether to grant an authorisation, the capacity of the PMSC to carry out its activities in conformity with relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:
  - a) acquiring information relating to the principal services the PMSC has provided in the past;
  - b) obtaining references from clients for whom the PMSC has previously provided similar services or clients in the Territorial State;
  - c) acquiring information relating to the PMSC's ownership structure and conduct background checks on the PMSC and its personnel, taking into account relations with subcontractors, subsidiary corporations and ventures, or obtain information from the Contracting State on these matters.
- 29. To ensure transparency with regard to authorisations. Relevant mechanisms may include:
  - a) public disclosure of authorisation regulations and procedures;
  - b) public disclosure of general information on granted authorisations, including on the identity of authorised PMSCs and their number of personnel, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
  - c) publication of an overview of incident reports or complaints, and sanctions taken where misconduct has been proven; if necessary redacted to address national security, privacy and commercial confidentiality requirements;
  - d) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies;
  - e) publishing and adhering to fair and non-discriminatory fee schedules for authorisations.

### **IV. Criteria for granting an authorisation**

- 30. To ensure that PMSCs fulfil certain quality criteria relevant for the respect of relevant national law, international humanitarian law and human rights law by the PMSC and its personnel, including those set out below.

31. To require that the conduct of PMSCs and of any PMSC subcontracted is in conformity with relevant national law, international humanitarian law and international human rights law, which includes ensuring that:
  - a) the PMSC notifies any subcontracting of military and security services to the authorisation authority;
  - b) the PMSC can demonstrate that its subcontractors comply with equivalent requirements as the PMSC which initially obtained an authorisation by the Territorial State;
  - c) the subcontractor is in possession of an authorisation;
  - d) the PMSC initially granted authorisation is liable, as appropriate and within applicable law, for the conduct of its subcontractors.
32. To take into account, within available means, the past conduct of the PMSC and its personnel, which includes ensuring that the PMSC has:
  - a) no reliably attested record of involvement in serious crime (including organised crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately dealt with such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and where appropriate and consistent with findings of wrong-doing, providing individuals injured by their conduct with appropriate reparation;
  - b) conducted comprehensive inquiries within applicable law regarding the extent to which any of its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;
  - c) not previously had an operating license revoked for misconduct of the PMSC or its personnel.
33. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.
34. To take into account whether the PMSC maintains accurate and up to date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by the Territorial State and other authorities.
35. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardisation of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:
  - a) rules on the use of force and weapons;

- b) international humanitarian law and human rights law;
- c) religious, gender, and cultural issues, and respect for the local population;
- d) complaints handling;
- e) measures against bribery, corruption, and other crimes.

Territorial States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

36. Not to grant an authorisation to a PMSC whose weapons are acquired unlawfully or whose use is prohibited by international law.
37. To take into account the PMSC's internal organisation and regulations, such as:
  - a) the existence and implementation of policies relating to international humanitarian law and human rights law, especially on the use of force and firearms, as well as policies against bribery and corruption;
  - b) the existence of monitoring and supervisory measures as well as internal accountability mechanisms, such as:
    - i. internal investigation and disciplinary arrangements in case of allegations of wrong-doing by its personnel;
    - ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaints mechanisms and whistle-blower protection arrangements;
    - iii. regular reporting on the performance of the assignment and/or specific incident reporting;
    - iv. requiring PMSC personnel and its subcontracted personnel to report any misconduct to the PMSC's management or a competent authority.
38. To consider the respect of the PMSC for the welfare of its personnel.
39. To take into account, in considering whether to grant a license or to register an individual, good practices 32 (past conduct) and 35 (training).

## **V. Terms of authorisation**

40. To include clauses to ensure that the conduct of the PMSC and its personnel is continuously in conformity with relevant national law, international humanitarian law and international human rights law. The authorisation includes, where appropriate, clauses requiring the PMSC and its personnel to implement the quality criteria referred to above as criteria for granting general and/or specific operating licenses and relating to:
  - a) past conduct (good practice 32);
  - b) financial and economic capacity (good practice 33);
  - c) personnel and property records (good practice 34);
  - d) training (good practice 35);

- e) lawful acquisitions (good practice 36);
  - f) internal organisation and regulation and accountability (good practice 37);
  - g) welfare of personnel (good practice 38);
41. To require the PMSC to post a bond that would be forfeited in case of misconduct or non-compliance with the authorisation, provided that the PMSC has a fair opportunity to rebut allegations and address problems.
42. To determine, when granting a specific operating license, a maximum number of PMSC personnel and equipment understood to be necessary to provide the services.

#### **VI. Rules on the provision of services by PMSCs and their personnel**

43. To have in place appropriate rules on the use of force and firearms by PMSCs and their personnel, such as:
- a) using force and firearms only when necessary in self-defence or defence of third persons;
  - b) immediately reporting to and cooperation with competent authorities in the case of use of force and firearms.
44. To have in place appropriate rules on the possession of weapons by PMSCs and their personnel, such as:
- a) limiting the types and quantity of weapons and ammunition that a PMSC may import, possess or acquire;
  - b) requiring the registration of weapons, including their serial number and calibre, and ammunition, with a competent authority;
  - c) requiring PMSC personnel to obtain an authorisation to carry weapons that is shown upon demand;
  - d) limiting the number of employees allowed to carry weapons in a specific context or area;
  - e) requiring the storage of weapons and ammunition in a secure and safe facility when personnel are off duty;
  - f) requiring that PMSC personnel carry authorised weapons only while on duty;
  - g) controlling the further possession and use of weapons and ammunition after an assignment is completed, including return to point of origin or other proper disposition of weapons and ammunition.
45. To require, if consistent with force protection requirements and safety of the assigned mission, that the personnel of the PMSC be personally identifiable whenever they are carrying out activities in discharge of their responsibilities under a contract. Identification should:



- a) be visible from a distance where mission and context allow, or consist of a non-transferable identification card that is shown upon demand;
- b) allow for a clear distinction between a PMSC's personnel and the public authorities in the State where the PMSC operates.

The same should apply to all means of transportation used by PMSCs.

## **VII. Monitoring compliance and ensuring accountability**

46. To monitor compliance with the terms of the authorisation, in particular:
  - a) establish or designate an adequately resourced monitoring authority;
  - b) ensure that the civilian population is informed about the rules of conduct by which PMSC have to abide and available complaint mechanisms;
  - c) requesting local authorities to report on misconduct by PMSCs or their personnel;
  - d) investigate reports of wrong-doing.
47. To provide a fair opportunity for PMSCs to respond to allegations that they have operated without or in violation of an authorisation.
48. To impose administrative measures, if it is determined that a PMSC has operated without or in violation of an authorisation; such measures may include:
  - a) revocation or suspension of the authorisation or putting the PMSC on notice of either of these steps in case remedial measures are not taken within a set period of time;
  - b) removing specific PMSC personnel under the penalty of revoking or suspending the authorisation;
  - c) prohibition to re-apply for an authorisation in the future or for a set period of time;
  - d) forfeiture of bonds or securities;
  - e) financial penalties.
49. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing corporate criminal responsibility for crimes committed by the PMSC, consistent with the Territorial State's national legal system.
50. To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSC and its personnel, including:
  - a) providing for civil liability;
  - b) otherwise requiring PMSCs, or their clients, to provide reparation to those harmed by the misconduct of PMSCs and their personnel.

51. When negotiating agreements with Contracting States which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel:
  - a) to consider the impact of the agreements on the compliance with national laws and regulations;
  - b) to address the issue of jurisdiction and immunities to ascertain proper coverage and appropriate civil, criminal, and administrative remedies for misconduct, in order to ensure accountability of PMSCs and their personnel.
52. To cooperate with investigating and regulatory authorities of Contracting and Home States in matters of common concern regarding PMSCs.

### **C. GOOD PRACTICES FOR HOME STATES**

The following good practices aim to provide guidance to Home States for governing the supply of military and security services by PMSCs and their personnel abroad ("export"). It is recognised that other good practices for regulation – such as regulation of standards through trade associations and through international cooperation – will also provide guidance for regulating PMSCs, but have not been elaborated here.

In this understanding, Home States should evaluate whether their domestic legal framework, be it central or federal, is adequately conducive to respect for relevant international humanitarian law and human rights law by PMSCs and their personnel, or whether, given the size and nature of their national private military and security industry, additional measures should be adopted to encourage such respect and to regulate the activities of PMSCs. When considering the scope and nature of any licensing or regulatory regime, Home States should take particular notice of regulatory regimes by relevant Contracting and Territorial States, in order to minimise the potential for duplicative or overlapping regimes and to focus efforts on areas of specific concern for Home States.

In this sense, good practices for Home States include the following:

#### **I. Determination of services**

53. To determine which services of PMSCs may or may not be exported; in determining which services may not be exported, Home States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

#### **II. Establishment of an authorisation system**

54. To consider establishing an authorisation system for the provision of military and security services abroad through appropriate means, such as requiring an operating license valid for a limited and renewable period ("corporate operating license"), for specific services ("specific operating license"), or through other forms of authorisation ("export authorisation"). If such a system of authorisation is established, the good practices 57 to 67 set out the procedure, quality criteria and terms that may be included in such a system.

55. To have in place appropriate rules on the accountability, export, and return of weapons and ammunition by PMSCs.
56. To harmonise their authorisation system and decisions with those of other States and taking into account regional approaches relating to authorisation systems.

### **III. Procedure with regard to authorisations**

57. To assess the capacity of the PMSC to carry out its activities in respect of relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:
  - a) acquiring information relating to the principal services the PMSC has provided in the past;
  - b) obtaining references from clients for whom the PMSC has previously provided similar services or clients in the Territorial State;
  - c) acquiring information relating to the PMSC's ownership structure and conduct background checks on the PMSC and its personnel, taking into account relations with subcontractors, subsidiary corporations and ventures.
58. To allocate adequate resources and trained personnel to handle properly and timely authorisations.
59. To ensure transparency with regard to the authorisation procedure. Relevant mechanisms may include:
  - a) public disclosure of authorisation regulations and procedures;
  - b) public disclosure of general information on specific authorisations, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
  - c) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies;
  - d) publishing and adhering to fair and non-discriminatory fee schedules.

### **IV. Criteria for granting an authorisation**

60. To take into account the past conduct of the PMSC and its personnel, which include ensuring that the PMSC has:
  - a) no reliably attested record of involvement in serious crime (including organised crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately dealt with such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and where appropriate and consistent with findings of wrong-doing, providing individuals injured by their conduct with appropriate reparation;

- b) conducted comprehensive inquiries within applicable law regarding the extent to which its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;
  - c) not previously had an authorisation revoked for misconduct of the PMSC or its personnel.
61. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.
62. To take into account whether the PMSC maintains accurate and up to date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by competent authorities.
63. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardisation of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:
- a) rules on the use of force and firearms;
  - b) international humanitarian law and human rights law;
  - c) religious, gender, and cultural issues, and respect for the local population;
  - d) complaints handling;
  - e) measures against bribery, corruption and other crimes.
- Home States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.
64. To take into account whether the PMSC's equipment, in particular its weapons, is acquired lawfully and its use is not prohibited by international law.
65. To take into account the PMSC's internal organisation and regulations, such as:
- a) the existence and implementation of policies relating to international humanitarian law and human rights law;
  - b) the existence of monitoring and supervisory as well as internal accountability mechanisms, such as:
    - i. internal investigation and disciplinary arrangements in case of allegations of wrong-doing by its personnel;
    - ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaints mechanisms and whistle-blower protection arrangements.

66. To consider the respect of the PMSC for the welfare of its personnel as protected by labour law and other relevant national law.

#### **V. Terms of authorisation granted to PMSCs**

67. To include clauses to ensure that the conduct of the PMSC and its personnel respect relevant national law, international humanitarian law and international human rights law. Such clauses, reflecting and implementing the quality criteria referred to above as criteria for granting authorisations, may include:
- a) past conduct (good practice 60);
  - b) financial and economic capacity (good practice 61);
  - c) personnel and property records (good practice 62);
  - d) training (good practice 62);
  - e) lawful acquisitions (good practice 64);
  - f) internal organisation and regulation and accountability (good practice 65);
  - g) welfare of personnel (good practice 66).

#### **VI. Monitoring compliance and ensuring accountability**

68. To monitor compliance with the terms of the authorisation, in particular by establishing close links between its authorities granting authorisations and its representatives abroad and/or with the authorities of the Contracting or Territorial State.
69. To impose sanctions for PMSCs operating without or in violation of an authorisation, such as:
- a) revocation or suspension of the authorisation or putting the PMSC on notice of either of these steps in case remedial measures are not taken within a set period of time;
  - b) prohibition to re-apply for an authorisation in the future or for a set period of time;
  - c) civil and criminal fines and penalties.
70. To support Territorial States in their efforts to establish effective monitoring over PMSCs.
71. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, consider establishing:
- a) corporate criminal responsibility for crimes committed by the PMSC, consistent with the Home State's national legal system;
  - b) criminal jurisdiction over serious crimes committed by PMSC personnel abroad.

72. To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSCs and their personnel, including:
  - a) providing for civil liability;
  - b) otherwise requiring PMSCs to provide reparation to those harmed by the misconduct of PMSCs and their personnel.
73. To cooperate with investigating or regulatory authorities of Contracting and Territorial States, as appropriate, in matters of common concern regarding PMSCs.

**Document No. 31, Statutes of the International Red Cross  
and Red Crescent Movement**

[Source: Statutes of the International Red Cross and Red Crescent Movement, available at [www.icrc.org](http://www.icrc.org).  
Footnotes omitted]

**STATUTES OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT**

(adopted by the 25<sup>th</sup> International Conference of the Red Cross at Geneva in 1986,  
amended in 1995 and 2006)

**PREAMBLE**

The International Conference of the Red Cross and Red Crescent,

*Proclaims* that the National Red Cross and Red Crescent Societies, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies together constitute a worldwide humanitarian movement, whose mission is to prevent and alleviate human suffering wherever it may be found, to protect life and health and ensure respect for the human being, in particular in times of armed conflict and other emergencies, to work for the prevention of disease and for the promotion of health and social welfare, to encourage voluntary service and a constant readiness to give help by the members of the Movement, and a universal sense of solidarity towards all those in need of its protection and assistance.

*Reaffirms* that, in pursuing its mission, the Movement shall be guided by its Fundamental Principles, which are:

**Humanity** *The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.*

**Impartiality** *It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.*

**Neutrality** *In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.*

**Independence** *The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.*

**Voluntary Service** *It is a voluntary relief movement not prompted in any manner by desire for gain.*

**Unity** *There can be only one Red Cross or one Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.*

**Universality** *The International Red Cross and Red Crescent Movement, in which all Societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.*

*Recalls* that the mottoes of the Movement, *Inter arma caritas* and *Per humanitatem ad pacem*, together express its ideals.

*Declares* that, by its humanitarian work and the dissemination of its ideals, the Movement promotes a lasting peace, which is not simply the absence of war, but is a dynamic process of cooperation among all States and peoples, cooperation founded on respect for freedom, independence, national sovereignty, equality, human rights, as well as on a fair and equitable distribution of resources to meet the needs of peoples.

## **SECTION I: GENERAL PROVISIONS**

### **ARTICLE 1. Definition**

1. The International Red Cross and Red Crescent Movement (hereinafter called "the Movement") is composed of the National Red Cross and Red Crescent Societies recognized in accordance with Article 4 (hereinafter called "National Societies"), of the International Committee of the Red Cross (hereinafter called "the International Committee") and of the International Federation of Red Cross and Red Crescent Societies (hereinafter called "the Federation").
2. The components of the Movement, while maintaining their independence within the limits of the present Statutes, act at all times in accordance with the Fundamental Principles and cooperate with each other in carrying out their respective tasks in pursuance of their common mission.
3. The components of the Movement meet at the International Conference of the Red Cross and Red Crescent (hereinafter called "the International Conference") with the States Parties to the Geneva Conventions of 27 July 1929 or of 12 August 1949.

### **ARTICLE 2. States Parties to the Geneva Conventions**

1. The States Parties to the Geneva Conventions cooperate with the components of the Movement in accordance with these Conventions, the present Statutes and the resolutions of the International Conference.
2. Each State shall promote the establishment on its territory of a National Society and encourage its development.
3. The States, in particular those which have recognized the National Society constituted on their territory, support, whenever possible, the work of the components of the Movement. The same components, in their turn and in accordance with their respective statutes, support as far as possible the humanitarian activities of the States.



4. The States shall at all times respect the adherence by all the components of the Movement to the Fundamental Principles.
5. The implementation of the present Statutes by the components of the Movement shall not affect the sovereignty of States, with due respect for the provisions of international humanitarian law.

## **SECTION II: COMPONENTS OF THE MOVEMENT**

### **ARTICLE 3. National Red Cross and Red Crescent Societies**

1. The National Societies form the basic units and constitute a vital force of the Movement. They carry out their humanitarian activities in conformity with their own statutes and national legislation, in pursuance of the mission of the Movement, and in accordance with the Fundamental Principles. The National Societies support the public authorities in their humanitarian tasks, according to the needs of the people of their respective countries.
2. Within their own countries, National Societies are autonomous national organizations providing an indispensable framework for the activities of their voluntary members and their staff. They cooperate with the public authorities in the prevention of disease, the promotion of health and the mitigation of human suffering by their own programmes in such fields as education, health and social welfare, for the benefit of the community.

They organize, in liaison with the public authorities, emergency relief operations and other services to assist the victims of armed conflicts as provided in the Geneva Conventions, and the victims of natural disasters and other emergencies for whom help is needed.

They disseminate and assist their governments in disseminating international humanitarian law; they take initiatives in this respect. They disseminate the principles and ideals of the Movement and assist those governments which also disseminate them. They also cooperate with their governments to ensure respect for international humanitarian law and to protect the distinctive emblems recognized by the Geneva Conventions and their Additional Protocols.

3. Internationally, National Societies, each within the limits of its resources, give assistance for victims of armed conflicts, as provided in the Geneva Conventions, and for victims of natural disasters and other emergencies. Such assistance, in the form of services and personnel, of material, financial and moral support, shall be given through the National Societies concerned, the International Committee or the Federation.

They contribute, as far as they are able, to the development of other National Societies which require such assistance, in order to strengthen the Movement as a whole.

International assistance between the components of the Movement shall be coordinated as provided in Article 5 or Article 6. A National Society which is to

receive such assistance may however undertake the coordination within its own country, subject to the concurrence of the International Committee or the Federation, as the case may be.

4. In order to carry out these tasks, the National Societies recruit, train and assign such personnel as are necessary for the discharge of their responsibilities.

They encourage everyone, and in particular young people, to participate in the work of the Society.

5. National Societies have a duty to support the Federation in terms of its Constitution. Whenever possible, they give their voluntary support to the International Committee in its humanitarian actions.

#### **ARTICLE 4. Conditions for recognition of National Societies**

In order to be recognized in terms of Article 5, paragraph 2 b) as a National Society, the Society shall meet the following conditions:

1. Be constituted on the territory of an independent State where the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field is in force.
2. Be the only National Red Cross or Red Crescent Society of the said State and be directed by a central body which shall alone be competent to represent it in its dealings with other components of the Movement.
3. Be duly recognized by the legal government of its country on the basis of the Geneva Conventions and of the national legislation as a voluntary aid society, auxiliary to the public authorities in the humanitarian field.
4. Have an autonomous status which allows it to operate in conformity with the Fundamental Principles of the Movement.
5. Use a name and distinctive emblem in conformity with the Geneva Conventions and their Additional Protocols.
6. Be so organized as to be able to fulfil the tasks defined in its own statutes, including the preparation in peace time for its statutory tasks in case of armed conflict.
7. Extend its activities to the entire territory of the State.
8. Recruit its voluntary members and its staff without consideration of race, sex, class, religion or political opinions.
9. Adhere to the present Statutes, share in the fellowship which unites the components of the Movement and cooperate with them.
10. Respect the Fundamental Principles of the Movement and be guided in its work by the principles of international humanitarian law.

#### **ARTICLE 5. The International Committee of the Red Cross**

1. The International Committee, founded in Geneva in 1863 and formally recognized in the Geneva Conventions and by International Conferences of the Red Cross, is

an independent humanitarian organization having a status of its own. It co-opts its members from among Swiss citizens.

2. The role of the International Committee, in accordance with its Statutes, is in particular:
  - a) to maintain and disseminate the Fundamental Principles of the Movement, namely humanity, impartiality, neutrality, independence, voluntary service, unity and universality;
  - b) to recognize any newly established or reconstituted National Society, which fulfils the conditions for recognition set out in Article 4, and to notify other National Societies of such recognition;
  - c) to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law;
  - d) to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results;
  - e) to ensure the operation of the Central Tracing Agency as provided in the Geneva Conventions;
  - f) to contribute, in anticipation of armed conflicts, to the training of medical personnel and the preparation of medical equipment, in cooperation with the National Societies, the military and civilian medical services and other competent authorities;
  - g) to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof;
  - h) to carry out mandates entrusted to it by the International Conference.
3. The International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution.
4.
  - a) It shall maintain close contact with National Societies. In agreement with them, it shall cooperate in matters of common concern, such as their preparation for action in times of armed conflict, respect for and development and ratification of the Geneva Conventions, and the dissemination of the Fundamental Principles and international humanitarian law.
  - b) In situations foreseen in paragraph 2 d) of this Article and requiring coordinated assistance from National Societies of other countries, the International Committee, in cooperation with the National Society of the country or

countries concerned, shall coordinate such assistance in accordance with the agreements concluded with the Federation.

5. Within the framework of the present Statutes and subject to the provisions of Articles 3, 6 and 7, the International Committee shall maintain close contact with the Federation and cooperate with it in matters of common concern.
6. It shall also maintain relations with governmental authorities and any national or international institution whose assistance it considers useful.

**ARTICLE 6. The International Federation of Red Cross and Red Crescent Societies**

1. The International Federation of Red Cross and Red Crescent Societies comprises the National Red Cross and Red Crescent Societies. It acts under its own Constitution with all rights and obligations of a corporate body with a legal personality.
2. The Federation is an independent humanitarian organization which is not governmental, political, racial or sectarian in character.
3. The general object of the Federation is to inspire, encourage, facilitate and promote at all times all forms of humanitarian activities by the National Societies, with a view to preventing and alleviating human suffering and thereby contributing to the maintenance and the promotion of peace in the world.
4. To achieve the general object as defined in paragraph 3 and in the context of the Fundamental Principles of the Movement, of the resolutions of the International Conference and within the framework of the present Statutes and subject to the provisions of Articles 3, 5 and 7, the functions of the Federation, in accordance with its Constitution, are *inter alia* the following:
  - a) to act as the permanent body of liaison, coordination and study between the National Societies and to give them any assistance they might request;
  - b) to encourage and promote in every country the establishment and development of an independent and duly recognized National Society;
  - c) to bring relief by all available means to all disaster victims;
  - d) to assist the National Societies in their disaster relief preparedness, in the organization of their relief actions and in the relief operations themselves;
  - e) to organize, coordinate and direct international relief actions in accordance with the Principles and Rules adopted by the International Conference;
  - f) to encourage and coordinate the participation of the National Societies in activities for safeguarding public health and the promotion of social welfare in cooperation with their appropriate national authorities;
  - g) to encourage and coordinate between National Societies the exchange of ideas for the education of children and young people in humanitarian ideals and for the development of friendly relations between young people of all countries;

- h) to assist National Societies to recruit members from the population as a whole and inculcate the principles and ideals of the Movement;
  - i) to bring help to victims of armed conflicts in accordance with the agreements concluded with the International Committee;
  - j) to assist the International Committee in the promotion and development of international humanitarian law and collaborate with it in the dissemination of this law and of the Fundamental Principles of the Movement among the National Societies;
  - k) to be the official representative of the member Societies in the international field, *inter alia* for dealing with decisions and recommendations adopted by its Assembly and to be the guardian of their integrity and the protector of their interests;
  - l) to carry out the mandates entrusted to it by the International Conference.
5. In each country the Federation shall act through or in agreement with the National Society and in conformity with the laws of that country.

#### **ARTICLE 7. Cooperation**

1. The components of the Movement shall cooperate with each other in accordance with their respective statutes and with Articles 1, 3, 5 and 6 of the present Statutes.
2. In particular the International Committee and the Federation shall maintain frequent regular contact with each other at all appropriate levels so as to coordinate their activities in the best interest of those who require their protection and assistance.
3. Within the framework of the present Statutes and their respective statutes, the International Committee and the Federation shall conclude with each other any agreements required to harmonize the conduct of their respective activities. Should, for any reason, such agreements not exist, Article 5, paragraph 4 b) and Article 6, paragraph 4 i) shall not apply and the International Committee and the Federation shall refer to the other provisions of the present Statutes to settle matters relative to their respective fields of activities.
4. Cooperation between the components of the Movement on a regional basis shall be undertaken in the spirit of their common mission and the Fundamental Principles, within the limits of their respective statutes.
5. The components of the Movement, while maintaining their independence and identity, cooperate whenever necessary with other organizations which are active in the humanitarian field, provided such organizations are pursuing a purpose similar to that of the Movement and are prepared to respect the adherence by the components to the Fundamental Principles.

### **SECTION III: STATUTORY BODIES**

#### **The International Conference of the Red Cross and Red Crescent**

##### **ARTICLE 8. Definition**

The International Conference is the supreme deliberative body for the Movement. At the International Conference, representatives of the components of the Movement meet with representatives of the States Parties to the Geneva Conventions, the latter in exercise of their responsibilities under those Conventions and in support of the overall work of the Movement in terms of Article 2. Together they examine and decide upon humanitarian matters of common interest and any other related matter.

##### **ARTICLE 9. Composition**

1. The members of the International Conference shall be the delegations from the National Societies, from the International Committee, from the Federation and from the States Parties to the Geneva Conventions.
2. Each of these delegations shall have equal rights expressed by a single vote.
3. A delegate shall belong to only one delegation.
4. A delegation shall not be represented by another delegation or by a member of another delegation.

##### **ARTICLE 10. Functions**

1. The International Conference contributes to the unity of the Movement and to the achievement of its mission in full respect of the Fundamental Principles.
2. The International Conference contributes to the respect for and development of international humanitarian law and other international conventions of particular interest to the Movement.
3. The International Conference shall have the sole competence:
  - a) to amend the present Statutes and the Rules of Procedure of the International Red Cross and Red Crescent Movement (hereinafter called "Rules of Procedure");
  - b) to take, at the request of any of its members, the final decision on any difference of opinion as to the interpretation and application of these Statutes and Rules;
  - c) to decide on any question, referred to in Article 18, paragraph 2 b), which may be submitted to it by the Standing Commission, the International Committee or the Federation.
4. The International Conference shall elect in a personal capacity those members of the Standing Commission mentioned in Article 17, paragraph 1 a) of the present Statutes, taking into account personal qualities and the principle of fair geographical distribution.
5. Within the limits of the present Statutes and of the Rules of Procedure, the International Conference shall adopt its decisions, recommendations or declarations in the form of resolutions.

6. The International Conference may assign mandates to the International Committee and to the Federation within the limits of their statutes and of the present Statutes.
7. The International Conference may enact, when necessary and by a two-thirds majority of its members present and voting, regulations relating to matters such as procedure and the award of medals.
8. The International Conference may establish for the duration of the Conference subsidiary bodies in accordance with the Rules of Procedure.

#### **ARTICLE 11. Procedure**

1. The International Conference shall meet every four years, unless it decides otherwise. It shall be convened by the central body of a National Society, by the International Committee or by the Federation, under the mandate conferred for that purpose either by the previous International Conference or by the Standing Commission as provided in Article 18, paragraph 1 a). As a general rule, favourable consideration shall be given to any offer made during an International Conference by a National Society, the International Committee or the Federation to act as host to the next Conference.
2. Should exceptional circumstances so require, the place and date of the International Conference may be changed by the Standing Commission. The Standing Commission may act on its own initiative or on a proposal by the International Committee, the Federation or at least one third of the National Societies.
3. The International Conference shall elect the Chairman, Vice-Chairmen, Secretary General, Assistant Secretaries General and other officers of the Conference.
4. All participants in the International Conference shall respect the Fundamental Principles and all documents presented shall conform with these Principles. In order that the debates of the International Conference shall command the confidence of all, the Chairman and any elected officer responsible for the conduct of business shall ensure that none of the speakers at any time engages in controversies of a political, racial, religious or ideological nature. The Bureau of the International Conference, as defined in the Rules of Procedure, shall apply the same standard to documents before authorizing their circulation.
5. In addition to the members entitled to take part in the International Conference, observers, referred to in Article 18, paragraph 1 d), may attend the meetings of the Conference, unless the Conference decides otherwise.
6. The International Conference shall not modify either the Statutes of the International Committee or the Constitution of the Federation nor take decisions contrary to such statutes. The International Committee and the Federation shall take no decision contrary to the present Statutes or to the resolutions of the International Conference.
7. The International Conference shall endeavour to adopt its resolutions by consensus as provided in the Rules of Procedure. If no consensus is reached, a vote shall be taken in accordance with these Rules.

8. Subject to the provisions of the present Statutes, the International Conference shall be governed by the Rules of Procedure.

### **The Council of Delegates of the International Red Cross and Red Crescent Movement**

#### **ARTICLE 12. Definition**

The Council of Delegates of the International Red Cross and Red Crescent Movement (hereinafter called "the Council") is the body where the representatives of all the components of the Movement meet to discuss matters which concern the Movement as a whole.

#### **ARTICLE 13. Composition**

1. The members of the Council shall be the delegations from the National Societies, from the International Committee and from the Federation.
2. Each of these delegations shall have equal rights expressed by a single vote.

#### **ARTICLE 14. Functions**

1. Within the limits of the present Statutes, the Council shall give an opinion and where necessary take decisions on all matters concerning the Movement which may be referred to it by the International Conference, the Standing Commission, the National Societies, the International Committee or the Federation.
2. When meeting prior to the opening of the International Conference, the Council shall:
  - a) propose to the Conference the persons to fill the posts mentioned in Article 11, paragraph 3;
  - b) adopt the provisional agenda of the Conference.
3. Within the limits of the present Statutes, the Council shall adopt its decisions, recommendations or declarations in the form of resolutions.
4. Notwithstanding the general provision contained in Article 10, paragraph 7, the Council may amend, by a two-thirds majority of its members present and voting, the regulations for the Henry Dunant Medal.
5. The Council may refer any matter to the International Conference.
6. The Council may refer a matter to any of the components of the Movement for consideration.
7. The Council may establish by a two-thirds majority of its members present and voting such subsidiary bodies as may be necessary, specifying their mandate, duration and membership.
8. The Council shall take no final decision on any matter which, according to the present Statutes, is within the sole competence of the International Conference, nor any decision contrary to the resolutions of the latter, or concerning any matter



already settled by the Conference or reserved by it for the agenda of a forthcoming Conference.

#### **ARTICLE 15. Procedure**

1. The Council shall meet on the occasion of each International Conference, prior to the opening of the Conference, and whenever one third of the National Societies, the International Committee, the Federation or the Standing Commission so request. In principle, it shall meet on the occasion of each session of the General Assembly of the Federation. The Council may also meet on its own initiative.
2. The Council shall elect its Chairman and Vice-Chairman. The Council and the General Assembly of the Federation, as well as the International Conference when it is convened, shall be chaired by different persons.
3. All participants in the Council shall respect the Fundamental Principles and all documents presented shall conform with these Principles. In order that the debates of the Council shall command the confidence of all, the Chairman and any elected officer responsible for the conduct of business shall ensure that none of the speakers at any time engages in controversies of a political, racial, religious or ideological nature.
4. In addition to the members entitled to take part in the Council, observers, referred to in Article 18, paragraph 4 c), from those “National Societies in the process of recognition” which appear likely to be recognized in the foreseeable future may attend the meetings of the Council, unless the Council decides otherwise.
5. The Council shall endeavour to adopt its resolutions by consensus as provided in the Rules of Procedure. If no consensus is reached, a vote shall be taken in accordance with the Rules of Procedure.
6. The Council shall be subject to the Rules of Procedure. It may supplement them when necessary by a two-thirds majority of its members present and voting, unless the International Conference decides otherwise.

### **The Standing Commission of the Red Cross and Red Crescent**

#### **ARTICLE 16. Definition**

The Standing Commission of the Red Cross and Red Crescent (called “the Standing Commission” in the present Statutes) is the trustee of the International Conference between two Conferences, carrying out the functions laid down in Article 18.

#### **ARTICLE 17. Composition**

1. The Standing Commission shall comprise nine members, namely:
  - a) five who are members of different National Societies, each elected in a personal capacity by the International Conference according to Article 10, paragraph 4 and holding office until the close of the following International Conference or until the next Standing Commission has been formally constituted, whichever is the later;

- b) two who are representatives of the International Committee, one of whom shall be the President;
  - c) two who are representatives of the Federation, one of whom shall be the President.
2. Should any member referred to in paragraph 1 b) or c) be unable to attend a meeting of the Standing Commission, he may appoint a substitute for that meeting, provided that the substitute is not a member of the Commission. Should any vacancy occur among the members referred to in paragraph 1 a), the Standing Commission itself shall appoint as a member the candidate who, at the previous election, obtained the greatest number of votes without being elected, provided that the person concerned is not a member of the same National Society as an existing elected member. In case of a tie, the principle of fair geographical distribution shall be the deciding factor.
3. The Standing Commission shall invite to its meetings, in an advisory capacity and at least one year before the International Conference is to meet, a representative of the host organization of the next International Conference.

#### **ARTICLE 18. Functions**

1. The Standing Commission shall make arrangements for the next International Conference by:
- a) selecting the place and fixing the date thereof, should this not have been decided by the previous Conference, or should exceptional circumstances so require in terms of Article 11, paragraph 2;
  - b) establishing the programme for the Conference;
  - c) preparing the provisional agenda of the Conference for submission to the Council;
  - d) establishing by consensus the list of the observers referred to in Article 11, paragraph 5;
  - e) promoting the Conference and securing optimum attendance.
2. The Standing Commission shall settle, in the interval between International Conferences, and subject to any final decision by the Conference:
- a) any difference of opinion which may arise as to the interpretation and application of the present Statutes and of the Rules of Procedure;
  - b) any question which may be submitted to it by the International Committee or the Federation in connection with any difference which may arise between them.
3. The Standing Commission shall:
- a) promote harmony in the work of the Movement and, in this connection, coordination among its components;

- b) encourage and further the implementation of resolutions of the International Conference;
  - c) examine, with these objects in view, matters which concern the Movement as a whole.
4. The Standing Commission shall make arrangements for the next Council by:
    - a) selecting the place and fixing the date thereof;
    - b) preparing the provisional agenda of the Council;
    - c) establishing by consensus the list of the observers referred to in Article 15, paragraph 4.
  5. The Standing Commission shall administer the award of the Henry Dunant Medal.
  6. The Standing Commission may refer to the Council any question concerning the Movement.
  7. The Standing Commission may establish by consensus such *ad hoc* bodies as necessary and nominate the members of these bodies.
  8. In carrying out its functions and subject to any final decision by the International Conference, the Standing Commission shall take any measures which circumstances demand, provided always that the independence and initiative of each of the components of the Movement, as defined in the present Statutes, are strictly safeguarded.

#### **ARTICLE 19. Procedure**

1. The Standing Commission shall hold an ordinary meeting at least twice yearly. It shall hold an extraordinary meeting when convened by its Chairman, either acting on his own initiative or at the request of three of its members.
2. The Standing Commission shall have its headquarters in Geneva. It may meet in another place selected by its Chairman and approved by the majority of its members.
3. The Standing Commission shall also meet at the same place and at the same time as the International Conference.
4. All decisions shall be taken by a majority vote of the members present, unless otherwise specified in the present Statutes or in the Rules of Procedure.
5. The Standing Commission shall elect a Chairman and a Vice-Chairman from among its members.
6. Within the limits of the present Statutes and of the Rules of Procedure, the Standing Commission shall establish its own rules of procedure.

## **SECTION IV: FINAL PROVISIONS**

### **ARTICLE 20. Amendments**

Any proposal to amend the present Statutes and the Rules of Procedure must be placed on the agenda of the International Conference and its text sent to all members of the Conference at least six months in advance. To be adopted, any amendment shall require a two-thirds majority of those members of the International Conference present and voting, after the views of the International Committee and the Federation have been presented to the Conference.

### **ARTICLE 21. Entry into force**

1. The present Statutes shall replace the Statutes adopted in 1952 by the Eighteenth International Conference. Any earlier provisions which conflict with the present Statutes are repealed.
2. The present amended Statutes shall enter into force on 22 June 2006.

**Document No. 32, The Seville Agreement****I. The Seville Agreement**

[Source: Text of the Agreement adopted by consensus in Resolution 6 of the the Council of Delegates in Sevilla, Spain, November 26, 1997. Available on <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JP4Y>]

**AGREEMENT ON THE ORGANIZATION OF THE  
INTERNATIONAL ACTIVITIES OF THE COMPONENTS OF THE  
INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT****PREAMBLE**

The mission of the International Red Cross and Red Crescent Movement is *“to prevent and alleviate human suffering wherever it may be found, to protect life and health, and ensure respect for the human being, in particular in times of armed conflict and other emergencies, to work for the prevention of disease and for the promotion of health and social welfare, to encourage voluntary service and a constant readiness to give help by the members of the Movement, and a universal sense of solidarity towards all those in need of its protection and assistance”*.

The accomplishment of this common mission calls for the combined efforts and participation of all the components of the Movement. To respond with speed, flexibility and creativity to the needs of all those calling for impartial humanitarian protection and assistance, the components must join their forces and capitalize on their diversity. To achieve that goal through effective collaboration in a spirit of mutual trust, to ensure an efficient mobilization of resources, the components must therefore, based on a clear sense of purpose and their common mission, organize their international activities on a sound and predictable basis. This implies observance of the Fundamental Principles and of the Statutes of the Movement, and a synergetic cooperation, coupled with a clear division of labour, among components having distinct but closely related and complementary roles and competencies.

This Agreement is more than an instrument of operational management or a statement of understanding. It sets into motion a profound change in attitude between members of the same Movement: the adoption of a collaborative spirit, in which every member of the Movement values the contributions of other members as partners in a global humanitarian enterprise. It is an agreement on cooperation and not merely on a division of labour, and it applies to all those international activities which, under the Movement's Statutes, the components are called upon to carry out in close collaboration. It establishes clear guidelines for the performance of tasks by Movement members, using the specific areas of competence and the complementary capacities of each to best effect. It provides for continuity of activities as situations change, and aims at fostering among the components a stronger sense of identity, of solidarity, of mutual trust and of shared responsibility.

With those objectives set out, this Agreement on the organization of the international activities of the Movement's components constitutes an essential element of a new common strategy of action that will allow the components to achieve three important goals :

- to provide more effective response to humanitarian needs using to best effect the Movement's many resources;
- to promote better respect for humanitarian principles, and for international humanitarian law;
- to create a stronger International Red Cross and Red Crescent Movement in which all components cooperate to the optimum extent.

## **PART I – GENERAL**

### **ARTICLE 1. Scope of the Agreement**

- 1.1 The Agreement applies to those international activities which the components are called upon to carry out in cooperation, on a bilateral or multilateral basis, to the exclusion of the activities which the Statutes of the Movement and the Geneva Conventions entrust to the components individually.
- 1.2 The "international activities" of the components are the activities of the National Societies defined in Article 3, paragraphs 3 and 5 of the Statutes of the Movement; the activities of the International Committee of the Red Cross defined in Article 5, paragraphs 2, 3 and 4 of the Statutes of the Movement; and the activities of the International Federation of Red Cross and Red Crescent Societies defined in Article 6, paragraphs 3, 4 and 5 of the Statutes of the Movement.
- 1.3 Pursuant to Article 7, paragraph 1 of the Statutes of the Movement, the Agreement defines the organization of international activities carried out in bilateral or multilateral cooperation between :
  - the National Societies and their Federation;
  - the National Societies and the ICRC;
  - the National Societies between themselves;
  - the ICRC and the Federation;
  - the ICRC, the Federation and the National Societies.
- 1.4 Nothing in this Agreement shall be interpreted as restricting or impairing the specific role and competencies of each component according to the Geneva Conventions and their additional Protocols, and under the Statutes of the Movement.

### **ARTICLE 2. Object and Purpose of the Agreement**

The object and purpose of the Agreement is :

- a) to promote the efficient use of the human, material and financial resources of the Movement and to mobilize them as rapidly as possible in relief operations and development activities in the interest of the victims of armed conflicts or of internal strife and their direct results, as well as of natural or technological disasters, and of vulnerable persons in other emergency and disaster situations in peacetime;
- b) to promote closer cooperation among the components in situations referred to in Article 2 a) above;
- c) to strengthen the development of National Societies and to improve cooperation among them, thus enabling National Societies to participate more effectively in the international activities of the Movement;
- d) to obviate differences between the components as to the definition and the organization of their respective international activities and responsibilities within the Movement;
- e) to strengthen functional cooperation among the ICRC, the Federation and National Societies.

### **ARTICLE 3. Guiding Principles**

The organization of the international activities of the components is at all times governed by the values and principles which guide the Movement, as enshrined in :

- the Fundamental Principles of the Red Cross and Red Crescent;
- the Statutes of the Movement;
- the Geneva Conventions and their Additional Protocols.

### **Article 4. Management Principles**

Implicit in the Statutes of the Movement are two organizational concepts which this Agreement defines as “the lead role” and “the lead agency”.

#### *A) Lead Role*

- 4.1 The Geneva Conventions and the Statutes of the Movement entrust specific competencies to each component which therefore plays a lead role in these matters.
- 4.2 The concept of lead role implies the existence of other partners with rights and responsibilities in these matters.

#### *B) Lead Agency*

- 4.3 The lead agency concept is an organizational tool for managing international operational activities. In a given situation, one organization is entrusted with the function of lead agency. That organization carries out the general direction and coordination of the international operational activities.

- 4.4 The lead agency concept applies primarily in emergency situations as referred to in Article 2 a) above, where rapid, coherent and effective relief is required in response to the large-scale needs of the victims, on the basis of an evaluation of these needs and of the capacity of the National Society concerned to meet them.
- 4.5 Effective coordination between the components under the responsibility and general direction of the lead agency requires the establishment of appropriate mechanisms for consultation and a commitment by all those taking part to abide by coordination rules and procedures.
- 4.6 The effectiveness of an operation depends on adequate prior training and preparation of those carrying out the operation (emergency preparedness).

## **PART II – INTERNATIONAL RELIEF ACTIVITIES**

### **ARTICLE 5. Organization of International Relief Operations**

#### **5.1 *Situations Requiring a Lead Agency***

- A) International and non-international armed conflicts, internal strife and their direct results, within the meaning of the Geneva Conventions and their Additional Protocols and the Statutes of the Movement:
  - a) within the meaning of the Geneva Conventions and of this Agreement, the term “situation of armed conflict” covers the entire territory of the parties to a conflict as far as the protection and assistance of the victims of that conflict are concerned;
  - b) the term “direct results of a conflict” within the meaning of the Geneva Conventions applies beyond the cessation of hostilities and extends to situations where victims of a conflict remain in need of relief until a general restoration of peace has been achieved;
  - c) the term “direct results of a conflict” shall also apply to situations in which general restoration of peace has been achieved, hence the intervention of the ICRC as a specifically neutral and independent institution and intermediary is no longer required but victims remain in need of relief during the post-conflict period, especially within the context of reconstruction and rehabilitation programmes;
  - d) the term “direct results of a conflict” shall also apply to situations in which victims of a conflict are to be found on the territory of a State which is neither party to a conflict nor affected by internal strife, especially following a large scale movement of refugees.
- B) Natural or technological disasters and other emergency and disaster situations in peace time which require resources exceeding those of the operating National Society and thus call upon the *Principles and Rules for Red Cross and Red Crescent Disaster Relief* to apply;
- C) Armed conflict concomitant with natural or technological disasters.



## 5.2 *Armed Conflict and Internal Strife : Elements of Identification*

For the purposes of the application of the present Agreement and the organization of the international activities of the components,

- a) an armed conflict exists when the armed action is taking place between two or more parties and reflects a minimum of organization;
- b) internal strife does not necessarily imply armed action but serious acts of violence over a prolonged period or a latent situation of violence, whether of political, religious, racial, social, economic or other origin, accompanied by one or more features such as: mass arrests, forced disappearances, detention for security reasons, suspension of judicial guarantees, declaration of state of emergency, declaration of martial law.

## 5.3 *Lead Agency Role of each Component*

5.3.1 The ICRC will act as lead agency, as provided for in Article 4 of the present Agreement, in situations of international and non-international armed conflicts, internal strife and their direct results as referred to in Article 5.1, Section A and in paragraphs a) and b), and in Section C (armed conflict concomitant with natural or technological disasters).

5.3.2 The Federation will act as lead agency in situations referred to in Article 5.1, paragraphs c) and d) of Section A, and in Section B (natural or technological disasters and other emergency and disaster situations in peace time which require resources exceeding those of the operating National Society).

5.3.3 A National Society may undertake the functions of lead agency necessary for the coordination of international relief assistance within its own territory subject to the concurrence of the ICRC or the Federation, as the case may be, as provided for in Article 3, paragraph 3 of the Statutes of the Movement.

5.3.4 If a natural or technological disaster occurs in a situation of conflict where the ICRC is already engaged, the ICRC will call upon the Federation to provide additional appropriate expertise to facilitate relief.

5.3.5 If an armed conflict or internal strife breaks out in a situation where there is ongoing Federation relief assistance activity, the transition provisions apply, as provided for in Article 5.5 of the present Agreement.

## 5.4 *Unforeseen Situations*

In handling unforeseen situations which do not fall within the situations referred to in Part II, Articles 5.1 and 5.3, the components of the Movement directly concerned undertake, in good faith and with common sense, to be guided by the Fundamental Principles and the Statutes of the Movement, to ensure, in the interest of the victims, maximum efficiency of the operation and harmonious cooperation within the Movement as a whole.

## 5.5 *Transition*

5.5.1 Where, as a result of a change of situation, responsibility for directing and coordinating an international relief operation is transferred from the ICRC or from the Federation in accordance with the relevant Articles of the present Agreement, the incumbent lead agency shall, in agreement with the operating National Society and in consultation with the participating National Societies, take all the steps appropriate to ensure an efficient and harmonious handover of the management and conduct of the new international relief operation by the component taking over the lead agency function.

5.5.2 Subject to the agreement of the donors who have contributed to financing the international relief operation which is being phased out, the funds and relief supplies available, together with the logistic and material resources deployed in the field, shall, if they are suited to the objectives of the new operation, be placed at the disposal of the lead agency henceforth responsible for its general direction and coordination.

## 5.6 *Other International Relief Actions by National Societies*

5.6.1 In situations where the needs of the victims do not call for the organization of an international relief operation under a lead agency, a National Society which provides direct assistance to the Society of the country affected by a conflict or a disaster shall immediately inform the ICRC or the Federation, as the case may be.

5.6.2 Mutual emergency relief assistance agreements in case of natural or technological disasters between neighbouring National Societies, and bilateral or multilateral development agreements between National Societies shall be notified in advance to the Federation.

5.6.3 The fact that one or several National Societies submit a request for aid to the ICRC or to the Federation, or hand over relief supplies to one of them, shall in no way be deemed to modify the organization of functions and responsibilities between the two institutions as defined in the present Agreement. In such an event, the institution which is not competent will so inform the National Society or Societies concerned and will refer the matter without delay to the competent institution.

## 5.7 *Operational Difficulties*

5.7.1 Should an international relief operation directed and coordinated either by the ICRC or by the Federation be obstructed for a prolonged period, the lead agency shall consult the components involved with a view to bringing their combined influence to bear so that the obstacles to the operation may be overcome as soon as possible in the sole interest of the victims.

5.7.2 Where appropriate they may, by mutual agreement, decide to implement provisional measures which shall in no way be regarded as precedents affecting the respective mandates of the components of the Movement or the organization of tasks provided for in the present Agreement.

### 5.8 *United Nations Specialized Agencies*

5.8.1 In order to maintain among the components a coherent approach that will preserve the Movement's unity and independence, a National Society wishing to conclude a cooperation agreement with a specialized agency of the United Nations, shall keep the Federation and/or the ICRC informed.

5.8.2 In particular, it shall keep the Federation and/or the ICRC informed of any negotiations likely to lead to a formal agreement with the UNHCR which should be undertaken in association with the Federation and/or the ICRC.

## **ARTICLE 6. Responsibilities for General Direction and Coordination of International Relief Operations**

6.1 In situations defined in the present Agreement, where the general direction and coordination of an international relief operation is exercised by the ICRC or the Federation acting as lead agency, this function carries the following responsibilities:

### 6.1.1 *General Responsibilities*

- a) to define the general objectives of the international relief operation based on access to the victims and on an impartial assessment of their needs;
- b) to direct the implementation of these objectives;
- c) to ensure that all actions within the relief operation are effectively coordinated;
- d) to establish appropriate mechanisms of consultation with Red Cross and Red Crescent partners;
- e) to coordinate international Red Cross and Red Crescent relief operations with the humanitarian activities of other organizations (governmental or non-governmental) where this is in the interest of the victims and is in accordance with the Fundamental Principles;
- f) to act as a spokesman for the international relief action and to formulate the Red Cross and Red Crescent partners' response to public interest;
- g) to mobilize financial resources for the relief operation and to launch appeals integrating when necessary other directly or indirectly related Red Cross and Red Crescent activities;
- h) to ensure that the resources mobilized for an international relief operation are managed in a sound and efficient manner by the operating and the participating National Societies;
- i) to promote, by means of project delegations, bilateral or multilateral cooperation agreements between participating and operating National Societies;

### 6.1.2 *Specific Responsibilities*

#### A) In situations where the ICRC is acting as lead agency :

- a) to establish and maintain relations and contacts with all the parties to the conflict and take any steps necessary for the conduct of international relief operations for victims, in accordance with the relevant provisions of international humanitarian law and in compliance with the Fundamental Principles of independence, neutrality and impartiality;
- b) to assume ultimate responsibility for international relief operations vis-à-vis the parties to the conflict and the community of States party to the Geneva Conventions;
- c) to define and ensure the application of any measure which may prove necessary to guarantee, to the greatest extent possible, the physical safety of personnel engaged in relief operations in the field;
- d) to ensure respect for the rules in force relating to the use of the red cross and red crescent emblems for protective purposes;
- e) to draw up, in consultation with the National Societies concerned, public statements relating to the progress of the relief operation.

#### B) In situations where the Federation is acting as lead agency :

- a) to ensure that the participating and the operating National Societies comply with the *Principles and Rules for Red Cross and Red Crescent Disaster Relief* (1995) and the *Code of Conduct for International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief* (1993);
- b) to offer the National Societies rapid information on disasters in order to permit mobilization and coordination of all possible forms of relief;
- c) to promote, beyond the emergency phase, the establishment and the development of rehabilitation and reconstruction programmes, and to mobilize for this purpose the support of National Societies of other countries;
- d) to decide, in agreement with the National Society of the country concerned, and after consultation of the donor Societies, on the use of any goods or funds that remain available at the end of an international relief operation.

### 6.2 *Coordination of an International Relief Operation by a National Society within its own Territory*

#### 6.2.1 Taking into account:

- the nature of the situation and the resulting constraints imposed upon the implementation of the operation;
- the scope of the needs to be met;

- the logistic means to be deployed;
- the preparedness and capacity of the National Society to undertake efficiently the action required in conformity with the Fundamental Principles, a National Society may act as a lead agency in the sense of undertaking the coordination of an international relief operation within its own territory, subject to the concurrence of, and on the basis of general objectives defined by the ICRC or the Federation, as the case may be.

6.2.2 In this context, this function of coordination by a National Society within its own territory implies primarily the following responsibilities :

- a) to direct the implementation of the general objectives defined for the international relief operation;
- b) to direct the work of personnel made available by participating National Societies placed under the authority of the operating National Society for the purpose of the operation;
- c) to coordinate the relief operation with the humanitarian activities of other organizations (governmental or non-governmental) having a representation and being active locally when this is in the interest of the victims and in accordance with the Fundamental Principles;
- d) to act as a spokesman for the international relief operation to respond to public interest;
- e) to ensure respect for the rules in force relating to the use of red cross and red crescent emblems;
- f) to ensure that the action is carried out and conducted in accordance with the *Principles and Rules for Red Cross and Red Crescent Disaster Relief* (1995) and the *Code of Conduct for International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief* (1993);
- g) to ensure that the financial and material resources made available for the purpose of the relief operation through the ICRC and/or the Federation, as the case may be, are managed in a sound and efficient manner;
- h) to provide required and appropriate information to the Federation or the ICRC, as the case may be, on the progress of the relief operation in order to enable them to report to donors having responded to international appeals launched to mobilize the necessary financial resources to meet the general objectives set out.

### **PART III – STRENGTHENING THE MOVEMENT : DEVELOPMENT AND FUNCTIONAL COOPERATION**

All components shall strive to assist each other to realize their full potential and adopt a policy of constructive complementarity in elaborating a comprehensive development approach.

**ARTICLE 7. Development of National Societies****7.1 *A National Society is primarily responsible for its own development***

7.1.1 National Societies shall contribute as far as their means permit to the development of other National Societies requiring such assistance, by means of bilateral or multilateral development agreements.

7.1.2 Such agreements shall take account of the relevant policies and strategies adopted by the Federation's General Assembly.

7.2 The Federation has the lead role with regard to development activities and to the coordination of international development support to National Societies. The ICRC provides support in matters falling within its statutory core competencies.

7.2.1 The specific tasks of the Federation in development activities include :

- a) formulating and reviewing development policies on behalf of the Movement in consultation with the other components;
- b) assisting National Societies to draw up development plans and project proposals;
- c) providing standards and guidelines for programme design and planning;
- d) setting criteria for mobilization and allocation of resources for development.

7.2.2 The ICRC shall contribute to the development of the National Societies in the following matters, in coordination with the Federation :

- a) technical and legal assistance in establishing and reconstituting National Societies;
- b) support of the National Societies' programmes for disseminating knowledge of international humanitarian law and the Fundamental Principles;
- c) involvement of the National Societies in measures taken to promote international humanitarian law and ensure its implementation;
- d) preparation of the National Societies for their activities in the event of conflict;
- e) contribution to the training of National Society personnel in fields related to its mandate.

7.2.3 In armed conflict situations, internal strife and their direct results, the Federation may continue to assist the National Society of the country concerned in its further development, taking into account that in such situations, where the ICRC is acting as lead agency as provided for in Article 5.3, the ICRC has the responsibility to coordinate and direct the relief operations in favour of the victims.

7.2.4 In armed conflict situations, internal strife and their direct results, the ICRC may expand its cooperation with the operating National Society concerned in order to

strengthen its operational capacity. In such cases, the ICRC shall coordinate with the plans of the National Society concerned and the Federation in this regard.

7.2.5 Whenever it appears to either institution that a National Society has become unable to protect its integrity and to act in accordance with the Fundamental Principles, the ICRC and the Federation shall consult each other on the advisability of taking action, either jointly or separately. In the latter case, the two institutions shall keep each other informed of any action taken and of subsequent results.

#### **ARTICLE 8. Functional Cooperation between the Components of the Movement**

- 8.1 The coherence of the action of the components of the Movement depends on cooperation and coordination among them in undertaking emergency actions in general or specific cases, as well as in all other areas of activity.
- 8.2 Functional cooperation between the ICRC, the National Societies and the Federation applies in particular to the following areas of international activities :
  - a) establishment and recognition of National Societies and protection of their integrity;
  - b) use and respect of the red cross and red crescent emblems;
  - c) human resources development, training and preparation of personnel for international relief operations;
  - d) cooperation at delegation level;
  - e) relations with international institutions, non-governmental organizations and other actors on the international scene;
  - f) coordination of international fundraising.
- 8.3 The principles outlined in Articles 3 and 4 of this Agreement may serve as a frame of reference for more detailed bilateral agreements on an *ad hoc* basis, that the ICRC and the Federation may wish to conclude for organizing their cooperation in specific areas at the institutional or regional levels.
- 8.4 The process of development of functional cooperation among the components, and the opportunities for its evolution in response to changes in the external environment can only be enhanced by continuous dialogue and regular consultation between those responsible for international activities within the ICRC and the Federation and with National Societies with a view to analyzing and anticipating needs. The initiative in respect of each specific area might best be taken by the organization having the lead role in that area.

#### **ARTICLE 9. Communication, Fundamental Principles and International Humanitarian Law**

##### **9.1 *Public Relations and Information***

9.1.1 In their public relations, the ICRC, the Federation and National Societies, while performing their respective functions and thereby informing the public of their

respective roles within the Movement, shall harmonize their activities so as to present a common image of the Movement and contribute to a greater understanding of the Movement by the public.

9.1.2 In order to ensure maximum efficiency in advocating humanitarian principles, according to the policies promulgated to that effect by the Council of Delegates, the components of the Movement shall cooperate in coordinating campaigns and developing communication tools. Whenever necessary, they may set up mechanisms to that effect, taking into account the lead roles of the different components.

## 9.2 *Fundamental Principles*

9.2.1 All components of the Movement shall ensure that the Fundamental Principles are respected by the Movement's components and statutory bodies.

9.2.2 The ICRC has the lead role in the maintenance and dissemination of the Fundamental Principles. The Federation and the ICRC shall collaborate in the dissemination of those Principles among the National Societies. National Societies have a key role to play in upholding and disseminating the Fundamental Principles within their own country.

## 9.3 *International Humanitarian Law*

9.3.1 The ICRC has the lead role for promoting, developing and disseminating international humanitarian law (IHL). The Federation shall assist the ICRC in the promotion and development of IHL and collaborate with it in the dissemination of IHL among the National Societies.

9.3.2 National Societies shall disseminate, and assist their governments in disseminating IHL. They shall also cooperate with their governments to ensure respect for IHL and to protect the red cross and red crescent emblems.

# **PART IV – IMPLEMENTATION AND FINAL PROVISIONS**

## **ARTICLE 10. Implementation**

10.1 All components of the Movement undertake to respect and implement the present Agreement on the organization of their international activities, in accordance with Article 7 of the Statutes of the Movement.

10.2 Each component – the Federation, the ICRC, and National Societies – is individually responsible for the implementation of the provisions of this Agreement, and shall instruct its volunteers and staff accordingly.

10.3 Beyond their individual responsibility to implement the provisions of this Agreement, the ICRC and the Federation, because of their directing and coordinating roles, have a special responsibility to ensure that the Agreement be fully respected and implemented by the Movement as a whole.

10.4 As the institutions most often called on to act as lead agency in international activities, the ICRC and the Federation have a need to:



- share information on global operational activities of common interest;
- discuss possible difficulties which may hamper smooth cooperation between the components.

It is for these institutions to agree between themselves what arrangements are best suited to meet this need.

10.5 The Standing Commission, by virtue of the role conferred upon it by Article 18 of the Statutes of the Movement, shall call annually for a report on the implementation of the Agreement from the ICRC and the Federation, which will be transmitted to all National Societies as part of a consultative process.

10.6 The Standing Commission shall include an item on the Agreement on the agenda of each Council of Delegates, thus establishing a process of regular review of the Agreement.

10.7 If differences arise between the components concerning the implementation of the Agreement and if these cannot be otherwise resolved, the Standing Commission may establish an *ad hoc* independent body, as and when required, to arbitrate, with the agreement of the Parties, differences between the components of the Movement where conciliation and mediation have failed.

#### **ARTICLE 11. Final Provisions**

The present Agreement replaces the 1989 Agreement between the ICRC and the League of Red Cross and Red Crescent Societies (International Federation). It was adopted by consensus, in Resolution 6 of the Council of Delegates in Seville, Spain, on 26 November 1997.

## **II. Supplementary Measures to Enhance the Implementation of the Seville Agreement**

[Source: International Red Cross and Red Crescent Movement, Council of Delegates, Resolution 8, "Implementing the Seville Agreement," 18 November 2005; available at [www.icrc.org](http://www.icrc.org). Footnotes omitted.]

### **ANNEX (Resolution 8)**

#### **SUPPLEMENTARY MEASURES TO ENHANCE THE IMPLEMENTATION OF THE SEVILLE AGREEMENT**

This document aims at improving the implementation and understanding of the Seville Agreement. It addresses parts of the Seville Agreement that may not be sufficiently explicit and may thus give room to various interpretations. It aims to guide users of the Seville Agreement in areas where there is a need for improvement: roles and responsibilities and understanding the Lead Agency concept, coordination, problem solving and enhancing knowledge about the Agreement. It supplements the Seville Agreement without modifying its conditions of application and contents.

## **1. Roles and responsibilities – Host National Society and the Lead Agency**

- 1.1. The International Red Cross and Red Crescent Movement must have an efficient and effective coordination system for international activities to manage the resources required to deliver services to affected people and populations and to coordinate with the wider humanitarian assistance systems. To achieve this, the Seville Agreement defines the Lead Agency concept as ‘an organisational tool for managing international operational activities’. It is allocated to one Movement component at a time (SA 4.3).
- 1.2. The Host National Society maintains at all times its role and mandate according to the Statutes of the Movement. The Seville Agreement focuses only on the organization of the international activities of the other components of the Movement. In this context, a National Society in its own country will continue to act according to its mandate in all situations. In respect of the Movement’s international operational activities, it may also assume the role of Lead Agency in some situations and when not, it always is the “primary partner” of the Lead Agency.
- 1.3. Since the Agreement states that the Lead Agency function is applicable ‘primarily in emergency situations where rapid, coherent and effective relief is required in response to the large-scale needs of the victims’ (SA 4.4), it implies that the function is a *temporary response to a particular set of circumstances*. In any given country, the coexistence of the mandated activities of the Host National Society and the supportive international activities of other Movement components leads to a complex Movement operating environment, which necessitates the coordination provided by a Lead Agency, which can be the Host National Society, the ICRC or the International Federation (SA 5.3).
- 1.4. Movement coordination under a Lead Agency has been functional only when a satisfactory working relationship has been developed between the Host National Society, the ICRC and/or the International Federation. All other components involved in an international operation should support an increased level of involvement and responsibility of the Host National Society in the direction and coordination of the operation.
- 1.5. The Lead Agency function is an organizational tool for managing a temporary response to a particular set of circumstances and co-exists with the mandated activities of the Host National Society that it carries at all times
- 1.6. In any international relief operation where the Host National Society is not the Lead Agency, it will be the primary partner of the institution assuming that responsibility.
- 1.7. As a primary partner of the Lead Agency, the Host National Society is consulted on all aspects of the Movement’s response within the scope of Article 1.1 of the Seville Agreement. Consultation between the Lead Agency and the Host National Society should take place through established coordination mechanisms that cover the following elements:

- a) Analysis of the political, socio-economic and humanitarian environment;
  - b) Assessment and identification of humanitarian needs;
  - c) Definition of general objectives of the international relief operation, determining priorities;
  - d) Establishment and maintenance of a framework for managing security for all Movement components;
  - e) Establishment of an operational strategy for a Movement response, that is aligned to the general objectives and takes into account available resources;
  - f) Development of the plan of action relating to priorities of the Movement response;
  - g) Description of mechanisms for problem solving;
  - h) Management of relationships with the authorities as far as the international relief operation is concerned; and
  - i) Definition of entry and exit strategies for programmes and activities of various components, including arrangements during transition.
- 1.8. Article 5.3 of the Seville Agreement clearly defines the assignment of the Lead Agency role. This expedites a rapid and coherent organization of the Movement's response in favour of victims in situations requiring a Lead Agency as determined by Article 5.1.
- 1.9. The framework for a Host National Society assuming the Lead Agency role is set out in article 6.2 of the Seville Agreement. Within this framework, the operational capacity required to meet victims' needs and the capacities and capabilities of the Host National Society are taken into account.
- 1.10. Elements that facilitate assessment of a National Society's capacities and capabilities in relation to coordination of an international relief operation within its own territory are:
- a) *Organizational and management structure of the Host National Society:* The National Society should conform to the standards established for a 'Well-Functioning National Society' and regularly carry out the process of National Society Self Assessment
  - b) *Capacities for managing the Movement's international relief operation*
    - 1) Acceptance by and access to all key actors in the given situation.
    - 2) National Society coverage of the national territory.
    - 3) Operational management, and logistics systems capacities.
    - 4) Capacity to manage security systems for National Societies working internationally.
    - 5) Functioning working relations within and outside the Movement.

- 1.11. When there is a Lead Agency other than the Host National Society, the operational strategy for the Movement response will be developed in ongoing and compulsory close consultation and cooperation with the Host National Society. Other Movement components operational in the context play a supporting role and are consulted.
- 1.12. Relief operations in conflict environments are managed differently from peacetime relief operations. Due consideration needs to be given to the fact that in situations of armed conflict, internal strife and their direct results (5.1 and 5.2 of SA) there are two institutions (the Host National Society and the ICRC) with an explicit mandate to meet the needs of the people affected. Other components of the Movement support and reinforce the national or multi-lateral response capacities.
- 1.13. The Lead Agency coordinating an international relief operation in a conflict environment needs the following additional capacities and abilities:
  - a) Maintaining relationships and contacts with state and non-state actors that have an influence on the conflict where the relief operation is conducted;
  - b) Managing and maintaining a security framework for all Movement components that are operational within a coordinated Movement approach;
  - c) Ensuring respect for the rules in force relating to the use of the red cross and red crescent emblems for protective purposes;
  - d) Formulating, in consultation with the National Societies concerned, public statements on the progress of the relief operation;
  - e) Assuming ultimate responsibility for the international relief operation in relation to state and non-state parties to the conflict.
- 1.14. These state and non-state actors may have interests in different populations and geographical areas. The Lead Agency should always seek to persuade and assure parties to the conflict that Movement assistance provided is based entirely on humanitarian needs, which is possible only when all parties to a conflict accept the Lead Agency as an impartial, neutral and independent humanitarian actor.
- 1.15. The organization of international relief operations in peacetime is guided by the Seville Agreement and by the Principles and Rules for Red Cross and Red Crescent Disaster Relief. In situations where the Seville Agreement foresees the Federation to act as the Lead Agency, the Federation is encouraged to conclude agreements with the Host National Society of the most disaster prone countries (either by a pre-disaster agreement or an *ad hoc* agreement) and, based on pre-disaster assessed or announced capacity and contingency mapping/planning, to define the respective roles and responsibilities, which may also include National Societies from other countries and the ICRC.

## 2. Coordination

- 2.1. The institution exercising the role of Lead Agency must have the capabilities and competencies required to carry out the 'general direction and coordination of the international operational activities' that the Seville Agreement envisages. Management and coordination systems for a Movement humanitarian response have to encompass the national working environment, international aid flows and international relations.
- 2.2. The main focus of the Lead Agency is on direction and coordination, with the requirement to establish 'appropriate mechanisms for consultation' (SA 4.5) with other Movement components. Other components of the Movement have to accept and abide by rules and procedures thus established. In order to promote a coherent framework for Movement coordination, mechanisms developed must involve all Movement partners operational in a country (the Host National Society, the ICRC, the International Federation and National Societies working internationally).
- 2.3. Coordination mechanisms will be established and take the form of regular meetings, chaired by the Lead Agency, between the various components of the Movement that are operational in a country (the Host National Society, the ICRC, the Federation and National Societies working internationally).
- 2.4. Such meetings must provide the necessary framework for strategic decision-making and for coordination of operational activities; they might be held at various levels (senior management and implementation levels) depending on the complexity of the operation.
- 2.5. All decisions taken at such meetings must be rapidly recorded and communicated to all the partners involved for implementation, which will be monitored by the coordination mechanisms.
- 2.6. It is recommended that Movement coordination mechanisms be established in all circumstances where various components of the Movement are present and contribute to operations in a given country. This means that such coordination mechanisms apply also in 'normal' and 'non-emergency' situations to ensure effectiveness and results within Movement cooperation. This would facilitate cooperation and dialogue at the 'entry' and 'exit' points of the Lead Agency role (transition) and help clarify longer-term coordination of the international activities of Movement components.
- 2.7. Procedures for engagement of other Movement components are to be established by the Lead Agency in cooperation with the Host National Society, based on the following sequence of steps:
  - a) Expressions of interest for participation based on the operational plan and priorities communicated to potential partners;
  - b) Determination of partners' motivation and interest in participating;

- c) Interests of the Host National Society: proximity, existing partnerships, potential for long-term engagement;
  - d) Specific proposals by potential partners, special skills and resources available;
  - e) Decision by the Lead Agency in cooperation with the Host National Society and in consultation with the prospective partners;
  - f) MoU or similar agreement(s) defining aims and objectives, roles and responsibilities, resources (human and financial), monitoring and reporting arrangements along with problem solving mechanisms.
- 2.8. The Lead Agency needs to have a system to identify and disseminate best practices about coordination and procedures of engagement.

Equally relevant for purposes of coordination are the following sections, 3 through 5 respectively.

### **3. Memoranda of Understanding (MoU)**

- 3.1. Memoranda of Understanding (MoU) regarding respective roles and responsibilities at country level need to be established whenever there are various components working in a given country, in order to promote coherent working practice and understanding of the roles and responsibilities already elaborated in the Statutes of the Movement and the Seville Agreement.
- 3.2. Experience in recent operations demonstrates the tremendous value of pre-agreed MoUs between the Host National Society, the ICRC and the Federation. The process of negotiating such MoUs presents an opportunity to develop stronger working relationships between the parties, stronger working knowledge of each other's capacities, systems and tools. MoUs can be seen as preparedness measures that anticipate the changed roles and responsibilities applied in emergency situations.
- 3.3. The Host National Society, the ICRC and the Federation will jointly ensure that this tool is elaborated in a process of adequate consultation and that other National Societies concerned participate and sign.
- 3.4. Such MoU will contain respective roles and responsibilities for functional cooperation in 'normal circumstances' and for situations where there is a need for an international relief operation in line with the Seville Agreement.
- 3.5. MoUs and CAS (Cooperation Agreement Strategies) processes should ideally complement each other with the objective of ensuring more effective cooperation and coordination at all times.

#### **4. Neighbouring National Societies and National Societies working internationally**

- 4.1. The Statutes of the Movement foresee the following role for National Societies working internationally: ‘... each within the limits of its resources, give assistance for victims of armed conflicts, as provided in the Geneva Conventions, and for victims of natural disasters and other emergencies. Such assistance, in the form of services and personnel, of material, financial and moral support, shall be given through the National Societies concerned, the ICRC or the Federation’ (Movement Statutes, Article 3.3).
- 4.2. In the planning of any Movement operation, all components, such as neighbouring National Societies, other Societies working internationally and the ICRC/Federation (as the case may be) should be given the opportunity to participate in the operation, in the spirit of the preamble of the Seville Agreement. All components must support the objectives and priorities set by the Lead Agency (in full consultation with the Host National Society as its “primary partner”, if it is not the Lead Agency). Furthermore, all components participating have the obligation to fully engage in and support the coordination mechanisms established.
- 4.3. The situation of mutual responsibilities between neighbouring National Societies within regional frameworks needs to be addressed recognizing that there are normal and logical relationships because of culture and language and other common denominators on this specific level.
- 4.4. Regional networks can play a vital role in support of Movement operations. The International Federation is called upon to coordinate cooperation between National Societies in various regions and to facilitate sub-regional pre-agreements as a preparedness measure in case of emergencies in peacetime requiring international assistance. The ICRC may also be party to such agreements.
- 4.5. The National Societies working in accordance with the Seville Agreement could provide a permanent forum for coordination and planning in their bordering regions for improved preparedness for any emergency. Plans of mutual assistance and specific protocols for response and recovery should be established taking due account of the Seville Agreement as well as of the Principles and Rules for Red Cross and Red Crescent Disaster Relief and specifying the main actors responsible for coordination. Regional capacities should focus on monitoring humanitarian needs and provide early warning systems for possible interventions required. Regional cooperation processes should be supported by other components.
- 4.6. According to the Seville Agreement, all international resources for an emergency operation channelled in whatever way, and regardless through which institution, are to be considered part of the overall coordinated approach of the Movement. In the interest of effectiveness and coherence, National Societies must avoid unilateral and uncoordinated bilateral action.

- 4.7. Wherever regional networks of National Societies exist, possibly with pre-negotiated cooperation agreements, they should be called upon to perform activities in support of the objectives and priorities set for a Movement operation.

## **5. Transition**

- 5.1. Transition of responsibilities for management of resources linked to the Movement response must be based on an analysis and monitoring of developments in the context. Such an analysis must be done and discussed in the regular coordination meetings between all parties involved – the Host National Society, the ICRC and/or the Federation and National Societies working internationally.
- 5.2. During transition, moving from a crisis situation through recovery and rehabilitation towards a situation of normalcy, established coordination mechanisms and agreements between components involved during the operation shall, as a rule, be maintained.
- 5.3. The Lead Agency in consultation with the Host National Society (if it is not the Lead Agency) is responsible for negotiations on any modifications or changes to established mechanisms and agreements.
- 5.4. Entry and exit strategies for programmes and other activities of Movement components in the context are to be defined in consultation between the Lead Agency and the Host National Society.
- 5.5. The decision to terminate the Lead Agency function will be made by the incumbent Lead Agency, in consultation with the Host National Society (if it is not the Lead Agency) and with the other components operationally involved in the context.
- 5.6. The transition process from a Lead Agency in charge to the Host National Society taking over the role should be formalized in a Memorandum of Understanding for Development Cooperation (MoUDC) as a framework for capacity building support.

## **6. Problem solving**

- 6.1. The overall plan established for the operation by the Lead Agency in consultation with the Host National Society (if it is not the Lead Agency) should include problem-solving mechanisms.
- 6.2. Problems regarding the implementation of the Seville Agreement should be clearly identified in the field and addressed there with the institution(s) or individuals concerned.
- 6.3. The various institutions of the Movement working in the field should ensure that their personnel in charge on the ground have as far as possible the competency and the mandate to take decisions to resolve problems arising in the country of operation.



- 6.4. The institution assuming the role of Lead Agency in the country of operation is responsible for ensuring that the issues are concretely defined and put across, with proposals for resolving them in the field. Such efforts are to be clearly documented in writing.
- 6.5. Problems arising in the field, which failed to be resolved there, in spite of being adequately addressed by clearly documented efforts, will be brought to the respective headquarters of the concerned Movement components working internationally.
- 6.6. The senior managers in charge of operations in the institutions working in the field will examine the case on the basis of the documentation and information provided, and will take the necessary decision. Such decisions will be communicated to the country of operation for implementation.
- 6.7. Article 10 of the Seville Agreement provides for monitoring of implementation of the Seville Agreement and for arbitration mechanisms to address differences that cannot be otherwise resolved. The provisions on monitoring and reporting on the implementation of the Agreement need to be used more effectively and in a more systematic manner to enable regular and rigorous reviews, as well as early corrective action in case of difficulties encountered.
- 6.8. Repeated failures of compliance with the Seville Agreement by any component of the Movement in carrying out its agreed role and responsibilities having consequences on the coherence, image and reputation of the action of the Red Cross and Red Crescent in the field will be initially addressed as outlined above. Pending on the circumstances, such cases may be considered as cases where integrity is at issue.

## **7. Enhancing knowledge of the Agreement**

- 7.1. Training is an essential element in building a spirit of cooperation and better understanding of policies and rules. To increase the role of the Seville Agreement as the catalyst for a collaborative spirit (see the Preamble of the Agreement), training should reach the widest possible group of people at all levels in all components of the Movement and not only those that are/could be involved in relief operations
- 7.2. Training needs to focus on accountability within each component with due respect for the rules and on the particular duty of governance to monitor management's compliance with obligations resulting from the Agreement.
- 7.3. The ICRC and the International Federation, with the involvement of National Societies, will establish standard training modules which differentiate between a basic training programme accessible for all staff and volunteers and a training programme about operational management for those likely to be directly involved in the coordination of international activities. Such training modules will adequately address the specificity of working in situations of conflict and internal disturbances.

- 7.4. National Societies, the ICRC and the International Federation will organize joint training sessions for their staff and volunteers concerned at implementation, management and governance levels of their respective institutions.
- 7.5. Such training sessions should, whenever possible, be conducted jointly and on a regular basis in order to ensure that new governance, personnel and volunteers have adequate knowledge of the Agreement.
- 7.6. The International Federation and the ICRC will offer assistance to National Societies in organizing such training sessions, involving participants from all the different components of the Movement.
- 7.7. The relevance of the Seville Agreement should be confirmed in policies, rules and regulations within the Movement.

**Document No 33, The International Humanitarian Fact-Finding Commission**

[Source: The International Humanitarian Fact-Finding Commission, ICRC, Advisory Service on International Humanitarian Law, Geneva, April 2001, <http://www.icrc.org/eng>, see also the Commission's website: <http://www.ihffc.org/>]

**The International Humanitarian Fact-Finding Commission**

In an effort to secure the guarantees accorded to the victims of armed conflict, Article 90 of the Protocol I Additional to the Geneva Conventions of 1949 (Protocol I) provides for the establishment of an International Fact-Finding Commission. The Commission was officially constituted in 1991 and is a permanent body whose primary purpose is to investigate allegations of grave breaches and other serious violations of international humanitarian law. As such, the Commission is an important means of ensuring that international humanitarian law is both applied and implemented during armed conflict.

**The composition of the Commission**

The Commission is composed of 15 individuals elected by those States that have recognized its competence. Commission members act in a personal capacity and do not represent the States of which they are nationals. Each member must be of high moral standing and established impartiality. Elections take place every five years and States have an obligation to ensure that all regions of the world are fairly represented.

**The powers and functioning of the Commission**

The Commission is competent to:

- a) enquire into any facts alleged to be a grave breach or other serious violation of the Geneva Conventions or Protocol I;
- b) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and Protocol I.

The principal task of the Commission is to enquire into facts. It investigates only whether or not a grave breach or other serious violation of the Geneva Conventions or Protocol I has in fact occurred.

The Commission is an investigative body and not a court or other judicial body: it does not hand down judgments or address questions of law in relation to the facts it has established. Its enquiry must involve grave breaches or other serious violations of the above-mentioned treaties. Consequently, it does not enquire into minor violations.

The Commission is also authorized to facilitate, through its good offices, an attitude of respect for the Conventions and their Protocol I. Generally, this means that it may, in addition to communicating its conclusions as to the facts, make observations and suggestions to promote compliance with the treaties on the part of the warring parties.

Though the Geneva Conventions and Protocol I are applicable only to international armed conflicts, the Commission has expressed its willingness to enquire into alleged

violations of humanitarian law arising from non-international armed conflicts, provided that the parties involved consent to this.

### **A Commission enquiry**

In order for the Commission to begin an enquiry there must be a request for it to do so. Only States that have recognized the Commission's competence are entitled to make such a request, and may do so regardless of whether they are themselves involved in the conflict concerned. Private individuals, organizations, or other representative bodies do not have such authority, nor does the Commission have the power to act upon its own initiative.

Enquiries are generally not conducted by the Commission as a whole. Unless otherwise agreed, they are conducted by a seven-member Chamber consisting of five members of the Commission itself plus two *ad hoc* appointees. Each party to the conflict nominates one *ad hoc* member, but no member of the Chamber may be a national of a party to the conflict.

During the course of the investigation, the warring parties are invited to assist the Chamber and are given an opportunity to present and challenge evidence. In addition, the Chamber is authorized to conduct its own investigations. All evidence is disclosed to the parties and to any other States that may be concerned, all of whom have the right to make observations.

### **Report of the Commission**

The Commission submits a report to the parties, based upon the findings of the Chamber. The report contains the Commission's findings regarding the facts, together with any recommendations. The Commission does not disclose its conclusions publicly unless requested to do so by all parties to the conflict.

### **Recognizing the Commission's competence**

One of the most important characteristics of the Commission is that it may conduct an investigation only with the consent of the parties involved. A State does not automatically recognize the Commission's competence by signing or ratifying Protocol I, but only by separately affirming that recognition. A State may make a comprehensive declaration, thereby permanently recognizing the Commission's competence, or it may consent to the investigation of a particular dispute.

#### **1) Comprehensive declaration**

A comprehensive declaration can be made when signing, ratifying, or acceding to Protocol I, or at any subsequent time.

By making such a declaration, a State authorizes the Commission to enquire into any conflict that may arise between itself and another State that has made the same declaration. No additional approval is then required for the Commission to act. It goes without saying that by accepting the Commission's competence, a State obtains the

right to request an enquiry regarding conflicts between States that have likewise accepted that competence, regardless of whether it is itself involved in the conflict.

## 2) Form of a comprehensive declaration

While there is no standard form, the State must unambiguously announce that it recognizes the competence of the International Fact-Finding Commission as set out in Article 90 of Additional Protocol I to the Geneva Conventions of 1949. The declaration must be submitted to the depository, i.e. the Swiss Confederation.

Both the Swiss government and the ICRC Advisory Service on International Humanitarian Law have drafted model declarations of recognition, which States are free to make use of.

## 3) *Ad hoc* consent

A party to an armed conflict that has not made a comprehensive declaration may accept the Commission's competence on a temporary basis, that acceptance being limited to the specific conflict in which it is involved. This form of recognition does not constitute permanent acceptance of the Commission's competence.

Any party to a conflict may ask the Commission to conduct an enquiry. If a party which has not given its consent is the object of a complaint, the Commission will convey the allegation to that party and ask it to consent to an enquiry. If consent is refused, the Commission is not authorized to conduct an enquiry. If consent is granted, the enquiry procedure will begin.

In a conflict involving parties that have not made the comprehensive declaration, a warring party will not be bound by a previous consent: it is up to that State to decide whether to reaffirm the Commission's competence should it become the object of a complaint. Obviously, the request for an enquiry must come from a State that has also recognized the Commission's authority.

## Financing the Commission's activities

The *administrative expenses* of the Commission are covered by the States that have recognized the Commission's competence in advance, and by voluntary contributions.

*Expenses arising from a Chamber* (i.e. an enquiry) are borne by the parties involved: the party requesting an enquiry must advance the necessary funds to cover the Chamber's expenses, but up to half of this advance will be reimbursed by the party that is the object of the enquiry. However, the Commission has indicated that there is considerable scope for flexibility in financing enquiries, other financial arrangements being possible by agreement of the parties.

## Ensuring respect for international humanitarian law

The States party to the Geneva Conventions of 1949 and to Protocol I undertake to "respect" and "ensure respect" for the provisions of those treaties. The International Fact-Finding Commission is a key mechanism in achieving those objectives.

By recognizing the Commission's competence, on a permanent or *ad hoc* basis, a State contributes significantly to the implementation of international humanitarian law and to ensuring compliance with it during armed conflict. By depositing a declaration of recognition, a State therefore takes an important step in securing the fundamental guarantees laid down for the victims of armed conflict.

## Document No. 34, ICRC, Tracing Service

[Source: International Committee of the Red Cross, *Restoration of Family Links: Waiting for News*, Geneva, 2002; available at [www.icrc.org](http://www.icrc.org). Footnotes omitted.]

**Population in flight, children lost, families dispersed, displaced,  
forced to become refugees...**

**Soldiers wounded, taken prisoner, missing or killed in battle...**

**Houses destroyed, front lines impassable, communications disrupted...**

[...] ***The activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives. (Protocol of 1977, Article 32)***

Of all the suffering caused by war, perhaps the most bitter anguish is not knowing what has happened to a son or brother gone off to fight, a wife or grandfather left behind in a village, a child separated from its relatives.

Ever since its origins, the Red Cross has placed this mental suffering at the centre of its concerns. To alleviate it the International Committee of the Red Cross (ICRC) takes the action described in this brochure.

**[1.] Writing a Red Cross message is an expression of hope that relatives will be found**

In time of conflict, postal and telephone communications are often disrupted and direct contacts may be impossible. In these circumstances, anyone who wishes to do so may send news of a strictly personal nature to his or her family and receive such news by means of a Red Cross message. This is a standard form with space for about 30 lines of text and the addresses of the sender and the recipient. Red Cross and Red Crescent staff collect, forward and distribute the messages by various means:

- door-to-door delivery;
- contacting neighbours, village elders or clan chiefs;
- posting lists in Red Cross and Red Crescent offices, refugee camps and public places where the people sought are likely to go;
- publicizing addressees' names in the press, on radio programmes or on public communication networks. In the former Yugoslavia and in Rwanda the BBC, in cooperation with the ICRC, broadcasts the names of people being sought by their relatives, and in Zaire "*Reporters sans frontières*" broadcasts a similar programme on "Radio Agatashya".

Exchange of correspondence through the Red Cross continues until normal means of communication are restored.

## **[2.] Unaccompanied children a tragic phenomenon**

Just like adults children flee from fighting and take the road to exile, but in the general panic they all too often lose their way, become separated from their parents and end up in a refugee camp with no one to take care of them. Also too often, they become orphans and prey to unofficial adoption or trafficking.

***Children shall be provided, with the care and aid they require, and [...] all appropriate steps shall be taken to facilitate the reunion of families temporarily separated. (Protocol II of 1977, Article 4, para 3(b))***

In order to preserve the family unit and to reunite children with their parents, the ICRC:

**registers and follows up** all unaccompanied children, wherever they may be;

**records** the identity of each child (name and age, parents' names, previous and present addresses);

**photographs**, in most cases, each child (a photo is often the only identity document that can be placed in the file of a baby or a very small child);

**sets in motion** a mechanism for tracing the parents, which includes:

- posting the names of the relatives sought in refugee camps and much frequented public places;
- broadcasting the names on local or international radio networks;
- launching appeals to parents who are looking for their children, urging them to contact the nearest Red Cross or Red Crescent office;
- sending Red Cross messages written by children to their parents' former addresses;
- visits to and enquiries in the children's villages of origin by volunteers of the Red Cross and Red Crescent and other humanitarian organizations;
- approaches to authorities which may be able to supply useful information.

All these efforts often culminate in their immense joy of being together again.

***In the Cambodian conflict, 4,167 unaccompanied children were registered between 1979 and 1982.***

## **[3.] The long road to family reunification...**

***The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts [...]. (Protocol I of 1977, Article 74)***

Reuniting members of families split up by war often entails lengthy administrative procedures. Before organizing a family reunification, ICRC delegates must make sure that such a move will improve the situation of everyone involved, particularly in conflict areas. The agreement of each person concerned must be obtained and the family



relationship verified. In addition, the ICRC must obtain the necessary authorizations and visas from the warring parties and the countries involved, including countries of transit.

Delegates give priority to people requiring special protection, such as unaccompanied children, elderly people living alone and released detainees, and the next of kin.

### **... or back home**

In the chaos of conflict many people lose their identity papers and have no means of obtaining new ones. Such cases were particularly common at the end of the Second World War, and that was why, in 1945, the ICRC used its right of initiative to establish an internationally recognized temporary travel document.

This is issued to refugees and displaced or stateless people who do not have or no longer have any identity papers and consequently can neither return to their country of origin or residence nor enter a host country. The document is not a substitute for a passport or for any other identity papers, and is valid only for the duration of the journey.

### **A worldwide network**

To restore family links between people affected by war, the ICRC cooperates with National Red Cross and Red Crescent Societies all over the world.

In areas affected by conflict and in neighbouring countries, the ICRC works with staff and volunteers of the Red Cross and Red Crescent Societies of the countries concerned.

Over 160 National Red Cross and Red Crescent Societies throughout the world make up the global network for restoration of family ties, which collects and forwards messages then delivers them, often after considerable time and effort have been spent tracing the addressees.

### **Humanitarian cooperation in action**

Other humanitarian organizations are becoming involved with increasing frequency in activities for restoring family links. The Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM), for example, are regular partners of the ICRC in nearly all conflict situations. Other agencies, such as UNICEF, and non-governmental organizations like the Save the Children Fund cooperate with ICRC delegates in dealing with certain specific issues, including that of unaccompanied children in Rwanda.

### **Computer technology for the restoration of family links**

All the information on war victims collected by the ICRC is managed in databases which are capable of processing millions of entries and are compiled in delegations throughout the world.

The information is made available as needed to other humanitarian organizations cooperating with the ICRC, on condition that the protection of personal data is guaranteed.

***The ICRC has over 60 databases, the main ones concerning Rwanda (details on 270,000 individuals); the Gulf war (120,000); Israel, the occupied territories and the autonomous territories (101,000); the former Yugoslavia (92,000); Sri Lanka (58,000); Somalia (25,000); and Peru (20,000). In Nairobi, Kenya, in 1996, two years after the conflict in Rwanda, seven ICRC delegates and 80 other employees were still processing thousands of data every day in connection with the individual files of 270,000 victims of those events. The items were entered in a database on 50 interconnected computers.***

#### **[4.] Deprived of their freedom**

***Prisoners of war must at all times be humanely treated. (Third Geneva Convention of 1949, Article 13)***

Soldiers captured on the battlefield, civilians arrested when a town is taken, interned for security reasons, detained by an occupying power or because they do not belong to the same ethnic group, do not practise the same religion, or hold different political opinions ... all these categories of people deprived of their freedom are visited by ICRC delegates the world over.

During the Second World War, the ICRC delegate in Berlin took the initiative of using capture cards filled in by the prisoners themselves to draw up lists of names and thus to facilitate family contacts. All the details were kept at the ICRC's Central Agency for prisoners of war in Geneva; without them the list of the missing would have been very much longer.

This method has since been extended to all conflicts. Thus during the ten years of war between Iran and Iraq, ICRC delegates recorded the identity of over 90,000 prisoners of war. The purpose of ICRC visits to POW camps is to ascertain that the prisoners are properly treated, in accordance with the requirements of the Third Geneva Convention of 1949 and the Additional Protocols of 1977.

In order to combat disappearances, torture and ill-treatment, and to improve the material and psychological conditions in which detainees are held, the ICRC delegates endeavour to:

- determine and record the identity of all persons deprived of their freedom;
- follow up each prisoner individually so as to monitor his or her treatment by the authorities throughout the period of captivity;
- restore contacts with relatives by informing the prisoner's family of his or her capture.

The ICRC expresses no opinion on the reasons that prompt the authorities to make arrests and never interferes in decisions to release captives. It requests release only for vulnerable categories of people, on humanitarian or medical grounds (children,

pregnant women, the elderly, the seriously ill and the seriously wounded). At the end of the hostilities, the ICRC calls for the release of all detainees.

### **Maintaining family contacts**

Thanks to Red Cross messages, persons deprived of their freedom can inform their families of their situation and keep in touch with them throughout the period of their detention.

Family visits to places of detention may be organized by the Red Cross, since prisons are often very far away from the family home and travel is expensive, or there may be front lines to cross. The ICRC facilitates such family visits in cooperation with the National Red Cross or Red Crescent Society concerned and the prison authorities. This is the case in the Philippines and Indonesia, where the National Societies arrange for the transport of families to prisons which may be more than a thousand kilometres away from their homes.

### **Guaranteeing release**

The ICRC is responsible for organizing the return of released prisoners to their countries or regions of origin at the end of hostilities, or sometimes even earlier. Its delegates interview the prisoners individually to ascertain whether they wish to be repatriated or transferred to the other side of the front line, or whether they prefer to remain in the place where they are released.

The ICRC tries to ensure that all prisoners are repatriated at the end of hostilities. During the conflict it encourages the simultaneous release of all captives in the hands of the belligerents, in order to avoid bargaining in human lives, or the making of arrests for the sole purpose of increasing the number of people to be released to match that of the adverse party, or for purposes of “ethnic cleansing”.

### **[5.] Assistance to families**

***Parties to the conflict shall record as soon as possible, in respect of each wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification.[...] Parties to the conflict shall prepare and forward to each other, [...] certificates of death or duly authenticated lists of the dead. (First Geneva Convention of 1949, Article 16)***

### **Certifying captivity**

In conflict situations, the ICRC draws up, where necessary, documents certifying that each detainee has been followed up by its delegates throughout the period of detention. Thousands of such certificates are issued every year by ICRC delegations all over the world. These documents often enable former captives or their families to receive compensation or State pensions under national legislation.

**Certifying death**

In accordance with its mandate, the ICRC tries to obtain notification of persons who have died during a conflict, in order to ensure that their families have been duly informed.

**Setting minds at rest**

One of the most distressing effects of war is uncertainty about the fate of close relatives: have they been taken prisoner, are they wounded, or dead? If the family link cannot be restored by means of Red Cross messages and no information can be obtained about the capture or death of the person sought, the ICRC approaches the authorities concerned, submitting lists of persons unaccounted for whose fate the authorities might help to elucidate using information at their disposal.

After certain conflicts (Cyprus in 1974, the Gulf war in 1991, the former Yugoslavia in 1991-1995), special commissions were set up under ICRC auspices to help the former belligerents carry out the necessary searches.

**Document No. 35, ICRC, Model Law Concerning the Emblem**

[Source: Model Law on the Emblems, National Legislation on the Use and Protection of the Emblem of the Red Cross, Red Crescent and Red Crystal; available at [www.icrc.org](http://www.icrc.org)]

**Model Law on the Emblems****National Legislation on the Use and Protection of the Emblem of the Red Cross, Red Crescent and Red Crystal****MODEL LAW<sup>1</sup> CONCERNING****THE USE AND PROTECTION OF THE EMBLEM OF THE RED CROSS, RED CRESCENT AND THE RED CRYSTAL<sup>2</sup>****I. GENERAL RULES****ARTICLE 1. Scope of protection**

Having regard to:

- the Geneva Conventions of 12 August 1949, their Additional Protocols I and II of 8 June 1977,<sup>3</sup> including Annex I to Additional Protocol I as regards the regulations concerning identification of medical units and transports,<sup>4</sup> and Additional Protocol III of 8 December 2005;<sup>5</sup>
- the Regulations on the Use of the Emblem of the Red Cross or the Red Crescent by the National Societies, as adopted by the 20th International Conference of the Red Cross, and subsequent amendments;<sup>6</sup>

1 This model law is proposed for consideration by States that have a civil law system. It outlines the provisions that should be included in a comprehensive legal regime regulating the use and protection of the emblem in conformity with the requirements of the Geneva Conventions, their two Additional Protocols of 1977 and Additional Protocol III of 2005. The said requirements may be met through the adoption of a stand-alone legislation for which the following may serve as a model. In States with a common law system, the protection of the emblem is usually regulated in a chapter of a Geneva Conventions' Implementation Act. In consideration of Additional Protocol III, such States should review their Geneva Conventions' Act to both extend the protective regime of the red cross and the red crescent to the new emblem – the red crystal – and to incorporate the text of Additional Protocol III as a schedule. The ICRC Advisory Service on international humanitarian law has developed a model Geneva Conventions' Act and may be contacted for technical assistance in the implementation of the provisions of Additional Protocol III.

2 The "red crystal" is not formally recognized as the designation of the new distinctive emblem in the text of Protocol III additional to the Geneva Conventions, as adopted on 8 December 2005. It was decided by Resolution 1 of the 29th International Conference of the Red Cross and Red Crescent (Geneva, 20-21 June 2006) to use the name "red crystal" to designate the distinctive emblem of Protocol III. Accordingly, Article 1 of the preamble to the following model law provides for the protection of the "red crystal" designation.

3 To make it easier to find these treaties, it is advisable to indicate their precise locations in the official national compendium of laws and treaties. They are also reproduced in the Treaty Series of the United Nations, Vol. 75 (1950), pp. 31-417, and Vol. 1125 (1979), pp. 3-699 and posted on the website of the Swiss Federal Department of Foreign Affairs (<http://www.eda.admin.ch/eda/fr/home/topics/intla/intrea/chdep/warvic.html>). They may also be accessed on the Website of the ICRC at <http://www.icrc.org/ihl.nsf/CONVPRES>

4 This Annex was revised on 30 November 1993 and its amended version entered into force on 1 March 1994. It is reproduced in the International Review of the Red Cross, No. 298, January-February 1994, pp. 29-41.

5 The full text of Additional Protocol III is available on the website of the Swiss Federal Department of Foreign Affairs (<http://www.eda.admin.ch/eda/fr/home/topics/intla/intrea/chdep/warvic/gvapr3.html>). It may also be accessed on the ICRC Website at <http://www.icrc.org/ihl.nsf/FULL/615>

6 The current Regulations were adopted by the 20th International Conference of the Red Cross in 1965 and revised by the Council of Delegates in 1991. They were submitted to the States party to the Geneva Conventions and entered into force on 31 July 1992. The Regulations are reproduced in the International Review of the Red Cross, No. 289, July-August 1992, pp. 339-362.

- Resolution 1 of the 29th International Conference of the Red Cross and Red Crescent (Geneva, 20-21 June 2006);<sup>7</sup>
- the law (decree, or other act) of *[date]* recognizing the *[National Society of ...]*;<sup>8</sup>

The following are protected by the present law:

- the emblems of the red cross, the red crescent and the red crystal on a white ground;<sup>9</sup>
- the designations “red cross,” “red crescent” and “red crystal”;<sup>10</sup>
- the distinctive signals for identifying medical units and transports.

### **ARTICLE 2. Protective use and indicative use**

1. In time of armed conflict, the emblem used as a protective device is the visible sign of the protection conferred by the Geneva Conventions and their Additional Protocols on medical personnel and medical units and transports. The dimensions of the emblem shall therefore be as large as possible.
2. The emblem used as an indicative device shows that a person or an object is linked to an institution of the International Movement of the Red Cross and Red Crescent. The emblem shall be of a small size.

## **II. RULES ON THE USE OF THE EMBLEM**

### **A. Protective use of the emblem<sup>11</sup>**

#### **ARTICLE 3. Use by the Medical Service of the armed forces**

1. Under the control of the Ministry of Defence, the medical service of the armed forces of *[name of the State]* shall, both in peacetime and in time of armed conflict, use the emblem of the *[name of the emblem to be used]* to mark its medical personnel, medical units and transports on the ground, at sea and in the air.

Medical personnel shall wear armlets and carry identity cards displaying the emblem. These armlets and identity cards shall be issued by ... *[e.g. Ministry of Defence]*.<sup>12</sup>

Religious personnel attached to the armed forces shall be afforded the same protection as medical personnel and shall be identified in the same way.

<sup>7</sup> Accessible on the ICRC website at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/international-conference-resolution-220606>

<sup>8</sup> As a voluntary relief society, auxiliary to the public authorities in the humanitarian sphere. Wherever the present law refers to the “National Society of ...”, the name of the Society should be inserted. The official name as it appears in the law or instrument of recognition should be used.

<sup>9</sup> It is important that national legislation in all cases protect the emblems of the red cross, the red crescent and the red crystal, as well as the names “red cross,” “red crescent” and “red crystal.”

<sup>10</sup> When reference is made to the emblem, the term «red cross», «red crescent» or «red crystal» is generally in lower case while the designation “Red Cross,” “Red Crescent” or “Red Crystal” with initial capitals is reserved for Red Cross, Red Crescent or Red Crystal institutions. This rule helps to avoid confusion.

<sup>11</sup> In order to confer optimum protection, the dimensions of the emblem used to mark medical units and transports shall be as large as possible. The distinctive signals provided for in Annex I to Protocol I shall also be used.

<sup>12</sup> Pursuant to Article 40 of the First Geneva Convention, armlets are to be worn on the left arm and shall be water-resistant; the identity card shall bear the holder’s photograph. States can model the identity card on the example attached to this Convention. The authority within the Ministry of Defence which is to issue armlets and identity cards must be clearly specified.

2. Where this may enhance protection, the medical services and religious personnel attached to the armed forces may, without prejudice to their current emblem, make temporary use of either of the other distinctive emblems recognized by, and enjoying equal status under, the Geneva Conventions and their Additional Protocols.

#### **ARTICLE 4. Use by hospitals and other civilian medical units**

1. With the express authorization of the Ministry of Health<sup>13</sup> and under its control, civilian medical personnel, hospitals and other civilian medical units, as well as civilian medical transports, assigned in particular to the transport and treatment of the wounded, sick and shipwrecked, shall be marked by the emblem, used as a protective device, in time of armed conflict.<sup>14</sup>
2. Civilian medical personnel shall wear armlets and carry identity cards displaying the emblem. These armlets and identity cards shall be issued by ... *[Ministry of Health]*.<sup>15</sup>
3. Civilian religious personnel attached to hospitals and other medical units shall be identified in the same way.

#### **ARTICLE 5. Use by the *[National Society of ...]*<sup>16</sup>**

1. The *[National Society of ...]* is authorized to place medical personnel and medical units and transports at the disposal of the medical service of the armed forces.

Such personnel, units and transports shall be subject to military laws and regulations and may be authorized by the Ministry of Defence to display as a protective device the emblem of the red cross *[red crescent or red crystal]*, or, where this may enhance protection, to make temporary use of either of the other distinctive emblems recognized by, and enjoying equal status, under the Geneva Conventions and their Additional Protocols.<sup>17</sup>

Such personnel shall wear armlets and carry identity cards, in accordance with Article 3, paragraph 2, of the present law.

<sup>13</sup> It is important to indicate clearly the authority which is competent to grant such authorization and monitor the use of the emblem. This authority shall work together with the Ministry of Defence, which may, if necessary, give advice and assistance.

<sup>14</sup> See Articles 18 to 22 of the Fourth Geneva Convention, and Articles 8 and 18 of Protocol I. Article 8 in particular defines the expressions "medical personnel," "medical units" and "medical transports." Hospitals and other civilian medical units should be marked by the emblem only during times of armed conflict. Marking them in peacetime risks causing confusion with property belonging to the National Society.

<sup>15</sup> As concerns armlets and identity cards for civilian medical personnel, Article 20 of the Fourth Geneva Convention and Article 18, para. 3, of Protocol I provide for their use in occupied territory and in areas where fighting is taking place or is likely to take place. It is, however, recommended that armlets and identity cards be widely distributed during times of armed conflict. A model of an identity card for civilian medical and religious personnel is given in Annex I to Protocol I. The authority which is to issue the armlets and identity cards (for example a department of the Ministry of Health) should be specified.

<sup>16</sup> Pursuant to Article 27 of the First Geneva Convention, a National Society of a neutral country may also place its medical personnel and medical units and transports at the disposal of the medical service of the armed forces of a State which is party to an armed conflict. Articles 26 and 27 of the First Geneva Convention also provide for the possibility that other voluntary aid societies recognized by the authorities may be permitted, in time of war, to place medical personnel and medical units and transports at the disposal of the medical service of the armed forces of their country or of a State which is party to an armed conflict. Like the personnel of National Societies, such personnel shall then be subject to military laws and regulations and shall be assigned exclusively to medical tasks. These aid societies may be authorized to display the emblem. Such cases are rare, however. If such an authorization has been granted, or is to be granted, it might be useful to mention this in the present law. Furthermore, Article 9, para. 2, sub-paragraph c) of Protocol I provides for the possibility of an impartial international humanitarian organization placing medical personnel and medical units and transports at the disposal of a State which is party to an international armed conflict. Such personnel shall then be placed under the control of this party to the conflict and subject to the same conditions as National Societies and other voluntary aid societies. They shall in particular be subject to military laws and regulations.

<sup>17</sup> This should in principle be the same emblem as that used by the medical service of the armed forces. With the consent of the competent authority, the National Society may, in time of peace, use the emblem to mark units and transports whose assignment to medical purposes in the event of armed conflict has already been decided. See Article 13 of the Regulations on the Use of the Emblem.

2. The National Society may be authorized to use the emblem as a protective device for its medical personnel and medical units in accordance with Article 4 of the present law.

## **B. Indicative use of the emblem<sup>18</sup>**

### **ARTICLE 6. Use by the [National Society of ...]**

1. The *[National Society of ...]* is authorized to use the emblem as an indicative device in order to show that a person or an object is linked to the National Society. The dimensions of the emblem shall be small, so as to avoid any confusion with the emblem employed as a protective device.<sup>19</sup>
2. The *[National Society of ...]* may, in accordance with national legislation and in exceptional circumstances and to facilitate its work, make temporary use of the red crystal<sup>20</sup>.
3. The *[National Society of ...]* shall apply the "Regulations on the Use of the Emblem of the Red Cross or the Red Crescent by the National Societies."<sup>21</sup>
4. National Societies of other countries present on the territory of *[name of the State]* shall, with the consent of the *[National Society of ...]*, be entitled to use the emblem under the same conditions.

## **C. International Red Cross and Red Crescent organizations**

### **ARTICLE 7. Use by the international organizations of the International Red Cross and Red Crescent Movement**

1. The International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies may make use of the emblems of the red cross and red crescent at any time and for all their activities.<sup>22</sup>
2. The International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, and their duly authorized personnel, may make use of the red crystal in exceptional circumstances and to facilitate their work.<sup>23</sup>

<sup>18</sup> Pursuant to Article 44, para. 4, of the First Geneva Convention, the emblem may be used, as an exceptional measure and in peace time only, as an indicative device for marking vehicles, used as ambulances by third parties (not forming part of the International Red Cross and Red Crescent Movement), and aid stations exclusively assigned to the purpose of giving treatment free of charge to the wounded or sick. Express consent for displaying the emblem must, however, be given by the National Society, which shall control the use thereof. Such use is not recommended, however, because it increases the risk of confusion and might lead to misuse. The term «aid station» by analogy also covers boxes and kits containing first-aid supplies and used, for example, in shops or factories. The United Nations Convention of 8 November 1968 on road signs and signals provides for road signs displaying the emblem to mark hospitals and first-aid stations. As these signs are not in conformity with the rules on the use of the emblem, it is advised to employ alternative signs, for example the letter «H» on a blue ground to indicate hospitals.

<sup>19</sup> The emblem may not, for example, be placed on an armlet or the roof of a building. In peacetime, and as an exceptional measure, the emblem may be of large dimensions, in particular during events where it is important for the National Society's first-aid workers to be identified quickly.

<sup>20</sup> Paragraph 2 is not applicable for the domestic legislation of States which National Societies have opted to use the red crystal in accordance with Article 3, paragraph 1, of Protocol III.

<sup>21</sup> These Regulations enable the National Society to give consent, in a highly restrictive manner, for third parties to use the name of the Red Cross or the Red Crescent and the emblem within the context of its fundraising activities (Article 23, "sponsorship").

<sup>22</sup> Article 44, paragraph 3, of the First Geneva Convention and Article 1, paragraph 4 of the Internal Regulations of the International Federation of Red Cross and Red Crescent Societies.

<sup>23</sup> Article 4 of Additional Protocol III.



### III. CONTROL AND PENALTIES

#### ARTICLE 8. Control measures

1. The authorities of [*name of the State*] shall at all times ensure strict compliance with the rules governing the use of the emblems of the red cross, the red crescent and the red crystal, the names “red cross,” “red crescent” and “red crystal”, and the distinctive signals. They shall exercise strict control over the persons authorized to use the said emblems, names and signals.<sup>24</sup>
2. They shall take every appropriate step to prevent misuse, in particular:
  - by disseminating the rules in question as widely as possible among the armed forces, the police forces, the authorities and the civilian population;<sup>25</sup>
  - by issuing instructions to national civilian and military authorities on the use of the distinctive emblem in accordance with the Geneva Conventions and their Additional Protocols and by providing for the necessary penal, administrative and disciplinary sanctions in cases of misuse.

#### ARTICLE 9. Misuse of the emblem as a protective device in time of armed conflict<sup>26</sup>

1. Anyone who has wilfully committed or given the order to commit acts resulting in the death of, or causing serious harm to the body or health of, an adversary by making perfidious use of the red cross, the red crescent, or a distinctive signal, has committed a war crime and shall be punished by imprisonment for a period of [...] years.<sup>27</sup> Perfidious use of the red crystal under the same conditions shall be subject to the same penalty.<sup>28</sup> Perfidious use means appealing to the good faith of the adversary, with the intention to deceive him and make him believe that he was entitled to receive or was obliged to confer the protection provided for by the rules of international humanitarian law.
2. Anyone who in time of armed conflict has used wilfully and without entitlement the red cross, the red crescent, or the red crystal, or a distinctive signal, or any other sign or signal which constitutes an imitation thereof or which might lead to confusion, shall be punished by imprisonment for a period of [... months or years].

<sup>24</sup> It is recommended that responsibilities be clearly set down, either in the present law or in an implementing regulation or decree.

<sup>25</sup> In particular among members of the medical and paramedical professions, and among non-governmental organizations, which must be encouraged to use other distinctive signs.

<sup>26</sup> This is the most serious type of misuse, for in this case the emblem is of large dimensions and is employed for its primary purpose, which is to protect persons and objects in time of war. This Article should be brought into line with penal legislation (for example, the military penal code), which generally provides for the prosecution of violations of international humanitarian law, and in particular the Geneva Conventions and their Additional Protocols.

<sup>27</sup> By virtue of Article 85, paragraph 3, sub-paragraph f) of Protocol I, perfidious use of the emblem is a grave breach of this Protocol and is regarded as a war crime (Article 85, para. 5). Such misuse is therefore particularly serious and must be subject to very severe penalties.

<sup>28</sup> See Article 6, paragraph 1, of Additional Protocol III.

**ARTICLE 10. Misuse of the emblem as an indicative device  
in peacetime and in time of armed conflict**<sup>29</sup>

1. Anyone who, wilfully and without entitlement, has made use of the emblem of the red cross, the red crescent or the red crystal, the words "red cross," "red crescent" or "red crystal", a distinctive signal or any other sign, designation or signal which constitutes an imitation thereof or which might lead to confusion, irrespective of the aim of such use;

anyone who, in particular, has displayed the said emblem or words on signs, posters, announcements, leaflets or commercial documents, or has affixed them to goods or packaging, or has sold, offered for sale or placed in circulation goods thus marked;

shall be punished by imprisonment for a period of [... *days or months*] and/or by payment of a fine of [*amount in local currency*].<sup>30</sup>

2. If the offence is committed in the management of a corporate body (commercial firm, association, etc.), the punishment shall apply to the persons who committed the offence or ordered the offence to be committed.

**ARTICLE 11. Misuse of the white cross on a red ground**

Owing to the confusion which may arise between the arms of Switzerland and the emblem of the red cross, the use of the white cross on a red ground or of any other sign constituting an imitation thereof, whether as a trademark or commercial mark or as a component of such marks, or for a purpose contrary to fair trade, or in circumstances likely to wound Swiss national sentiment, is likewise prohibited at all times; offenders shall be punished by payment of a fine of [*amount in local currency*].

**ARTICLE 12. Interim measures**

The authorities of [*name of the State*]<sup>31</sup> shall take the necessary interim measures. The authorities may in particular order the seizure of objects and material marked in violation of the present law, demand the removal of the emblem of the red cross, the red crescent or the red crystal and of the words "red cross," "red crescent" or "red crystal" at the cost of the instigator of the offence, and order the destruction of the instruments used for their reproduction.

**ARTICLE 13. Registration of associations, trade names and trademarks**

1. The registration of associations and trade names, and the filing of trademarks, commercial marks and industrial models and designs making use of the emblem of the red cross, the red crescent or the red crystal or the designation "red cross," "red crescent" or "red crystal" in violation of the present law shall be refused.

<sup>29</sup> Even though misuse of the emblem as an indicative device is less serious than the misuse described in Article 9, it must be taken seriously and rigorously prevented or, failing that, suppressed. Indeed, the emblem will be better respected during an armed conflict if it has been protected effectively in peacetime. Such effectiveness derives in particular from the severity of any penalties imposed. Consequently, it is recommended that the penalties include imprisonment and/or a heavy fine likely to serve as a deterrent.

<sup>30</sup> In order to maintain the deterrent effect of the fine, it is important that its amount be periodically reviewed so as to take account of the depreciation of the local currency. This remark also applies to Article 11. It might therefore be appropriate to set the amounts of the fines by other means than the present law, for example in an implementing regulation.

<sup>31</sup> Indicate the competent authority (e.g. courts, administrative authorities, etc.).

2. Persons making use of the red crystal or the designation “red crystal,” or of any sign constituting an imitation thereof, prior to the adoption of Additional Protocol III<sup>32</sup> shall be permitted to continue such use, provided that the said use shall not be such as would appear, in time of armed conflict, to confer the protection of the Geneva Conventions and their Additional Protocols, and provided that such rights were acquired prior to the entry into force of this Act.

#### **ARTICLE 14. Role of the [National Society of ...]**

The *[National Society of ...]* shall cooperate with the authorities in their efforts to prevent and repress any misuse.<sup>33</sup> It shall be entitled to inform *[competent authority]* of such misuse and to participate in the relevant criminal, civil or administrative proceedings.

### **IV. APPLICATION AND ENTRY INTO FORCE**

#### **ARTICLE 15. Application of the present law**

The ... *[Ministry of Defence, Ministry of Health]* is responsible for the application of the present law.<sup>34</sup>

#### **ARTICLE 16. Entry into force**

The present law shall enter into force on *[date of promulgation, etc.]*.

---

<sup>32</sup> Additional Protocol III was adopted on 8 December 2005.

<sup>33</sup> The National Societies have a very important role to play in this regard. The Statutes of the International Red Cross and Red Crescent Movement stipulate expressly that the National Societies shall “also cooperate with their governments to ensure respect for international humanitarian law and to protect the red cross and red crescent emblems” (Article 3, paragraph 2).

<sup>34</sup> It is particularly important to specify which national authority has ultimate responsibility for applying this law. Close cooperation between the ministries directly concerned, generally the Ministries of Defence and Health, would be advisable. A national committee for the implementation of international humanitarian law could play a useful role in this respect.

**Document No. 36, ICRC, Advisory Services on International Humanitarian Law**

[Source: Advisory Services on International Humanitarian Law, available at [www.icrc.org](http://www.icrc.org)]

**Advisory Service on international humanitarian law**

**The three main priorities of the ICRC's Advisory Service are to encourage ratification of IHL treaties, to promote national implementation of the obligations arising from these treaties and to collect and facilitate the exchange of information on national implementation measures.**

**Why promote international humanitarian law?**

Currently, dozens of conflicts are raging throughout the world. Each day brings news of yet another atrocity perpetrated in the name of war: massacres, tortures, summary executions, rape, deportation of civilians, children taking a direct part in hostilities... the list is endless.

Some may argue that these are just some of war's necessary evils. They are not. They are illegal. They are outright violations of a universally recognized body of law known as international humanitarian law (IHL).

As part of its humanitarian mission to protect the lives and dignity of victims of armed conflict, the International Committee of the Red Cross (ICRC) strives to promote respect for the rules of IHL. Universal ratification of IHL instruments and effective implementation of the obligations they contain are promoted to ensure maximum protection for the victims of armed conflict.

**How can IHL be implemented by States?**

Adherence to IHL treaties is just the first step. The following measures must be taken before States can comply with their obligations arising from the Geneva Conventions of 1949, their Additional Protocols of 1977, the 1954 Convention for the Protection of Cultural Property and its two Protocols, other treaties relating to the prohibition and use of certain weapons, as well as the Rome Statute of the International Criminal Court:

- translation of IHL treaties into national languages
- adoption of criminal legislation punishing war crimes and other violations of IHL
- adoption of measures to prevent and punish misuse of the red cross and red crescent emblems and other signals and emblems recognized by the treaties
- definition and guarantee of the status of protected persons
- protection of fundamental and procedural guarantees in the event of armed conflict

- establishment and/or regulation of National Societies, organization of civil defence and National Information Bureaux
- dissemination of IHL
- appointment of legal advisers for armed forces
- identification and marking of protected people, places and property
- observance of IHL in the location of military sites, and in the development and adoption of weapons and military tactics

### **How can the ICRC help?**

The ICRC set up its Advisory Service in 1996 to step up its support to States committed to implementing IHL.

Aims:

- encourage all States to ratify IHL treaties
- encourage States to fulfil their obligations under these treaties at the national level

Structure:

- a unit attached to the ICRC's Legal Division in Geneva, i.e. one supervisor plus three legal advisers, one specialized in civil law, one in common law and one in the Advisory Service's database
- a team of legal experts based in each continent

### **What can the Advisory Service offer?**

The Advisory Service works closely with governments, taking into account their specific needs and their respective political and legal systems. It also works with the following:

- National Red Cross and Red Crescent Societies
- academic institutions
- international and regional organizations

### **Specifically, the Advisory Service:**

Organizes meetings of experts

*Arranges national and regional seminars on the implementation of IHL and meetings of experts on selected topics; takes part in international fora*

Offers legal and technical assistance in incorporating IHL into national law

*Translates IHL treaties; carries out studies on the compatibility of national law with the obligations arising from these treaties; provides legal advice*

Encourages States to set up national IHL committees and assists them in their work  
*Supports the work of advisory bodies to governments with respect to implementing, developing and disseminating IHL*

Promotes the exchange of information

*Manages a collection of texts on legislation, case law, national studies and manual for the armed forces; a database on the implementation of IHL accessible on the ICRC's website ([www.icrc.org](http://www.icrc.org)) and on the ICRC's CD-ROM on IHL*

Publishes specialist documents

*Produces factsheets on the main IHL treaties and topics relating to implementation; kits for ratifying treaties; guidelines on implementation measures; regular reports on national implementation worldwide; reports on seminars and meetings of experts*

## Case No. 37, Protection of Journalists

## I. Protection of Journalists and Media Professionals in Time of Armed Conflict

[Source: "Protection des journalistes et des médias en période de conflit armé," ALEXANDRE BALGUYGALLOIS, *IRRC*, March 2004, Vol. 86 No. 853, pp. 37-68; available on <http://www.icrc.org>; original in French; unofficial translation. Footnotes omitted.]

The number of journalists killed in the world in 2003 – 42 – is the highest since 1995. This figure can be largely explained by the recent military campaign in Iraq, which inflicted a proportionally higher number of casualties on journalists than on members of the coalition's armed forces: 14 journalists and media personnel lost their lives, two went missing and a dozen or so were wounded while covering the conflict and its aftermath. In recent years, one might also mention the deliberate targeting of journalists in the occupied Palestinian territories, the bombing of the Serbian State radio and television (*Radio Televizija Srbije* – RTS) building in Belgrade by NATO forces in 1999 and the bombing, by US forces, of the Kabul and Baghdad offices of the Qatar-based Al-Jazeera television network.

The general trend is towards the deterioration of the working conditions of journalists in periods of armed conflict. "...Covering a war is becoming more and more dangerous for journalists. Added to the traditional dangers of war are the unpredictable hazards of bomb attacks, the use of more sophisticated weapons against which even the training and protection of journalists is ineffective – and belligerents who care more about winning the war of images than respecting the safety of media staff. So many factors that increase the risks of war reporting..."

This particularly worrying situation prompted Reporters Without Borders to issue a "Declaration on the safety of journalists and media personnel in situations involving armed conflict," which was opened for signing on 20 January 2003 and revised on 8 January 2004 in light of the events in Iraq. The purpose of the declaration is to remind belligerents of the principles and rules of international humanitarian law that protect journalists and media personnel in periods of armed conflict and to improve the law by adapting it to present needs. In this regard, it would seem necessary to reaffirm the illegality of attacks on journalists and news media and to remind the authorities of their obligation to take precautions when preparing attacks that might affect them.

### Illegality of attacks on journalists and news media

The illegality of attacks on journalists and news media derives from the protection granted to civilians and civilian objects under international humanitarian law, and from the fact that the media, even when used for propaganda purposes, cannot be considered as military objectives except in special cases. In other words, while no specific status exists for journalists and the equipment they use, both journalists and

their equipment benefit from the general protection enjoyed by civilians and civilian objects unless they make an effective contribution to military action.

### ***Protection of journalists as civilians***

Without providing a precise definition of them, humanitarian law distinguishes between two categories of journalists working in conflict zones: war correspondents accredited to the armed forces and “independent” journalists. According to the *Dictionnaire de droit international public*, the former category comprises all “specialized journalists who, with the authorization and under the protection of a belligerent’s armed forces, are present on the theatre of operations with a view to providing information on events related to the hostilities.” This definition reflects a practice followed during the Second World War and the Korean War, when war correspondents wore uniforms, enjoyed officers’ privileges and were placed under the authority of the head of the military unit in which they were incorporated. As for the term “journalist,” it designates, according to a 1975 draft UN convention, “...any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in any of these activities as their principal occupation...”

### ***Protection of war correspondents***

War correspondents fall into the ill-defined category of “persons who accompany the armed forces without actually being members thereof.” Since they are not part of the armed forces, they enjoy civilian status and the protection derived from that status. Moreover, since they are, in a manner of speaking, associated with the war effort, they are entitled to prisoner-of-war status when they fall into the hands of the enemy, provided they have been duly authorized to accompany the armed forces.

### ***Protection of journalists engaged in dangerous professional missions***

The participants in the Diplomatic Conference held in Geneva from 1974 to 1977 felt that in order to better respond to the needs of their time it would be advisable to include a special provision on “measures of protection for journalists” in Protocol I to supplement Article 4 (A) (4) of the Third Geneva Convention. The resulting provision – Article 79 – does not change the regime applicable to war correspondents. [...]

Article 79 formally states that journalists engaged in dangerous professional missions in zones of armed conflict are civilians within the meaning of Article 50 (1). As such, they enjoy the full scope of protection granted to civilians under international humanitarian law. Journalists are thus protected both against the effects of hostilities and against arbitrary measures taken by a party to the conflict when they fall into that party’s hands, either by being captured or being arrested. The framers of Protocol I did not wish to create a special status for journalists, since “... any increase in the number of persons with a special status, necessarily accompanied by an increase in protective signs, tends to weaken the protective value of each protected status already accepted...” The identity card mentioned in Article 79 (3) does not create a status for its holder, but merely “...attests to his status as a journalist.” It is therefore unnecessary



to own such a card in order to enjoy the status of civilian. Moreover, while it is true that protection measures for journalists are only codified in the case of international conflicts (Protocol I), journalists also enjoy the protection granted to civilians in non-international armed conflicts. [...]

### *Protection of “embedded” journalists*

Some ambiguity surrounds the status of “embedded” journalists, that is to say those who accompany military troops in wartime. Embedment is not a new phenomenon; what is new is the sheer scale on which it has been practiced since the 2003 conflict in Iraq. The fact that journalists were assigned to American and British combat units and agreed to conditions of incorporation that obliged them to stick with these units, which ensured their protection, would liken them to the war correspondents mentioned in the Third Geneva Convention. And indeed, the guidelines issued by the British Ministry of Defence regarding the media grant the status of prisoners of war to embedded journalists who are taken prisoner. According to unofficial sources, however, it would seem that the French military authorities consider “embeds” as “unilaterals” who are only entitled to civilian status, as stipulated in Article 79 of Protocol I. A clarification on this point would seem essential. [...]

The way in which “unilateral” journalists surround themselves with armed bodyguards can have dangerous consequences for all journalists. On 13 April 2003, the private security escort of a CNN crew on its way to Tikrit (northern Iraq) responded with an automatic weapon after the convoy came under fire at the entrance to the town. Some journalists are concerned by this new type of behaviour, which is contrary to all the rules of the profession: “Such a practice sets a dangerous precedent that could jeopardise all other journalists covering this war as well as others in the future,” said Reporters Without Borders secretary-general Robert Ménard. “There is a real risk that combatants will henceforth assume that all press vehicles are armed. Journalists can and must try to protect themselves by such methods as travelling in bulletproof vehicles and wearing bulletproof vests, but employing private security firms that do not hesitate to use their firearms just increases the confusion between reporters and combatants.”

### *Loss of protection*

Under Articles 79.2 and 51.3 of Protocol I, journalists enjoy the protection afforded by international humanitarian law provided that they do not take a direct part in the hostilities. [...] According to the Commentary of Article 51.3, “direct participation in the hostilities” means “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.” The fact that a journalist engages in propaganda cannot be considered as direct participation (see below). It is only when a journalist takes a direct part in the hostilities that he loses his immunity and becomes a legitimate target. Once he ceases to do so, he recovers his right to protection against the effects of the hostilities. [...]

***Protection of media facilities as civilian objects***

Radio and television facilities are civilian objects and as such enjoy general protection. The prohibition on attacking civilian objects has been firmly established in international humanitarian law since the beginning of the twentieth century and was reaffirmed in 1977 Protocol I and in the Statute of the International Criminal Court.

In particular, it follows from the twofold obligation mentioned in Article 48 of Protocol I – namely, at all times to distinguish between civilian objects and military objectives and, accordingly, to direct operations only against the latter – that civilian objects, along with the civilian population, enjoy the general protection set out in Article 52. While Article 85 of the same Protocol makes it a war crime to attack civilians, no similar provision exists for civilian objects. It is, nonetheless, a war crime to attack certain objects to which special protection is afforded, namely works and installations containing dangerous forces, non-defended localities, demilitarized zones, historic monuments, works of art and places of worship. Protocol II grants no general protection to civilian objects; only certain objects, of particular importance to civilians, are entitled to specific protection under its provisions, that is to say medical units and transports, objects indispensable to the survival of the civilian population and cultural objects. [...]

***Obligation to presume that civilian objects are being used for civilian purposes***

In case of doubt, objects normally dedicated to civilian purposes, such as radio and television facilities, are to be presumed as being used for such purposes, as stipulated in Article 52.3 of Protocol I. [...]

***Loss of protection for civilian objects***

It clearly follows from the above-mentioned instruments of international humanitarian law that the immunity enjoyed by civilian objects and protected objects is not absolute and that such immunity is lost if these objects are used for hostile purposes. Civilian objects (ships, aircraft, vehicles and buildings) that contain military personnel, equipment or supplies or that in any way make a major contribution to the war effort, incompatible with their status, constitute legitimate targets. [...] For example, if the facilities of the RTS building in Belgrade were really being used as radio relay stations and transmitters by the military and special police forces of the Federal Republic of Yugoslavia, the review committee set up by the International Criminal Tribunal for the Former Yugoslavia (ICTY) was right in concluding that they constituted legitimate military targets for NATO. [See *Case No. 226*, Federal Republic of Yugoslavia, NATO Intervention]

***Can media facilities constitute legitimate military objectives?***

International humanitarian law requires attacks to be strictly limited to “military objectives.” Although the doctrine of “limited war” has now replaced the doctrine of “total war,” greatly reducing the category of “military objectives,” the objects that can be considered as such are still extremely numerous. According to the ICRC, the above-mentioned doctrine and the 1954 Hague Convention for the Protection of Cultural

Property in the Event of Armed Conflict, radio and television facilities may, under certain conditions, be included among them. [...]

*Dual civilian and military use of media equipment and facilities*

In today's highly technological society, dual civilian and military use is often made of goods and resources and this is not without consequences in terms of protection. Civilian objects (roads, schools, railways, etc.) that are temporarily put to military use or used both for civilian and for military purposes constitute legitimate targets. On 27 March 2003 coalition forces twice bombed the Ministry of Information building in Baghdad although it was known to shelter offices of the international media. On 8 April 2003, after a US tank fired on the Palestine Hotel, a gathering spot for the foreign press in Baghdad, a spokesman for the American Defense Department claimed that the hotel was a legitimate target since Iraqi officials had held meetings there 48 hours earlier. During NATO's air campaign in Yugoslavia, NATO representatives justified the bombing of the RTS building in terms of the dual use that had been made of it: in addition to their civilian use, RTS facilities were incorporated into the C3 (command, control and communications) network of the Serbian army. In its final report, the ICTY review committee stated that in so far as these facilities were used as transmitters by the armed forces, they constituted a military objective [See Case No. 226, Federal Republic of Yugoslavia, NATO Intervention]. This conclusion seems to reflect both the spirit and letter of Protocol I: it is lawful to attack objects that are being put to dual use when the conditions of Article 5 (2) of Protocol I are met. Likewise, if, as a US spokesman claimed to justify the bombing of 12 November 2002, the building of the Arab Al-Jazeera television network in Kabul really sheltered offices belonging to Taliban forces and Al Qaeda operatives, then it was a legitimate target. Whatever the case may be, the obligations that belligerents have to take precautions are greater when the object is used for dual purposes.

*Does the use of media facilities for propaganda purposes make legitimate targets of them?*

During the 2003 military campaign in Iraq, the British media were attacked by certain ministers and members of Parliament who accused them of playing into the hands of the Iraqi propaganda machine. Four years earlier, various NATO representatives publicly justified the bombing of the RTS building in Belgrade in terms of the wish to neutralize a propaganda tool. While there is no doubt that the RTS was used for propaganda purposes, Article 52 of Protocol I cannot reasonably be interpreted as meaning that this, in itself, could justify the military attack.

The ICTY commission adopted a firm and clear position in this regard. In its report, the commission states that the media cannot be considered as a "legitimate target" merely because they are disseminating propaganda, even though such an activity supports the war effort. It also specifies that civilian morale as such is not a "legitimate military objective." The British Defence Doctrine, published in 1996, makes the same assertion, as does the report presented by Volker Krönig to the NATO Parliamentary Assembly in November 1999. This constitutes a break with the doctrine of "total war" – first described, with lucidity, by the Prussian general von Clausewitz in his treaty *On War* – according to which, to quote the famous words of Winston Churchill, "enemy

morale is also a military objective.” If psychological harassment of the population were recognized as a legitimate war aim, no limits would be placed on violence, as was the case during the Second World War. That is why the following statement by Amnesty International can only meet with approval:

“Amnesty International recognizes that disrupting government propaganda may help to undermine the morale of the population and the armed forces, but believes that justifying an attack on a civilian facility on such grounds stretches the meaning of “effective contribution to military action” and “definite military advantage” [Article 52(2) of Protocol I] beyond the acceptable bounds of interpretation.”

Not all forms of propaganda are authorized, however. Propaganda that incites war crimes, acts of genocide or acts of violence is forbidden, and news media that disseminate such propaganda can become legitimate targets. “Whether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target...” It is not clearly established whether or not media that incite genocide, as Radio-Télévision Libre des Mille Collines and the newspaper *Kangura* did in Rwanda in 1994, constitute a legitimate target. A positive reply to this question may no doubt be found in an interpretation of Article 52 (2) of Protocol I or of the principle whereby protection is lost in the event of participation in the hostilities. The ICTY commission itself replies as follows: “If the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective. It may also be argued that “hate media” constitute legitimate targets by virtue of the obligation to repress breaches of the Geneva Conventions (Articles 49/50/129/146 respectively of the four Geneva Conventions) and Protocol I (Article 85). Indeed, under common Article 1 of the Geneva Conventions and Protocol I, States Parties undertake to respect and “ensure respect” for these instruments.

### **Obligation to take precautionary measures when launching attacks that could affect journalists and news media**

The lawfulness of an attack depends not only on the nature of the target – which must be a military objective – but also on whether the required precautions have been taken, in particular as regards respect for the principle of proportionality and the obligation to give warning. In this regard, journalists and news media do not enjoy a particular status but benefit from the general protection against the effects of hostilities that Protocol I grants to civilians and civilian objects.

### ***The principle of proportionality: a curb on immunity for journalists and media***

[...] It was only in 1977 that [the principle of proportionality] was enshrined in a convention, namely in Articles 51 (5) (b) and 57 (2) (a) (iii) of Protocol I. This principle represents an attempt to reduce as much as possible the “collateral damage” caused by military operations. It provides the criterion that makes it possible to determine to what degree such damage can be justified under international humanitarian law: there must be a reasonable correlation between legitimate destruction and undesirable collateral effects. According to the principle of proportionality as set out

in the above-mentioned articles, the accidental collateral effects of the attack, that is to say the incidental harmful effects on protected persons and property, must not be excessive in relation to the anticipated military advantage. [...]

### ***Obligation to give advance warning of an attack***

Although NATO contended that it had “made every possible effort to avoid civilian casualties and collateral damage” when bombing the RTS building, doubts were expressed about whether it had met its obligation to warn the civilian population in advance of the attack, as provided for under Article 57 (2) (c) of Protocol I (“effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit”). When the United States bombed the Baghdad offices of the Al-Jazeera and Abu Dhabi television networks on 8 April 2003, killing one journalist and wounding another, it would also seem that no advance warning of the attacks had been given to the journalists. [...]

### ***Obligation to give “effective advance warning”***

Protocol I requires that “effective advance warning” be given. According to Doswald-Beck, “common sense must be used in deciding whether and how to give warning, and the safety of the attacker will inevitably be taken into account.” The rule set out in Article 57 (2) (c) most certainly does not require that warning be given to the authorities concerned; a direct warning to the population – by means of air-dropped leaflets, radio or loudspeaker messages, etc., requesting civilians to remain at home or stay away from certain military objectives – must be considered as sufficiently effective. [...]

In 1987, lieutenant colonel Burrus M. Carnahan, of the US Joint Chiefs of Staff and Michael J. Matheson, deputy legal adviser to the US Department of State, expressed the opinion that the obligation to give warning was customary in character. This *opinio juris* is confirmed by the practice of a considerable number of States in international and internal armed conflicts. [...]

### ***Adequacy of means***

In a message to Amnesty International dated 17 May, NATO contended that it had made “every possible effort to avoid civilian casualties and collateral damage... “during the attack on RTS, in accordance with the prescriptions of Article 57 (“Precautions in attack”) of Protocol I. Beyond the specific cases of RTS in Yugoslavia, Al-Jazeera in Afghanistan or Baghdad and the Palestinian radio-television offices in Ramallah, it may more generally be asked whether the bombing of radio-television facilities is the most adequate means to the sought end. According to Article 52.2 of Protocol I, the destruction of a military objective is not the only possible solution: it may be enough to capture or neutralize the objective. These other solutions may be justified from a military point of view in terms of economy and concentration of means, since the destruction of a military objective implies the destruction of materials and ammunition. But these solutions are justified above all from a humanitarian point

of view, by making it possible to “minimize loss of civilian life” (Article 57.2 (a) (ii) of Protocol I).

For all these reasons, would it not be preferable to use other means than bombing whenever possible? [...]

## Conclusion

It follows from the above that journalists and their equipment enjoy immunity, the former as civilians, the latter as a result of the general protection that international humanitarian law grants to civilian objects. However, this immunity is not absolute. Journalists are protected only as long as they do not take a direct part in the hostilities. News media, even when used for propaganda purposes, enjoy immunity from attacks, except when they are used for military purposes or to incite war crimes, genocide or acts of violence. However, even when an attack on news media may be justified for such reasons, every feasible precaution must be taken to avoid, or at least limit, loss of human life, injury to civilians and damage to civilian objects. [...]

## II. UN Security Council Resolution on the Protection of Journalists during Armed Conflict

[Source: United Nations Security Council, Resolution 1738 (2006), 23 December 2006; available at [www.un.org](http://www.un.org)]

### Resolution 1738 (2006)

Adopted by the Security Council at its 5613th meeting, on 23 December 2006

*The Security Council,*

[...]

*Reaffirming* that parties to an armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of affected civilians,

*Recalling* the Geneva Conventions of 12 August 1949, in particular the Third Geneva Convention of 12 August 1949 on the treatment of prisoners of war, and the Additional Protocols of 8 June 1977, in particular article 79 of the Additional Protocol I regarding the protection of journalists engaged in dangerous professional missions in areas of armed conflict,

*Emphasizing* that there are existing prohibitions under international humanitarian law against attacks intentionally directed against civilians, as such, which in situations of armed conflict constitute war crimes, and *recalling* the need for States to end impunity for such criminal acts,

*Recalling* that the States Parties to the Geneva Conventions have an obligation to search for persons alleged to have committed, or to have ordered to be committed a grave breach of these Conventions, and an obligation to try them before their own courts,

regardless of their nationality, or may hand them over for trial to another concerned State provided this State has made out a *prima facie* case against the said persons,

[...]

*Deeply concerned* at the frequency of acts of violence in many parts of the world against journalists, media professionals and associated personnel in armed conflict, in particular deliberate attacks in violation of international humanitarian law,

*Recognizing* that the consideration of the issue of protection of journalists in armed conflict by the Security Council is based on the urgency and importance of this issue, and recognizing the valuable role that the Secretary-General can play in providing more information on this issue,

1. *Condemns* intentional attacks against journalists, media professionals and associated personnel, as such, in situations of armed conflict, and calls upon all parties to put an end to such practices;
2. *Recalls* in this regard that journalists, media professionals and associated personnel engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians and shall be respected and protected as such, provided that they take no action adversely affecting their status as civilians. This is without prejudice to the right of war correspondents accredited to the armed forces to the status of prisoners of war provided for in article 4.A.4 of the Third Geneva Convention;
3. *Recalls* also that media equipment and installations constitute civilian objects, and in this respect shall not be the object of attack or of reprisals, unless they are military objectives;
4. *Reaffirms* its condemnation of all incitements to violence against civilians in situations of armed conflict, further reaffirms the need to bring to justice, in accordance with applicable international law, individuals who incite such violence, and indicates its willingness, when authorizing missions, to consider, where appropriate, steps in response to media broadcast inciting genocide, crimes against humanity and serious violations of international humanitarian law;
5. *Recalls its demand* that all parties to an armed conflict comply fully with the obligations applicable to them under international law related to the protection of civilians in armed conflict, including journalists, media professionals and associated personnel;
6. *Urges* States and all other parties to an armed conflict to do their utmost to prevent violations of international humanitarian law against civilians, including journalists, media professionals and associated personnel;
7. *Emphasizes* the responsibility of States to comply with the relevant obligations under international law to end impunity and to prosecute those responsible for serious violations of international humanitarian law;

8. *Urges* all parties involved in situations of armed conflict to respect the professional independence and rights of journalists, media professionals and associated personnel as civilians;
9. *Recalls* that the deliberate targeting of civilians and other protected persons, and the commission of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security, and *reaffirms in this regard its readiness* to consider such situations and, where necessary, to adopt appropriate steps;
10. *Invites* States which have not yet done so to consider becoming parties to the Additional Protocols I and II of 1977 to the Geneva Conventions at the earliest possible date;

[...]

### DISCUSSION

1. Would you consider that journalists on dangerous mission were adequately protected before the special provision, Art. 79 of Protocol I, was adopted?
2. Before Art. 79 on journalists, what was the situation in that regard? (HR, Art. 13; 1929 Geneva Convention, Art. 81; GC III, Art. 4(A)(4))
3. Does Art. 79 introduce any obligation for the parties to a conflict? Or does it introduce a right for journalists that would not exist without this provision? What is the benefit of that provision for journalists? Does it clarify the fact that they cannot be considered as spies? Does it protect their professional activities, namely their search for news? (GC IV, Art. 4; P I, Arts 46, 51 and 79)
4. What is the difference under IHL between war correspondents accompanying the armed forces and other journalists? Does IHL give them the same rights under IHL, whether they belong to the one category or the other? Do only “freelance journalists” come into the second category? Or also permanent media correspondents?
5. What are the rights under IHL of war correspondents accompanying the armed forces? What are the criteria they have to fulfil to be qualified as a war correspondent? What would happen if they do not fulfil those criteria? Is the ID card a prerequisite for a journalist to be entitled to POW status? Is that card still relevant under Art. 79 of Protocol I? Do you think that by making an explicit distinction between journalists engaged in dangerous missions and war correspondents, IHL broadens the protection of journalists? Or does it undermine their protection?
6. During the “travaux préparatoires” of Art. 79, the idea of special protection for journalists was put forward. Why was this idea rejected? Do you think that considering journalists as a special category of protected persons or providing them with a distinctive sign would give them better protection? Does Art. 79 of Protocol I clarify Art. 4(A)(4) of Convention III? What are the main rights of a journalist, other than a war correspondent covered by Convention III, who is detained during an international armed conflict? Do these rights differ from those of war correspondents covered by Convention III? Do you think that one category is more likely to be subjected to ill-treatment on being captured than the other?
7. If a journalist accompanies an army unit and is shot at by the enemy forces, would you consider this as a breach of IHL? Do the enemy forces have to take special care in a conflict to distinguish between combatants and journalists? Can military necessity justify the killing of a journalist?



8. Are journalists adequately protected in non-international armed conflicts? Are they civilians? Does the rule in Protocol I's Art. 79, stating that journalists in dangerous missions are considered at all times as civilians and therefore enjoy the same protection, also apply in non-international armed conflicts?
9. Has the 2003 war in Iraq and the unclear status of the "embedded" journalists made a clarification of the protection of journalists necessary? What consequences could the use of armed guards have for the status of journalists?
10. Should propaganda media be considered a legitimate target? Is the deliberate targeting of these facilities a violation of IHL? Where should the line be drawn between "hate media" and "normal" war propaganda? Is it possible to make such a distinction and target media in accordance with it? Is a journalist who encourages war crimes a legitimate target for an attack? Does everyone who commits war crimes lose protection against attacks?

**Case No. 38, The Environment and International Humanitarian Law**

**A. Article 35 of Protocol I**

[Source: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); available on <http://www.icrc.org/ihl>]

**Part III: Methods and means of warfare,  
Combatant and prisoner-of-war status**

**Section I: Methods and means of warfare**

**ARTICLE 35: Basic rules**

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited. [...]
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

**B. Article 55 of Protocol I**

[Source: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); available on <http://www.icrc.org/ihl>]

**Part IV: Civilian population**

**Section I: General protection against effects of hostilities**

[...]

**Chapter III: Civilian objects**

[...]

**ARTICLE 55: Protection of the natural environment**

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.

### **C. Article I of 1977 United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)**

[Source: Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, Adopted by Resolution 31/72 of the United Nations General Assembly, December 10, 1976; available on <http://www.un.org>]

#### **ARTICLE I**

1. Each Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long lasting or severe effects as the means of destruction, damage or injury to any other State Party.
2. Each Party to this Convention undertakes not to assist, encourage or induce any State, group of States or international organization to engage in activities contrary to the provisions of paragraph 1 of this article.

### **D. Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict**

[Source: International Committee of the Red Cross, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, 1993; available at [www.icrc.org](http://www.icrc.org)]

[N.B.: The Guidelines were submitted by the ICRC at the 48th session of the United Nations General Assembly on the Protection of the Environment in Times of Armed Conflict. The General Assembly did not formally approve the Guidelines, but at its 49th session, invited all States to disseminate and incorporate them into military manuals.]

#### **ANNEX:**

### **GUIDELINES FOR MILITARY MANUALS AND INSTRUCTIONS ON THE PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT**

#### **I. PRELIMINARY REMARKS**

- 1) The present Guidelines are drawn from existing international legal obligations and from State practice concerning the protection of the environment against the effects of armed conflict. They have been compiled to promote an active interest in, and concern for, the protection of the environment within the armed forces of all States.
- 2) Domestic legislation and other measures taken at the national level are essential means of ensuring that international law protecting the environment in times of armed conflict is indeed put into practice.
- 3) To the extent that the Guidelines are the expression of international customary law or of treaty law binding a particular State, they must be included in military manuals and instructions on the laws of war. Where they reflect national policy, it is suggested that they be included in such documents.

## II. GENERAL PRINCIPLES OF INTERNATIONAL LAW

- 4) In addition to the specific rules set out below, the general principles of international law applicable in armed conflict – such as the principle of distinction and the principle of proportionality – provide protection to the environment. In particular, only military objectives may be attacked and no methods or means of warfare which cause excessive damage shall be employed. Precautions shall be taken in military operations as required by international law.

G.PI Arts. 35, 48, 52 and 57

- 5) International environmental agreements and relevant rules of customary law may continue to be applicable in times of armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict.

Obligations concerning the protection of the environment that are binding on States not party to an armed conflict (e.g. neighbouring States) and that relate to areas beyond the limits of national jurisdiction (e.g. the high seas) are not affected by the existence of the armed conflict to the extent that those obligations are not inconsistent with the applicable law of armed conflict.

- 6) Parties to a non-international armed conflict are encouraged to apply the same rules that provide protection to the environment in international armed conflict and, accordingly, States are urged to incorporate such rules in their military manuals and instructions on the laws of war in a way that does not discriminate on the basis of how the conflict is characterized.
- 7) In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience.

H.IV preamble, G.PI Art. 1.2, G.PII preamble

## III. SPECIFIC RULES ON THE PROTECTION OF THE ENVIRONMENT

- 8) Destruction of the environment not justified by military necessity violates international humanitarian law. Under certain circumstances, such destruction is punishable as a grave breach of international humanitarian law.

H.IVR Art. 23(g), G.C.IV Arts. 53 and 147, G.PI Arts. 35.3 and 55

- 9) The general prohibition on destroying civilian objects, unless such destruction is justified by military necessity, also protects the environment.

H.IVR Art. 23(g), G.C.IV Art. 53, G.PI Art. 52, G.PII Art. 14

In particular, States should take all measures required by international law to avoid:

- (a) making forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives;

CW.P.III

- (b) attacks on objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas or drinking water installations, if carried out for the purpose of denying such objects to the civilian population;

G.PI Art. 54, G.P.II Art. 14

- (c) attacks on works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, even where they are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population and as long as such works or installations are entitled to special protection under Protocol I additional to the Geneva Conventions;

G.PI Art. 56, G.P.II Art. 15

- (d) attacks on historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.

H.CP, G.PI Art. 53, G.P.II Art. 16

- 10) The indiscriminate laying of landmines is prohibited. The location of all pre-planned minefields must be recorded. Any unrecorded laying of remotely delivered non-self-neutralizing landmines is prohibited. Special rules limit the emplacement and use of naval mines.

G.PI Arts. 51.4 and 51.5, CW/P.II Art. 3, H.VII

- 11) Care shall be taken in warfare to protect and preserve the natural environment. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment and thereby prejudice the health or survival of the population.

G.PI Arts. 35.3 and 55

- 12) The military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party is prohibited. The term "environmental modification techniques" refers to any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

ENMOD Arts. I and II

- 13) Attacks against the natural environment by way of reprisals are prohibited for States party to Protocol I additional to the Geneva Conventions.

G.PI Art. 55.2

- 14) States are urged to enter into further agreements providing additional protection to the natural environment in times of armed conflict.

G.P.I Art. 56.6

- 15) Works or installations containing dangerous forces, and cultural property shall be clearly marked and identified, in accordance with applicable international rules. Parties to an armed conflict are encouraged to mark and identify also works or

installations where hazardous activities are being carried out, as well as sites which are essential to human health or the environment.

e.g. G.P.I Art. 56.7, H.C.P. Art. 6

#### IV. IMPLEMENTATION AND DISSEMINATION

- 16) States shall respect and ensure respect for the obligations under international law applicable in armed conflict, including the rules providing protection for the environment in times of armed conflict.

G.C.IV Art. 1, G.P.I Art. 1.1

- 17) States shall disseminate these rules, making them known as widely as possible in their respective countries, and include them in their programmes of military and civil instruction.

H.I.V.R Art. 1, G.IV Art. 144, G.P.I Art. 83, G.P.II Art. 19

- 18) In the study, development, acquisition or adoption of a new weapon, means or method of warfare, States are under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by applicable rules of international law, including these providing protection to the environment in times of armed conflict.

G.P.I Art. 36

- 19) In the event of armed conflict, the parties thereto are encouraged to facilitate and protect the work of impartial organizations contributing to preventing or repairing damage to the environment, pursuant to special agreements between the parties concerned or, as the case may be, the permission granted by one of them. Such work should be performed with due regard to the security interests of the parties concerned.

e.g. G.C.IV Art. 63.2, G.P.I Arts. 61-67

- 20) In the event of breaches of rules of international humanitarian law protecting the environment, measures shall be taken to stop any such violation and to prevent further breaches. Military commanders are required to prevent and, where necessary, to suppress and to report to competent authorities breaches of these rules. In serious cases, offenders shall be brought to justice.

G.C.IV Arts. 146 and 147, G.P.I Arts. 86 and 87

### E. United Nations Environment Programme, Protecting the Environment During Armed Conflict

[Source: United Nations Environment Programme, Protecting the Environment During Armed Conflict, An Inventory and Analysis of International Law, November 2009; available at [http://postconflict.unep.ch/publications/int\\_law.pdf](http://postconflict.unep.ch/publications/int_law.pdf). Footnotes omitted.]

#### 1. INTRODUCTION

The toll of warfare today reaches far beyond human suffering, displacement and damage to homes and infrastructure. Modern conflicts also cause extensive destruction and degradation of the environment. In turn environmental damage,

which often extends beyond the borders of conflict-affected countries, can threaten the lives and livelihoods of people well after peace agreements are signed.

This report aims to understand how natural resources and the environment can be better protected during armed conflict by examining the status of existing international law and making recommendations on concrete ways to strengthen this legal framework and its enforcement.

Public concern regarding the targeting and use of the environment during wartime first peaked during the Viet Nam War. The use of the toxic herbicide Agent Orange, and the resulting massive deforestation and chemical contamination it caused, sparked an international outcry leading to the creation of two new international legal instruments. The Environmental Modification Convention (ENMOD) was adopted in 1976 to prohibit the use of environmental modification techniques as a means of warfare. Additional Protocol I to the Geneva Conventions, adopted in the following year, included two articles (35 and 55) prohibiting warfare that may cause “widespread, long-term and severe damage to the natural environment.”

The adequacy of these two instruments, however, was called into question during the 1990-1991 Gulf War. The extensive pollution caused by the intentional destruction of over 600 oil wells in Kuwait by the retreating Iraqi army and the subsequent claims for USD 85 billion in environmental damages led to further calls to strengthen legal protection of the environment during armed conflict. While some advocated a “fifth” Geneva Convention focusing on the environment, many scholars, organizations and States also considered whether and to what extent the emerging body of international environmental law might apply.

In 1992, the UN General Assembly held an important debate on the protection of the environment in times of armed conflict. While it did not call for a new convention, the resulting resolution (RES 47/37) urged Member States to take all measures to ensure compliance with existing international law on the protection of the environment during armed conflict. It also recommended that States take steps to incorporate the relevant provisions of international law into their military manuals and ensure that they are effectively disseminated.

As an outcome of the UN debate, the International Committee of the Red Cross (ICRC) issued a set of guidelines in 1994 that summarized the existing applicable international rules for protecting the environment during armed conflict. [See **Part D** of this case] These guidelines were meant to be reflected in military manuals and national legislation as a means to raise awareness and help limit damage to the environment in times of war. Despite this important step international momentum to address the issue – particularly through a formal binding instrument – slowed by the end of the 20th century.

Yet armed conflicts have continued to cause significant damage to the environment – directly, indirectly and as a result of a lack of governance and institutional collapse. For instance, dozens of industrial sites were bombed during the Kosovo conflict in 1999, leading to toxic chemical contamination at several hotspots. In another example, an estimated 12,000 to 15,000 tons of fuel oil were released into the Mediterranean Sea

following the bombing of the Jiyeh power station during the conflict between Israel and Lebanon in 2006. [See Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006]

[...]

The fact that the environment continues to be the silent victim of modern warfare raises a number of important legal questions. Which international laws directly and indirectly protect the environment and natural resources during armed conflict? Who is responsible for their implementation and enforcement? Who should pay for the damage and under what circumstances? Do multilateral environmental agreements apply during armed conflict? Can environmental damage be a violation of basic human rights? When can damage to the environment be a criminal offence? How can “conflict resources” be better monitored and international sanctions against their illegal exploitation and trade be made more systematic and effective?

To answer these questions, the United Nations Environment Programme (UNEP) and the Environmental Law Institute (ELI) undertook a joint assessment of the state of the existing legal framework protecting natural resources and the environment during armed conflict. This legal assessment was informed by the outcomes of an expert meeting held by UNEP and the ICRC in Nairobi, Kenya in March 2009, which brought together twenty senior legal experts from international organizations, non-governmental organizations, governments, the military, courts and academia to explore the status and effectiveness of the current instruments.

[...]

## **2. INTERNATIONAL HUMANITARIAN LAW**

### **2.1 Introduction**

The first body of law to consider in an analysis of the protection of the environment during armed conflict is international humanitarian law (IHL) – the set of laws that seek, for humanitarian reasons, to regulate war and armed conflict. [...]

IHL [...] distinguishes between international armed conflict (IAC) [...] and non-international armed conflict (NIAC) [...].

This distinction poses a significant challenge to the applicability and enforcement of IHL for environmental protection. Indeed, while IHL was largely developed in an era of interstate conflicts, the overwhelming majority of conflicts today are internal. Many laws are therefore inapplicable, or much less restrictive when applied to internal conflicts. Yet internal conflicts are the most strongly linked to the environment, with recent research suggesting that at least forty percent of all intrastate conflicts over the last sixty years have a link to natural resources.

Another challenge is that very few provisions of IHL address environmental issues directly, as most major treaties predate the widespread concern about environmental damage generated by the Viet Nam and Gulf wars. Protection is therefore generally inferred from provisions regulating the means and methods of warfare and the



impacts of armed conflict on civilian objects and properties, or recommended through non-binding or soft law, including UN resolutions.

[...]

## 2.2 Treaty law

The relevant provisions of IHL treaty law for the protection of the environment during armed conflict can be divided into three main categories: those that directly address the issue of environmental protection, the general principles of IHL that are applicable to environmental protection, and the provisions that can be considered to provide indirect protection to the environment during times of conflict.

### **Provisions specifically aimed at protecting the environment during armed conflict**

#### ***Additional Protocol I to the 1949 Geneva Conventions, Article 35(3) and Article 55(1) (1977)***

[...]

Article 35 [...] protects the natural environment *per se* – which had never been done before – and applies not only to intentional damage, but also to expected collateral damage. Importantly, specific intent is not necessary.

Article 55 provides specific protection for the environment within the context of the protection granted to civilian objects. It also explicitly prohibits attacks on the environment by way of reprisals.

The common core of these two Articles is the prohibition of warfare that may cause “widespread, long-term and severe damage to the natural environment.” The scope of these provisions initially appears extensive. However, important questions remain with regard to the threshold at which the damaging activity violates international law. Indeed, this triple standard is a cumulative requirement, meaning that to qualify as prohibited “damage,” the impact must be widespread *and* long-term *and* severe. The Protocol fails to define these terms, resulting in a high, uncertain and imprecise threshold.

One commentary on Article 35(3) has accordingly noted that it would “not impose any significant limitation on combatants waging conventional warfare. It seems primarily directed instead to high-level decision-makers and would affect such unconventional means of warfare as the massive use of herbicides and chemical agents which could produce widespread, long-term and severe damage to the natural environment.”

The relevance of these two provisions and the effectiveness of the protection they provide in practice, therefore, seem limited.

### ***UN Convention on the Prohibition of Military or Any Other Use of Environmental Modification Techniques (ENMOD) (1976)***

The ENMOD Convention was established as a reaction to the military tactics employed by the United States during the Viet Nam War. These included plans for large-scale environmental modification techniques that had the ability to turn the environment into a weapon, for instance by provoking earthquakes, tsunamis, or changes in weather patterns – what some commentators have called “geophysical warfare.” The Convention was also a reaction to the use of large quantities of chemical defoliants (known as Agents Orange, White and Blue), which resulted in extensive human suffering (death, cancer and other illnesses, mutations, and birth defects) and long-term environmental contamination, as well as very significant destruction of forests and wildlife.

ENMOD’s objective was to prohibit the use of environmental modification techniques as a means of warfare. Article (1) requires that “each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.” Hence, while Article 35(3) of Additional Protocol I aims to protect the natural environment *per se*, ENMOD prohibits the use of techniques that turn the environment into a “weapon.” [...]

Another noticeable difference with the article of Additional Protocol I is that ENMOD requires a much lower threshold of damage, with the triple cumulative standard being replaced by an alternative one: “widespread, long-lasting or severe.” In addition, it appears that the terms were interpreted differently. For instance, under ENMOD the term “long-lasting” is defined as lasting for a period of months or approximately a season, while under Additional Protocol I “long-term” is interpreted as a matter of decades.

[...]

### ***Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW), and its Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons (1980)***

[See **Document No. 11**, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons; **Document No. 12**, Amendment to Article 1 of the 1980 Convention, in Order to Extend it to Non-International Armed Conflicts; **Document No. 14**, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention)]

[...] An amendment to Article 1 of the Convention introduced in 2001 extends its application to situations referred to in common Article 3 to the 1949 Geneva Conventions – that is, to non-international armed conflict (NIAC).

Article 2(4) of the CCW Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons also directly addresses environmental protection, as it prohibits “mak[ing] forests or other kinds of plant cover the subject of an attack by incendiary weapons except when such natural elements are used to cover, conceal, or camouflage combatants or other military objectives, or are themselves military objectives.”

The specific situations where ENMOD and the CCW and its Protocol III would apply and the high threshold of the two provisions protecting the environment *per se* in Additional Protocol I limit the utility of these direct protections in establishing a wide-reaching duty to protect the environment in armed conflict.

### **General principles of IHL applicable to the protection of the environment during armed conflict**

The general principles of IHL are often referred to as a source of law on their own. They complement and underpin the various IHL instruments and apply to all countries. Prior to an analysis of these principles, it is important to note the importance of the Martens Clause, a general provision that was first adopted at the 1899 Hague Conference and thereafter contained in the Preamble of the 1907 Hague Convention IV.

[...]

In essence, [...] where gaps exist in the international framework governing specific situations (including, for instance, the relationship between armed conflict and the environment), the Martens Clause stipulates that States should respect a minimum standard as established by the standards of “humanity” and the “public conscience.” The Martens Clause is generally considered to constitute a foundational principle of IHL and a core principle protecting the environment in the absence of other provisions in treaty or customary law [...].

The core principles underpinning IHL include the principles of distinction, military necessity, proportionality, and humanity – all of which can be considered to have a bearing on environmental protection during armed conflict, as detailed below.

[...]

### ***The principle of distinction***

The principle of distinction is a cornerstone of IHL and the first test to be applied in warfare: it distinguishes between military and civilian persons and objects, and prohibits indiscriminate attacks and direct attacks against civilian objects. Article 52(2) of Additional Protocol I defines military objectives as those that “by nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” It can therefore be argued that given the non-military nature of most environmentally significant sites and protected areas, targeting such areas would be contrary to the principle of distinction and, subsequently, to Article 52(2).

Nevertheless, the application of this principle may be difficult in practice, for instance when considering the targeting of industrial facilities such as power plants or chemical factories, which could have important environmental impacts but would be seen as a direct contribution to ongoing military action. In such circumstances, a relevant question regarding the meaning of Protocol I would be: “Does undermining a country’s morale and political resilience constitute a sufficiently definite military advantage?”

Similar questions arise for example when a protected area is affected by the illegal exploitation of high-value natural resources (whether by rebels, government troops or foreign occupying forces). In this scenario, would the protected area be considered an acceptable target, considering that revenue from this illegal trade was contributing to the war effort?

The difficulties in interpreting the provisions of Article 52(2) highlight the need for a more precise definition of what constitutes a definite (or direct) military advantage, as opposed to a diffuse (or indirect) one.

### ***The principle of military necessity***

The principle of military necessity implies that the use of military force is only justified to the extent that it is necessary to achieve a defined military objective. Furthermore, the principle of military necessity seeks to prohibit military actions that do not serve any evident military purpose.

The principle of military necessity is reflected in the 1907 Hague Convention IV, in Article 23(g) on enemy property, which stipulates that it is forbidden “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.” This provision has significant environmental relevance as “enemy property” may well encompass protected areas, environmental goods and high-value natural resources, all of which could therefore be granted indirect protection.

### ***The principle of proportionality***

Based on the principle of proportionality codified in Article 57 of Additional Protocol I, disproportionate attacks are those in which the “collateral damage” would be regarded as excessive in relation to the anticipated direct military advantage gained. Destroying an entire village or burning an entire forest to reach a single minor target, for example, would be considered a disproportionate strategy in relation to the military gain.

Many instances of environmental damage could be seen as a “disproportionate” response to a perceived threat and therefore considered illegal. This was the opinion shared by most experts in the case of the massive pollution resulting from the burning of oil fields and the millions of gallons of oil deliberately spilled into the Gulf Sea during the 1990-1991 Gulf War.

### ***The principle of humanity***

The principle of humanity prohibits inflicting unnecessary suffering, injury and destruction. Thus a Party cannot use starvation as a method of warfare, or attack, destroy, remove or render useless such objects indispensable to the survival of the civilian population. According to this principle, the poisoning of water wells and the destruction of agricultural land and timber resources that contribute to the sustenance of the population, as seen in the ongoing conflict in Darfur, could be considered “inhumane” means of warfare.

[...]

### **IHL treaty provisions that indirectly protect the environment during armed conflict**

The rules of IHL treaty law that can be considered to indirectly protect the environment during armed conflict can be clustered into the five following categories: rules limiting or prohibiting certain weapons and methods of warfare; clauses protecting civilian objects and property; clauses protecting cultural heritage sites; rules concerning installations containing dangerous forces; and limitations on certain specifically defined areas.

#### ***Limitation on means and methods of warfare***

Many weapons have the potential to cause serious and lasting damage to the environment. Limiting the development and use of these weapons can therefore indirectly protect the environment during armed conflict.

The following sources, regulating the use of various types of weapons, are relevant in this context:

- **The Hague Convention IV (1907)**

[...]

[T]wo provisions of the Hague Convention IV of 1907 [...] are relevant for the environment. The first, Article 22, provides that “the right of belligerents to adopt means of injuring the enemy is not unlimited.” Some commentators have referred to this Article as one of the most significant provisions in the regulations in so far as a precautionary imperative can be implied from it in the absence of explicit provisions. This first provision should be read in light of the second – the Martens Clause – which is contained in the Preamble of the 1907 Hague Convention IV.

It should be noted that very little has been achieved so far in terms of enforcement of the Hague Law on means and methods of warfare, and that most judicial cases conducted to date have instead focused on violations of the Geneva Law protecting persons and civilian objects.

- **The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925)**

[See **Document No. 9**, The Geneva Chemical Weapons Protocol]

[...]

In so far as the use of chemical and biological weapons may cause harm to the environment, the Protocol can be seen to provide some level of environmental protection during armed conflict.

The Protocol, however, suffers from major limitations. First, only the use of chemical and biological means of warfare is prohibited, excluding the research, development, stockpiling and possession of such weapons from control. Second, the Protocol lacks control mechanisms and provisions for establishing responsibility for violations, thereby limiting its ability to serve as a deterrent.

- **The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC) (1972)**

[See **Document No. 48**, ICRC, Biotechnology, Weapons and Humanity]

[...]

The actual use of biological weapons is not prohibited by the BWC, as the drafters of the agreement took the stance that this aspect is regulated by the 1925 Protocol. [...]

By banning the use of these weapons, the BWC and the Protocol protect the environment in armed conflict from weapons that are likely to cause significant environmental degradation, particularly to the natural environment and to fauna and flora.

- **Convention on Certain Conventional Weapons (CCW) (1980)**

[See **Document No. 11**, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons; **Document No. 12**, Amendment to Article 1 of the 1980 Convention, in Order to Extend it to Non-International Armed Conflicts; **Document No. 14**, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention); **Document No. 16**, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention); **Document No. 18**, Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention)]

As noted above, the Preamble of the 1980 CCW and its Protocol III expressly mention environmental protection. Following a 2001 amendment, the CCW also applies to non-international armed conflict (NIAC).

In addition, Protocol II to the CCW attempts to limit the harmful effect of landmines by requesting States to take protective measures such as recording the location of targets in order to allow for later collection of the unexploded devices, and thereby facilitate substantial restoration to prior environmental conditions. Finally, Protocol V on Explosive Remnants of War, adopted in 2003, is the first international legal instrument dealing with the problem of unexploded and abandoned ordnance, and offers similar guidelines that can serve to indirectly protect the environment from post-conflict threats.

- **Chemical Weapons Convention (CWC) (1993)**

[See **Document No. 21**, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction]

[...]

It is [...] notable that the CWC specifically prohibits destroying chemical weapons by “dumping in any body of water, land burial and open pit burning,” thereby ensuring that the human and environmental costs of disposal are minimized.

As is the case for the Biological Weapons Convention, the CWC has an immediate bearing on the protection of the natural environment during armed conflict, as chemical substances may have particularly direct and severe impacts on the environment. In addition, the CWC has effective mechanisms in place that may provide a model for monitoring, verification and non-compliance mechanisms in other treaties.

- **Nuclear weapons**

[See **Case No. 62**, ICJ, Nuclear Weapons Advisory Opinion]

Nuclear weapons are indiscriminate by nature and the damage they cause to human populations and the environment they live in is immense.

The use of nuclear weapons must be considered in reference to three treaties. The first is the 1963 Partial Test-Ban Treaty, which does not regulate the conduct of warfare as such, but instead prohibits States from undertaking any nuclear test or explosion “at any place under its jurisdiction or control.” Although this treaty is mainly concerned with nuclear testing and restricted to the atmosphere, outer space and the marine environment, it ensures that nuclear testing does not cause harm to the identified areas and, importantly for this report, to marine ecosystems.

The second treaty of interest is the 1968 Nuclear Non-Proliferation Treaty, which does not explicitly prohibit the use of nuclear weapons in armed conflict *per se*, but does prohibit signatory States from “manufacturing or otherwise acquiring nuclear weapons or other nuclear explosive devices.” By seeking complete disarmament and non-proliferation, the treaty anticipated that the issue of the *use* of nuclear weapons would be rendered a moot point.

The third treaty, and the most significant, is the 1996 Comprehensive Nuclear-Test-Ban Treaty, which seeks to secure an end to all nuclear weapons testing and other forms of nuclear explosions. By prohibiting all nuclear explosions, the treaty constitutes a holistic measure of nuclear disarmament and non-proliferation and could, as noted in its Preamble, “contribute to the protection of the environment.” The Comprehensive Nuclear-Test-Ban Treaty has, however, yet to enter into force. Only 35 of the 44 Annex II States that are required to ratify it to ensure that it enters into force have done so, and three of the nine countries yet to ratify it have not even become signatories. Nevertheless, a total of 150 UN Member States have ratified the treaty to date, emphasizing widespread worldwide support for banning nuclear explosions, which negatively impact human health and the environment.

It is also important in this respect to mention regional nuclear disarmament treaties. The 1967 Tlatelolco Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean is a key regional instrument ratified by all 33 States in Latin America and the Caribbean. The Treaty entered into force in 1969, and forbids the testing, use, possession, fabrication, production or acquisition by any means of all nuclear weapons in this region. Under the treaty, member States have over the years adopted resolutions addressing radioactive pollution and the environment. Other regional instruments include the 1985 Treaty of Rorotonga (establishing a nuclear free zone in the South Pacific), the 1995 Treaty of Bangkok for South-East Asia, the 1996 Treaty of Pelindaba for Africa, the 2006 Treaty of Semipalatinsk for Central Asia, and the 1959 Antarctic Treaty.

#### – Landmines and cluster bombs

[See **Document No. 14**, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention); **Document No. 17**, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; **Document No. 18**, Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention); and **Document No. 19**, Convention on Cluster Munitions]

[...]

In addition, Articles 51(4) and (5) of Additional Protocol I to the Geneva Conventions, which prohibit indiscriminate attacks, can be of particular relevance when encouraging States to refrain from using landmines in warfare, as such weapons are indiscriminate by nature and pose particularly injurious long-term risk to both humans and animals.

[...]

In concluding this analysis of IHL treaty law addressing the means and methods of warfare, attention should be given to the absence of treaties explicitly banning or otherwise addressing the use of depleted uranium munitions and other recently developed weapons. This being said, Article 36 of Additional Protocol I to the Geneva Conventions, which is binding on 168 States, requires them to ensure that any new weapon, or means or method of warfare, does not contravene existing rules of international law. IHL also prohibits weapons and means or methods of warfare that cause superfluous injury or unnecessary suffering, have indiscriminate effects, or cause widespread, long-term and severe damage to the natural environment.

### ***Protection of civilian objects and property***

The provisions that govern the protection of civilian objects and property could provide a more effective legal basis for protecting the environment during armed conflict than those protecting the environment *per se*, at least under existing IHL treaty law. Relevant provisions are as follows:

#### **– The Hague Regulations (1907)**

The Hague Regulations attached to the 1907 Hague Convention IV on the Laws and Customs of War on Land stipulate that it is forbidden “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.” As noted earlier, this “enemy property” could include protected areas, environmental goods and natural resources, which would as such be indirectly protected by the Hague Regulations.

#### **– The Geneva Convention IV (1949)**

[...] In a reiteration of the Hague Regulations rule on enemy property, Article 147 lists “extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly” among the acts constituting “grave breaches” of the Convention.

Furthermore, in the specific context of occupation, Article 53 states that “any destruction by the Occupying Power of real or personal property belonging individually or collectively to individuals, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”

As natural resources are generally considered civilian property, belonging collectively to private persons, their destruction could be considered to violate Articles 147 and 53 of the Geneva Convention IV, if not justified by imperative military necessity.

#### **– Additional Protocol I to the 1949 Geneva Conventions (1977)**

The “basic rule” for the protection of civilian objects against the effects of hostilities is enunciated under Article 48 of Additional Protocol I to the Geneva Conventions. Article 48 provides indirect protection for the environment by stating that “in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and



combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” This basic rule is an explicit affirmation of the general principle of distinction. This principle is re-emphasized within the rule contained in Article 52, which explains what constitutes a military objective as opposed to a civilian object.

Article 54(2) of Additional Protocol I also indirectly protects the environment by prohibiting attacks against “objects indispensable to the survival of the civilian population,” meaning objects that are of basic importance to the population’s livelihood. Natural resources such as agricultural land, cattle, and drinking water could in many instances be seen as such means of survival. This provision is generally considered to reflect customary international law as its violation would constitute a grave breach of IHL if it amounted to any of the acts enumerated within Article 147 of Geneva Convention IV. In addition, Article 54(3)(b) applies even when farmlands and foodstuffs are used in direct support of military action, if their destruction were to cause starvation or forced relocation of the civilian population. The effect of this provision is also to exclude, except in defence of a State’s own territory, recourse to scorched-earth policies that cause severe environmental destruction.

Finally, the precautionary measures contained within Article 57, which also recall the proportionality principle, add protection for the environment by discouraging acts that could possibly impact the environment.

– **Additional Protocol II to the 1949 Geneva Conventions (1977)**

Additional Protocol II specifically addresses issues of protection during non-international armed conflict (NIAC). [...] The provisions that indirectly address environmental protection are Article 14 on civilian objects, Article 15 on installations containing dangerous forces and Article 16 on cultural objects and places of worship. Article 14 prohibits attacks on objects indispensable to civilian populations, including foodstuffs, agricultural land, crops, livestock, drinking water installations and irrigation works. It thus replicates for internal conflicts the protection provided by Article 54 of Protocol I applicable to international armed conflict (IAC). [...]

***Protection of cultural objects***

– **The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols (1954 and 1999)**

[See Document No. 10, Conventions on the Protection of Cultural Property]

[...]

– **Additional Protocols I and II to the 1949 Geneva Conventions (1977)**

The protection of cultural property is reinforced by provisions contained in the two 1977 Additional Protocols to the 1949 Geneva Conventions, namely Articles 38, 53 and 85 of Additional Protocol I and Article 16 of Additional Protocol II. Though they do not mention the environment *per se*, these provisions could be useful in providing legal protection for the natural environment during armed conflict.

**Protection of industrial installations containing dangerous forces****– Additional Protocol I to the 1949 Geneva Conventions, Article 56**

[...] Oil fields and petrochemical plants are not explicitly addressed here (and may even have been intentionally excluded). As a result, the provision does not cover the attacks on oil fields and petrochemical facilities that occurred, for instance, during the 1990-1991 Gulf War, the 1999 Kosovo conflict, or the 2006 Israel-Lebanon conflict. It should be noted, however, that oil fields and petrochemical plants can be protected by the general principle of distinction comprised within the *chapeau* rule under Article 52.

As is the case under Article 54(2), the prohibition set forth in Article 56 applies even when the target (dams, dykes and nuclear electrical generating stations) constitutes a military objective, except in the restricted cases referred to under Paragraph 2.

**– Additional Protocol II to the 1949 Geneva Conventions,**

Article 15 of Additional Protocol II extends the protections contained in Article 56 of Protocol I to non-international armed conflicts [...].

**Limitations based on targeted areas****– Territories under occupation**

[...]

Article 55 of the 1907 Hague Convention IV sets forth the rules of usufruct for the occupying power. It clarifies that the occupying power has the right to “use” the occupied property, but not the right to damage or destroy it, except in the circumstances of military necessity. Similarly, Article 53 of the 1949 Geneva Convention IV prohibits destruction by the occupying power of property individually or collectively owned by inhabitants of the occupied territories, except in the circumstances of absolute military necessity.

The special status of occupation and the regulations attached to it, such as those provisions qualifying the occupants as “usufructuary,” may offer some guiding principles for dealing with similar situations in the context of non-international armed conflict (NIAC). The over-extraction and depletion of valuable natural resources has become an all too common feature of NIACs, with revenue generated from this often illegal exploitation serving to finance armed forces and their weaponry. Recent research shows that over the last twenty years, at least eighteen civil wars have been fuelled by natural resources such as diamonds, timber, minerals and cocoa, which have been exploited by armed groups in Liberia, Angola and the Democratic Republic of Congo, for example.

**– Neutral territories**

[...]

With respect to the environment, this customary principle is articulated in the ICRC *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict* [See Part A of this case], where it is stipulated that “obligations relating to the protection of the environment towards States not party to an armed

conflict are not affected by the existence of the armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict.”

– **Demilitarized zones**

Formally identified “neutralized” or “demilitarized” zones between belligerents are also subject to dedicated protection under Article 15 of the Geneva Convention IV and Article 60 of Additional Protocol I. Violation of this obligation constitutes a grave breach of IHL if it is carried out under the circumstances set forth in the *chapeau* requirements under Article 85 of Protocol I.

A few other areas are specifically protected from warfare and its impacts, including Antarctica – by the 1959 Antarctic Treaty – and outer space – by the 1967 Outer Space Treaty.

It thus follows that one option to enhance the protection of particularly valuable protected areas or dangerous environmental hotspots would be to formally classify them as “demilitarized zones.” [...]

## 2.3 Customary international humanitarian law

[...]

[See Case No. 43, ICRC, Customary International Humanitarian Law]

The ICRC 2005 multi-volume explanation of customary IHL discusses 161 “rules” that the authors consider to represent customary international humanitarian law. Three of these rules relate particularly to natural resources, and specify the implications of the general principles of IHL for environmental protection during armed conflicts. These are:

Rule 43. The general principles on the conduct of hostilities apply to the natural environment:

- A. No part of the natural environment may be attacked, unless it is a military objective.
- B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.
- C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited (applicable in IAC and NIAC).

Rule 44. Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions (applicable in IAC and arguably in NIAC).

Rule 45. The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is

prohibited. Destruction of the natural environment may not be used as a weapon (applicable in IAC and arguably in NIAC).

The ICRC rules offer an articulation of the principles of distinction, proportionality and military necessity in relation to the natural environment, and emphasize the importance of taking a precautionary approach in the absence of scientific certainty about the likely effects of a particular weapon on the environment. In addition, the rules expressly prohibit the use of means of warfare that are intended or can be expected to cause significant damage to the environment, requiring Member States to consider the likely environmental repercussions of their military methods.

The difference in applicability of these rules in IAC versus NIAC remains to a large extent open to interpretation. Due to the differences of scholarly opinion, some experts have noted that codifying the existing customary law on this topic could clarify some of the outstanding questions and, in the process, create more definite measures to protect the environment in armed conflict.

## **2.4 Soft law related to the corpus of international humanitarian law**

[...]

### ***UNGA Resolution 47/37 (9 February 1993)***

[...]

### ***UNGA Resolution 49/50 (17 February 1995)***

In 1994, the ICRC submitted a proposal to the UN General Assembly in the form of *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict* [See Part A of this case]. At its 49th Session, the General Assembly, without formally approving them, invited all States to disseminate the guidelines widely and to “give due consideration to the possibility of incorporating them” into their national military manuals. These guidelines have also been published as an annex to the Secretary-General Report A/49/323 *United Nations decade of international law* (1994).

### ***UNGA resolutions considering nuclear disarmament***

[...]

### ***UNGA resolutions addressing depleted uranium-related issues***

Guided by the purposes and principles enshrined in the Charter of the United Nations and the rules of IHL, the General Assembly has started addressing the issue of depleted uranium. Since 2007, it has adopted two resolutions aimed at assessing both the human and environmental impacts of depleted uranium armaments. UNGA Resolutions 62/30 of December 2007 and 63/54 of January 2009 request the Secretary-General to produce reports on the issue.

UNGA Resolution 63/54 clearly acknowledges the importance of protecting the environment and reads, in part, that because “humankind is more aware of the need to take immediate measures to protect the environment, any event that could jeopardize such efforts requires urgent attention to implement the required measures.” The resolution also recognizes “the potential harmful effects of the use of armaments and ammunitions containing depleted uranium on human health and the environment.”

These two resolutions could eventually lead to the codification in treaty law of norms protecting both human health and the environment from depleted uranium armaments, thus addressing the current major gap in treaty law regarding the use of such weapons.

### ***UNGA Resolution 63/211 (19 December 2008)***

[...]

### ***The San Remo Manual (1994) and UNGA Resolution 2749***

[See Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea]

[...]

## **2.5 Case law**

Generally speaking, cases addressing the responsibility and liability of States for violations of international humanitarian law (IHL) have been extremely rare. Similarly, there have been very few interpretations by authoritative judicial bodies of international humanitarian law and international criminal law norms relating to environmental protection.

However, several international cases provide relevant guidance and clarification in relation to the protection of the environment during armed conflict. Indeed, judicial decisions are helpful for treaty interpretation and as evidence of customary law. In addition, case law reveals a number of practical gaps in the existing international legal framework governing environmental protection during armed conflict.

### **Case law of the International Court of Justice (ICJ)**

[...]

### ***ICJ Advisory Opinion on Nuclear Weapons (1996)***

[See Case No. 62, ICJ, Nuclear Weapons Advisory Opinion]

[...]

### ***ICJ Decision on Armed Activities on the Territory of the Congo (DRC v. Uganda) (2005)***

[See Case No. 236, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo]

In this case, the ICJ found that the Republic of Uganda had failed to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering

and exploitation of Congolese natural resources, and therefore had violated its obligations of vigilance under international law (particularly stated in Article 43 of the Hague Regulations of 1907), which resulted in a duty of reparation. This case therefore recognized that acts of looting, plundering and exploitation by occupying powers are illegal, that there exists a State duty of vigilance for preventing such acts from occurring, and that reparations are due for damage to natural resources in the context of an armed conflict.

### **Decisions of international tribunals and the United Nations Compensation Commission (UNCC)**

[...]

#### ***ICTY Decision on Yugoslavia v. NATO (1999)***

[See Case No. 226, Federal Republic of Yugoslavia, NATO Intervention]

[...] Although the prosecutor ultimately found no basis for opening a criminal investigation into any aspects of the NATO air campaign, the ICTY did examine the question of responsibility for environmental damage and use of depleted uranium from an environmental perspective, thereby establishing a precedent that merits attention.

The report of the Special Committee established to study the case stated that “the NATO bombing campaign did cause some damage to the environment,” mentioning the bombings of chemical plants and oil installations. Second, it observed that Article 55 of Additional Protocol I “may reflect current customary law” and, therefore, may be applicable to non-Parties to the Protocol (such as France and the United States). With regard to the substance of the legal provisions contained in this Protocol, the committee held that: “Articles 35(3) and 55 have a very high threshold of application. Their conditions for application are extremely stringent and their scope and contents imprecise. Consequently, it would appear extremely difficult to develop a *prima facie* case upon the basis of these provisions, even assuming they were applicable.” The Special Committee report maintained that the NATO air campaign did not reach the threshold of Additional Protocol I.

The report then analysed the question of environmental damage in light of the customary principles of military necessity and proportionality, stating that: “[E]ven when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to the economic infrastructure and natural environment with a consequential adverse effect on the civilian population. Indeed, military objectives should not be targeted if the attack is likely to cause collateral environmental damage which would be excessive in relation to the direct military advantage which the attack is expected to produce.”

With respect to the principle of proportionality, the report stressed that the importance of the target must be assessed and weighed against the incidental damage expected; the more important the target, the greater the degree of risk to the environment that may be justified. After analysing Article 8(2)(b)(iv) of the ICC Rome Statute, the report stated that: “In order to satisfy the requirement of proportionality, attacks

against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate. At a minimum, actions resulting in massive environmental destruction, especially when they do not serve a clear and important military purpose, would be questionable. The targeting by NATO of Serbian petrochemical industries may well have served a clear and important military purpose."

After dwelling upon the imprecise nature of the notion of "excessive" environmental destruction and the fact that the present and long-term environmental impact of NATO actions was "unknown and difficult to measure," the report set forth a detailed list of points that it considered necessary to clarify in order to evaluate claims of intentional excessive environmental damage: "It would be necessary to know the extent of the knowledge possessed by NATO as to the nature of Serbian military-industrial targets (and thus the likelihood of environmental damage flowing from their destruction), the extent to which NATO could reasonably have anticipated such environmental damage (for instance, could NATO have reasonably expected that toxic chemicals of the sort allegedly released into the environment by the bombing campaign would be stored alongside that military target?), and whether NATO could reasonably have resorted to other (and less environmentally damaging) methods for achieving its military objective of disabling the Serbian military-industrial infrastructure."

On the basis of these considerations, the report concluded that an investigation into the collateral environmental damage caused by the NATO bombing campaign should not be initiated. Concerning the use of depleted uranium projectiles by NATO aircraft, the report observed that there is currently no specific treaty banning the use of such projectiles, but that principles such as proportionality are also applicable in this context. Referring to the information available regarding environmental damage from depleted uranium, the report recommended that the Office of the prosecutor should not commence investigations into the use of depleted uranium projectiles by NATO.

[...]

### ***The United Nations Compensation Commission (UNCC)***

[See Case No. 180, UN Compensation Commission, Recommendations]

[...]

During the war, the extensive environmental damage caused by Iraq was widely condemned by the international community. In addition, the damage caused outside the territory of Iraq was declared to have violated Article 23(g) of the Hague Regulations regarding the destruction of enemy property. As a result, UNSC Resolution 687 stated in Paragraph 16 that "Iraq is liable under international law for any [...] damage, including environmental damage and the depletion of natural resources [...] as a result of Iraq's unlawful invasion and occupation of Kuwait." Paragraph 18 of the Resolution created a fund to provide compensation for claims that came under Paragraph 16, and established the UNCC to administer it.

[...]

One way to strengthen the international legal framework governing environmental protection during armed conflict would be to broaden the principles and approach taken by UNSC Resolution 687 creating the UNCC, by establishing a permanent body in charge of evaluating and possibly compensating for wartime environmental damage. Such an approach would be more effective and legally sound if it were grounded in the clear legal basis that environmental damages are illegal *per se*, and directly breed State or criminal liability.

## 2.6 Conclusions on international humanitarian law

The provisions of IHL governing environmental protection during armed conflicts constitute a disparate body of treaty law, customary law, soft law and general principles that have developed over decades to respond to a wide range of practical problems and moral concerns. A number of significant gaps and difficulties remain to be reconciled if the protection of the environment is to be enhanced within the IHL framework.

First, while most recent and ongoing conflicts are internal, the body of IHL treaty and customary law governing non-international armed conflict (NIAC) is relatively limited. There is no treaty norm that explicitly addresses the issue of environmental damage during NIAC, and obligations applicable in this context are generally far less restrictive than for international armed conflicts (IAC). The principle treaty law regulations for NIAC are contained within Common Article 3 to the four Geneva Conventions and Additional Protocol II. Common Article 3 merely restates basic protections for persons *hors de combat*, and is of little direct relevance to environmental protection, while Protocol II does not provide detailed limitations regarding methods and means of warfare. In addition, as noted by one expert, “instances of Protocol II’s application have been rare,” mainly due to the fact that few States ratified it before the late 1980s or 1990s. Protocol II could not, therefore, be applied as a source of treaty law in the many internal conflicts that occurred during that period, including in Angola, Haiti, Somalia and Sri Lanka. General principles of IHL and customary law may be of assistance in filling this gap of applicable law to internal conflicts.

[...]

Second, many rules contained within treaties are not universally applicable to all States (particularly to those States that are not a Party to them) unless they have entered the corpus of customary international law. This is a major limitation for the practical relevance and effectiveness of the treaties highlighted above, particularly in light of the fact that many have not been ratified by some of the major military powers, resulting in disagreement regarding their implementation and enforcement. It is therefore essential that all States be encouraged to become signatories to the major treaties and to ratify them with haste to ensure that IHL protection for the environment is real and effective.

Third, few norms of IHL explicitly address the issue of environmental protection, and in most cases the environment is better protected indirectly by other norms regulating the means and methods of warfare or protecting civilian persons and objects. The



analysis has shown that the indirect means provide significantly more comprehensive protection than the norms of IHL that protect the environment *per se*.

Fourth, a significant criticism of the entire IHL framework centres on the lack of State adherence to IHL norms even where they are signatories to the relevant treaties. It has all too often been observed that even where applicable environmental provisions do exist, States decide not to enforce them for political or military reasons. The ICRC *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict* (1994) provide guidance for implementation of these norms of IHL in military education.

Finally, aside from the International Criminal Court [...], and ad hoc criminal tribunals, there are few effective mechanisms for enforcing provisions of IHL, particularly relating to damage to the environment.

A key solution to these issues involves the codification of environmental protection into a coherent and practical instrument that considers both IAC and NIAC. Such an instrument could be developed on the basis of updated ICRC guidelines on protecting the environment during armed conflict, and with the expertise of the International Law Commission (ILC). In the absence of such a practical instrument, the protection of the environment remains governed by a disparate body of law that requires elaboration and consolidation.

### DISCUSSION

1. a. Which approach to the environment has traditionally been adopted by IHL?
- b. Is every object that composes the environment necessarily a civilian object, which may therefore not be attacked, independently of any specific rule on the environment? Why is this not sufficient protection for the environment?
- c. Traditionally the protection of the environment has been linked to the protection of the civilian population and civilian objects. Would you say that this approach has changed?
2. Would you qualify the provisions on the environment in the Hague Conventions, the Geneva Conventions and the latter's Protocols as being insufficient?
3. Can the environment or parts of it become a military objective as defined in Protocol I? Under which conditions? May those parts be attacked? (P I, Arts 35(3), 52(2) and 55)
4. a. What is the purpose of the ENMOD Convention? Which element does its Art. I add to the protection of the environment provided by IHL?
- b. Does the ENMOD Convention also cover attacks against military objectives? Do the provisions protecting the environment in Protocol I also cover attacks on military objectives?
- c. In light of the recent State practice would you say that the ENMOD Convention is necessary? Has the environment as such been used as a weapon since the adoption of that Convention in 1977? If not, does your answer prove that the Convention is not necessary?
5. Since Art. 35(3) of Protocol I focuses on the environment, do you consider Art. I of the ENMOD Convention necessary? Do you think that the thresholds of applicability for Art. 35(3) of Protocol I and for Art. I of ENMOD are the same? Would you differentiate between the two articles in terms of applicability?

6. Does the terminology used in Art. I of the ENMOD Convention and Art. 35(3) of Protocol I, namely that effects (or, respectively, damage) must be “widespread, long lasting or [respectively, long-term and] severe”, have the same meaning?
7. To what extent may the articles protecting the environment be bypassed by invoking military necessity? Is there a difference between the provisions of Protocol I and Art. I of the ENMOD Convention in that regard?
8. Would you consider the articles concerning the environment as being customary or emerging customary international law? How could they become customary international law? Only through practice in armed conflicts? Or also through general State practice concerning the protection of the environment?
9. Do you agree that the protection of the environment is less codified in non-international armed conflict? Are States allowed to damage the environment inside their own territory? Should the rules applying in international armed conflict be applied by analogy in non-international armed conflict? Or are the existing rules sufficiently protective in non-international armed conflict?
10. Do you think there is a need for new international rules directly protecting the environment? Or do you think that the existing rules are sufficient, but need to be better implemented? To what extent could it be counter-productive to start a new process of codification of new rules?

## Document No. 39, ICRC, Protection of War Victims

[Source: Report on the Protection of War Victims, Prepared by the ICRC, Geneva, June 1993; footnotes omitted.]

[...]

## 2. Prevention

Armed conflicts cause unspeakable suffering, whatever is done to prevent it and however well international humanitarian law is respected. It is therefore vital to encourage and intensify all efforts to tackle the root causes of conflicts, such as poverty, inequalities, illiteracy, racism, the uncontrolled growth of huge cities, the collapse of governmental and social structures, corruption, crime organized on a world scale, drug trafficking and arms dealing...

To encourage *compliance with international humanitarian law* is not enough. Such encouragement cannot serve as an excuse to ignore those fundamental problems, which are moreover not only the source of conflicts but often also stand in the way of respect for that law. How indeed should young people whose sole education has been that of the streets understand the underlying principles of humanitarian law and respect humanitarian work?

**Neither the present document nor the International Conference for the Protection of War Victims have any ambition of addressing problems relating to the root causes of armed conflicts. It is nevertheless essential to stress that efforts to tackle those causes and efforts to protect the victims of war are mutually complementary.**

The measures described below are therefore intended, to be taken in peacetime, to ensure that international humanitarian law will be respected if an armed conflict breaks out. They may well seem unspectacular, but they stem from the conviction that the most wonderful statements have no effect unless they are accompanied by persistent, long-term work.

### 2.1 Promotion of the international humanitarian law treaties

[...]

Now that the Geneva Conventions enjoy almost universal recognition, it would be desirable if the same could be achieved for the whole range of international humanitarian law treaties and particularly the Additional Protocols of 1977. It is only through such recognition that the humanitarian rules to be applied in armed conflicts can be laid down clearly and without ambiguity. Admittedly, many of the rules codified in the 1977 Protocols may be considered international customary law, but there are still grey areas. Since international humanitarian law, which applies in situations of armed conflict and therefore fraught with tension and distrust between the belligerents, suffers if there is any uncertainty as to the applicability of its rules, it is of paramount

importance for its security and credibility that the rules taught during military training should be the same everywhere.

**All States which have not yet adopted one or other of the international humanitarian law treaties are asked to examine or re-examine the possibility of doing so without delay**

[...]

It is recommended that efforts be made to promote all international humanitarian law treaties and that all States party thereto should actively support such efforts.

Finally, note should be taken of the important task assigned to the International fact-finding Commission set up in accordance with Article 90 of 1977 Additional Protocol I. As recognition of the general competence of this Commission requires a formal declaration of acceptance, it is essential that all the States should make such a declaration and communicate it to the depositary State, either on ratifying or acceding to the Protocol or at a later date. The Commission will not be able to play an active role unless it is widely recognized. However, only 34 States have hitherto made the aforesaid declaration. [...]

## ***2.2 Adoption in peacetime of national implementation measures***

The virtually universal acceptance of the Geneva Conventions of 1949 and the fact that a large number of States are party to their 1977 Additional Protocols are not enough to guarantee the effective application of these treaties, owing to the inadequacy of laws and other measures adopted by States at national level to implement them.

Certain crucial obligations undertaken by States may well remain a dead letter if the necessary legislative and practical measures are not adopted, for it is by adopting such measures, in particular, that States demonstrate their genuine intention to fulfil their commitments.

Concern for this situation has prompted the international community to encourage the ICRC on various occasions to promote the adoption of such laws and measures. The ICRC accordingly followed up previous steps to that effect by writing to the States party to the Geneva Conventions of 1949 to request information with regard to the measures they had taken or were planning to take, at national level, to ensure that international humanitarian law was effectively applied. These written representations, some of which were made in conjunction with the National Red Cross or Red Crescent Societies, also request ideas as to mechanisms that could be used more effectively to help States fulfil their obligations.

On the basis of reactions to date – about one third of the States party to the Geneva Conventions have replied to the written enquiry – certain domains of international humanitarian law, are considered to be of greatest importance, in particular the repression of grave breaches, the protection of the red cross and red crescent emblem, and dissemination of international humanitarian law. National measures have also been adopted in other areas such as the definition of protected persons, safeguards for humane treatment, the protection of medical units and staff, the disciplinary system

within the armed forces ensuring respect for international humanitarian law, and the training of legal advisers in these forces. The replies also indicated that although most States generally welcomed assistance in this field, they were not in favour of more compulsory systems or systems that might imply monitoring of the measures adopted.

The ICRC intends to continue collecting information in order to identify the most appropriate means of helping States to fulfil their obligations. [...]

### ***2.3 Spreading knowledge of international humanitarian law***

The dissemination of knowledge of international humanitarian law must imperatively begin in peacetime, for there is no chance of it being applied unless it is known by those whose duty it is to comply and ensure compliance with it. The importance of such work was recognized at the outset of modern international humanitarian law. It was accordingly included as an obligation in the Geneva Conventions of 1949 and their Additional Protocols of 1977.

The international community has furthermore mandated the ICRC to participate in this effort. It performs this task with the particular support of the National Red Cross and Red Crescent Societies and their Federation.

Activities to disseminate international humanitarian law have indisputably been considerably intensified over the past fifteen years. [...]

For its part, the ICRC has set up a structure specially for dissemination and has been able to raise the level of awareness of international humanitarian law in the various parts of the world through its network of regional delegations and with the support of the National Red Cross or Red Crescent Societies and their Federation. Thousands of seminars, courses, and exhibitions have been organized at both national and regional level for such diverse audiences as soldiers and officers, political and academic circles. The ICRC has also produced or helped to produce a significant range of teaching materials, adapted to various cultures. It has a list of over a thousand publications, many of them available in a large number of languages. Care has been taken to ensure that materials are suited to the level of education concerned: children are not approached in the same way as academics, or soldiers in the same way as senior officers.

Between 1988 and 1991 the International Red Cross and Red Crescent Movement as a whole led a World Campaign for the Protection of Victims of War which increased the awareness of the public and of governments throughout the world.

However, although a number of States have realized the importance of disseminating international humanitarian law and have begun to make the necessary arrangements, the results are still far from satisfactory.

**The ignorance of humanitarian rules shown by members of the armed forces or armed groups in certain recent conflicts, or their disregard for those rules, should induce every State to consider what precautions it is taking to avoid such excesses. The International Conference for the Protection of War Victims should serve as an opportunity to examine this question seriously and without complacency.**

Three subjects have been singled out here for closer consideration, namely the coordination of efforts to spread knowledge of international humanitarian law with other efforts of a similar nature, training for the armed forces, and the role of the media.

### 2.3.1 *The coordination of efforts to spread knowledge of international humanitarian law with other educational activities aimed at preventing conflicts*

It is imperative to begin spreading knowledge of the principles and basic rules of international humanitarian law in time of peace and, at national level, to have a well thought out programme of instruction to do so. The work carried out among *young people* in particular should pave the way for specific courses in universities and for instruction within the armed forces.

It is only logical that the work undertaken to spread knowledge of international humanitarian law, with the aim of preventing excesses in armed conflicts, should go hand in hand with educational efforts to prevent the conflicts themselves.

In this context, dissemination of the *principles contained in the Charter of the United Nations and education in human rights* come particularly to mind. It is indispensable that greater attention be given to these domains, placing special emphasis on young people and on harmonization of such work with activities to spread knowledge of international humanitarian law. How can we talk about the eventuality of armed conflicts without simultaneously saying that the international community nowadays rejects this means of settling differences? Should we not point out that strict respect for human rights is the best way of avoiding armed conflicts? Should there not be a special effort to explain that human rights and international humanitarian law are complementary and not mutually contradictory?

In other aspects of prevention, the International Red Cross and Red Crescent Movement can play a role, though a more modest one.

States should be helped in such work mainly by other intergovernmental institutions, in particular UNESCO, or non-governmental organizations. [...]

### 2.3.2 *Training for the armed forces*

In countries where the armed forces are taught the rules of international humanitarian law, this subject is often a marginal item in military training programmes. However, unless international humanitarian law becomes an integral part of regular combat training and a key constituent of training programmes at all levels in the chain of command, it can hardly be expected to have a favourable impact on the conduct of members of the armed forces engaged in the field. International humanitarian law considerations have already been experimentally included, with success, in the military decision-making process during certain military manoeuvres. [...]

With the rapid development of different types of armed conflict, the armed forces are increasingly engaged in operations to maintain or restore law and order. This new role calls for particular attention to the training of the armed forces, in view of the basic differences between traditional combat missions and the tasks of maintaining law and

order within their own country. In certain cases, such training should also be given to the police.

The ICRC recently organized a meeting of experts on the teaching of international humanitarian law to the armed forces, at which the majority of participants were senior officers from a variety of countries. The meeting concluded that it was important to increase the coordination of activities in this domain at the national, regional and international level. In particular, regional experience in Asia, Africa and Latin America suggests that greater cooperation could be established between armed forces and, more especially, between people responsible for instruction in international humanitarian law. [...]

### 2.3.3 *The role of the media*

The media have a key part to play during conflicts, as they are then the main means of communicating with the population. Their role consequently merits extensive consideration.

**What can the media be expected to do to alert governments and the general public to tragic but forgotten situations? How can they help to spread knowledge of the humanitarian rules both in time of peace and in time of war? What is their duty as regards the denunciation of excesses? How should manipulation of the media for political purposes, and in particular to exacerbate hatred between diverse communities, be avoided? How can they avoid trivialising horror? Where exactly does the independence of the media with regard to the previous questions begin and end?**

**Although these various subjects have already been considered to some extent, they should be discussed in even greater detail with senior media management and with journalists. [...]**

## 3. **Action taken despite all adversity**

It has been pointed out that the proliferation of armed conflicts and the course they are taking are threatening humanitarian values, and that everything must be done to protect them. [...]

Three interrelated issues call for particular attention here: the action to be taken to ensure respect for international humanitarian law; the coordination of humanitarian action; and the safety of those engaged in humanitarian work.

### **3.1 Action to be taken to ensure respect for international humanitarian law**

In many recent armed conflicts, the difficulties encountered in applying international humanitarian law have been so great that even its underlying philosophy has been called into question.

International humanitarian law is based on the principle that parties who can find no other way of settling their differences other than by the use of force will agree to

observe certain humanitarian principles during the conflict, irrespective of the merits of the cause being defended.

This approach is to the benefit of all the victims of armed conflict. It is therefore in the humanitarian interest of each of the parties to the conflict and does not place them at a political or military disadvantage, since respect for international humanitarian law does not have a significant effect on the military outcome of the conflict.

For this system to work, a number of conditions must be fulfilled. Many of them have been cited in the "Prevention" section of the present document.

The crucial question arising from recent armed conflicts is how the international community should react when the parties to a conflict are unwilling to respect the principles and rules of international humanitarian law, or are incapable of ensuring respect for them.

The International Conference for the Protection of War Victims provides an opportunity to clarify this question.

### *3.1.1 Is there still a place for international humanitarian law within the international system?*

In a long-term assessment it might seem that international humanitarian law will not retain its present importance. The end of the Cold War restored hope of a world at peace based on the universally recognized values laid down in international law and guaranteed by the United Nations, which would itself be backed by an international court whose mandatory authority in international disputes would be recognized by every State, and by armed forces capable of imposing the decisions of such a tribunal. National armed forces would be progressively reduced to the minimum necessary for ensuring internal order.

In the system established by the Charter, as originally conceived and briefly described above, there would no longer be a place for armed conflicts and consequently for international humanitarian law, or for the principle that emergency humanitarian aid should be neutral and independent. This was clear to the International Law Commission at the outset of its deliberations.

Moreover, although the climate of the Cold War at first prevented all necessary arrangements from being made for the system to work well, it is now felt, as expressed recently by the United Nations Secretary-General, that *"...an opportunity has been regained to achieve the great objectives of the Charter"*.

[footnote 20 reads: Report by the Secretary-General entitled: An Agenda for Peace, document A 47/277 S/24111 of June 17, 1992]

It cannot, however, be ignored that the aforesaid objectives are still far from being achieved: the mandatory authority of the International Court of Justice is not recognized by all States, the States themselves still possess powerful armed forces and the United Nations does not have the resources to maintain or, if necessary, restore, an international order devoid of armed conflict and based on international law.



The essential role of the United Nations nonetheless remains the maintenance of peace and the search for a solution to these conflicts. To end them, it must take measures tantamount to a political commitment. Such a commitment, however, carries the risk that one or other of the parties, or even all of them, may reject the United Nations.

**International humanitarian law and the neutrality and independence of humanitarian emergency aid consequently retain all their present significance, and the real difficulties encountered in applying this law cannot possibly be resolved by questioning the principles on which it is based.**

*3.1.2 The obligation of the States to “ensure respect” for international humanitarian law*

When large-scale violations of international humanitarian law occur, the first response must be a redoubling of efforts to make it operative, whatever the difficulties involved.

For this purpose, it is essential to speak with parties to conflict in order to obtain their commitment to respect the obligations placed upon them by international humanitarian law, and to find practical solutions to urgent problems such as access to populations in need or to defenceless prisoners. It is here that the ICRC’s role as a specifically neutral and independent intermediary assumes its full significance. The use of instruments provided by international humanitarian law for its own implementation, in particular, the designation of Protecting Powers or recourse to the International Fact-Finding Commission, must also be encouraged.

This indispensable dialogue is no longer sufficient, however, if grave breaches of international humanitarian law nonetheless persist. Belligerents are accountable for their acts to the entire international community, as the States party to the Geneva Conventions have undertaken to “*respect and ensure respect*” for these Conventions “*in all circumstances*”.

According to the terms of this provision, all the States party to the Geneva Conventions are under the obligation to act, individually or collectively, to restore respect for international humanitarian law in situations where parties to a conflict deliberately violate certain of its provisions or are unable to ensure respect for it.

There are lastly situations in which total or partial failure must be admitted, despite all efforts to ensure application of international humanitarian law. While these must certainly be maintained, violations are of such magnitude that their very continuation would represent an additional threat to peace within the meaning of Article 39 of the United Nations Charter.

It is then the responsibility of the United Nations Security Council to make such an assessment and recommend or decide on what measures are to be taken in accordance with Articles 41 and 42 of the Charter.

These measures differ from those provided for by the Geneva Conventions in that the use of force as a last resort is not excluded, and their purpose is not essentially to ensure respect for international humanitarian law but to tackle a situation which is threatening peace.

### 3.1.3 *Action taken to ensure respect for international humanitarian law*

A large range of options are possible within the framework of *Article 1 common to the Geneva Conventions* and Article 1 of Additional Protocol I. Among these are: diplomatic approaches of a confidential, public, individual or collective nature; encouragement to use the means of implementation provided for in international humanitarian law, such as the designation of Protecting powers and recourse to the International Fact-Finding Commission; and offers of good offices. It should be noted, moreover, that the limits imposed on such action are those of general international law, and that international humanitarian law could not possibly provide a State not involved in the conflict with a pretext for intervening militarily or for deploying forceful measures outside the framework provided for by the United Nations Charter.

Article 89 of Additional Protocol I moreover stipulates that the obligation to act in situations of serious violations of international humanitarian law, either jointly or individually, must be carried out in cooperation with the United Nations. The manner of this cooperation, however, has yet to be defined.

The steps taken to ensure respect for international humanitarian law have a direct effect on the work of organizations such as the ICRC. Their aim may even be to enable or facilitate the work of such organizations.

Conversely, the measures decided upon and recommendations made by the Security Council under Chapter VII of the Charter cannot be considered neutral within the meaning of international humanitarian law, even though their ultimate objective may in some cases include the aim of putting an end to violations of that law. The use of armed force is thereby not excluded. Should such force be used, it will itself be subject to the relevant provisions of international humanitarian law.

**It follows that a humanitarian organization such as the ICRC cannot be involved in the execution of such measures. It is vital for the ICRC to retain its complete independence and with it the possibility to act as a neutral intermediary, between all the Parties to a conflict, including any armed forces deployed or authorized by the United Nations.**

**Independent humanitarian organizations must nonetheless take into account the new situations created by measures adopted by the Security Council and examine with those carrying them out and with all the parties concerned the way in which they can play their traditional role within this context such as care of the wounded, visits to and protection of detainees, transport and distribution of aid to vulnerable persons, transmission of family messages or the reuniting of families, etc.**

As to the implementation of humanitarian measures stemming from decisions taken by the Security Council within its mandate to maintain or restore peace, the role of the subsidiary bodies or specialized agencies of the United Nations, and even that of the peace-keeping forces themselves, are questions which require further consideration first and foremost within the United Nations itself.

To sum up, it is important to mark a clear distinction between action taken to facilitate the application of international humanitarian law (which is primarily based on the consent of the Parties to conflict), and action (which does not exclude coercion) to maintain or restore peace. Recent practice should be analysed in this respect: apart from the undeniable merit of certain actions, the stress placed in peace-keeping or peace-making operations upon activities with purely humanitarian objectives threatens to create a certain confusion which may ultimately prove harmful to humanitarian work and to the objective of restoring peace. It should be noted, moreover, that although attention has been drawn several times, in specific situations, to the obligation to ensure respect for international humanitarian law, the action taken on this basis has not been a conclusive indication of customary practice.

Consequently, consideration must be given to a suitable framework for holding a regular multilateral and structured dialogue to address problems encountered in the application of international humanitarian law, bearing in mind the role that the International Conferences of the Red Cross and Red Crescent can play in this respect.

**Consultation is therefore still necessary to determine the most appropriate methods and framework for implementation of the States' obligation to ensure respect for international humanitarian law, as well as the type of cooperation to be established with the United Nations in the event of serious violations of that law. Further consideration should also be given to the most suitable framework in which a structured multilateral discussion of specific difficulties encountered in its application could take place at regular intervals. The ICRC intends to hold talks on these subjects with government and United Nations experts in 1994.**

### **3.2 Coordination of humanitarian action**

In its desire to contribute more effectively to the growing needs of the victims of armed conflicts and natural disasters, the United Nations has recently established coordinating mechanisms.

Adopted by consensus on 19 December 1991 after several work sessions, General Assembly Resolution 46/182 envisages a series of measures for the improved coordination of humanitarian aid. The most important of these are:

- the appointment of a humanitarian coordinator directly responsible to the Secretary-General;
- the creation of a rotating and automatically renewable fund at the disposal of the specialized agencies during the first phase of an emergency;
- the creation of a permanent Inter-Agency consultative committee for the coordination of humanitarian aid.

**Inter-Agency coordination should help to avoid the overlapping or absence of action in particular situations or areas, thanks to a distribution of tasks according to the respective mandates of the different organizations. It should certainly be continued and further improved, for the magnitude of needs requires combined efforts to overcome them.**

At this stage, however, it must be conceded that this dialogue aimed at a distribution of tasks has not yet enabled emergency action in the theatres of operations to be deployed on the scale and at the speed required. The ICRC itself stood alone for too long – despite the support it received from the Red Cross and Red Crescent National Societies and their Federation and the courageous work of certain non-governmental organizations – in a number of theatres of operation where additional assistance by other agencies would have been necessary. Apart from the quantitative aspect, such assistance would moreover have enabled the specific abilities of each organization to be turned to the best possible account to meet the victims' various needs.

The above-mentioned Resolution 46/182 certainly provides for early-warning systems. In addition, programmes for *disaster preparedness*, such as those of the National Red Cross and Red Crescent Societies under the aegis of their Federation, deserve to be encouraged.

However, the needs are so great that the basic problem is now the inability of the international community to react to those needs when they are identified. Given that there is a primary duty to provide aid on the spot and in good time in the face of atrocities committed against whole populations, to do so is also more economical and effective than to render aid belatedly or to have to receive hundreds of thousands of refugees and displaced persons.

Besides the need for a coordination of tasks, a *concerted approach* is extremely important to improve the effectiveness and quality of emergency humanitarian action. The political, logistic and socio-cultural difficulties that had to be overcome before emergency aid could be completely effective have for too long been underestimated. Action taken without respect for certain ethical principles may well be ineffective, or do more harm than good. Moreover, it enables the authorities to deny the humanitarian organizations which respect those principles the guarantees which they are duty bound to demand as regards the destination of aid and the monitoring of its distribution.

**For this reason, it is important for the International Conference for the Protection of War Victims to encourage the work of the International Red Cross and Red Crescent Movement, in consultation with various nongovernmental organizations, so as to draw up a code of conduct for organizations engaged in emergency aid.**

It is also essential to ensure that the transition from the emergency phase to that of reconstruction and development takes place smoothly, for this decreases or minimizes the dependence of those receiving aid, as well as limiting the duration of relief undertaken by organizations set up specifically for emergency work.

### **3.3 The safety of those engaged in humanitarian action**

[...]

Humanitarian action is dangerous nowadays and the terrible dilemma facing humanitarian organizations is to decide how far their representatives can be put at risk in order to supply women, children, prisoners, sometimes entire populations with

food and medicines or other goods essential for their survival; to provide them with some measure of protection; and to give them comfort and support.

The danger is ever-present and each incident must be analysed and evaluated. Was it an accident? Was it due to the general climate of insecurity? Was it perpetrated by the armed forces or armed groups? Did it arise from the disobedience of a soldier? Did it reflect the unacknowledged desire of the authorities to hinder humanitarian action?

The measures that have to be taken will depend on the reply to these questions: and they might sometimes be more severe than those working in the field would wish.

Confronted by this problem, humanitarian organizations must be stringent and clear-sighted in setting limits to their operations, for there are degrees of risk beyond which they cannot and should not go.

The particular problem of armed escorts has arisen in this connection in certain recent situations. The use of such escorts is obviously regrettable in that according to international humanitarian law the emblem of the red cross or red crescent should be sufficient protection for those who have come to help.

However, international humanitarian law itself does not exclude the arming of medical personnel to protect the convoys for which they are responsible against acts of banditry. Regrettable though they may be, and irrespective of the multiple problems they entail, armed escorts are thus not a means of protection that can immediately be excluded.

An absolute condition for their use by independent humanitarian organizations must be the consent of the relevant party to a conflict or, in situations where the structures of the State are in such disarray that it is difficult to identify the authorities, the absence of formal opposition. It is one thing to protect oneself from banditry with the agreement of the party to a conflict on whose territory the humanitarian operation is taking place, but quite another thing to impose humanitarian convoys by force on a party to a conflict which refuses to grant permission for such convoys.

Obviously, humanitarian organizations have no other weapon than that of persuasion, and cannot themselves envisage imposing convoys by force.

But, as stressed above, an organization such as the ICRC would not be able to participate, not even marginally, in operations imposed by force upon Parties to conflict because they are after all of a military nature even though their aim is humanitarian. An organization which is called upon to act as a neutral intermediary in conflicts must of necessity retain the possibility to give protection and assistance to all the victims, including the potential victims of precisely such an operation.

Lastly, attention must be drawn to the particular problem of spreading knowledge of the humanitarian rules, which has an evident bearing on the safety of humanitarian activity.

It has been mentioned that thorough preparatory instruction in international humanitarian law should be provided in peacetime, but in many of the present conflict situations such prior instruction has not been given, or not sufficiently. The need to save the victims is so imperative that different approaches must be adopted,

calling on the media to issue daily reports on how humanitarian work is conducted, its objectives and progress, and relying on the support of whatever political or military structure still exists.

The problems are even more serious in situations where government structures collapse.

**In such extreme circumstances, to enable humanitarian action to take place it is indispensable to ensure that its nature and purpose are clearly understood. In view of recent experience, particular attention should now be given to means of getting this message across in such circumstances.**

#### **4. Repression and reparation**

The States party to the 1949 Geneva Conventions are obliged to suppress all acts contrary to the provisions of those instruments and to repress any grave breaches. A number of these breaches are listed in the four Conventions and more are found in 1977 Additional Protocol I. All grave breaches are considered as *war crimes*.

Provision must be made in peacetime for the repression of breaches of rules of international humanitarian law; this has a dissuasive effect and therefore constitutes an important preventive measure.

However, the repression of breaches is also considered one of the emergency measures which must be taken in situations where international humanitarian law is violated on a massive scale.

This part of the report first discusses the role of the International Fact-Finding Commission. Although the Commission is not a court of law, its purpose is to facilitate the repression of breaches committed in situations of armed conflict.

The report goes on to examine the necessary penal measures at national and international levels.

##### **4.1 The International Fact-Finding Commission**

Additional Protocol I of 1977 introduced an important additional mechanism for implementing international humanitarian law. Article 90 of the Protocol provides for the establishment of an International Fact-Finding Commission when not less than 20 High Contracting Parties have agreed to accept its competence. This was the case as from June 25, 1991, when the 20 States elected the 15 members of the Commission.

The Commission is a permanent body whose mandate is to enquire into all allegations of grave breaches or other violations of the 1949 Geneva Conventions and of Protocol I, provided that the party alleging the violation and the party against whom the allegation was made have both accepted the Commission's competence. At its first meeting on March 12 and 13, 1992 the Commission expressed its readiness, subject to the agreement of all the parties to the conflict in question, to enquire into other breaches of international humanitarian law, including those committed during non-international armed conflicts.

Any party which has made the declaration accepting its competence may apply to the Commission by right and without special agreement concerning breaches alleged to have been committed by any other party having made the same declaration. Any party which has not made the declaration may apply to the Commission on an ad hoc basis with the agreement of the other party or parties concerned. The Commission will present a report on the result of its enquiry and, if need be, its recommendations to the Parties concerned. It will not report its findings publicly unless requested to do so by all the parties to the conflict.

In its capacity as a permanent and completely independent body, the Commission represents a new and important mechanism for promoting respect for international humanitarian law. Fact-finding in a situation of armed conflict is a means of averting unnecessary dispute and violence. The Commission also affords the belligerents the opportunity to show their willingness to comply with international humanitarian law.

This machinery can only prove its effectiveness, however, if it can function and draw lessons from its experiences. For this reason, it is most important, as mentioned above, for the States which have not yet accepted the competence of the Commission to do so.

**Apart from this important step, it devolves upon the States to avail themselves of the International Fact-Finding Commission in order to enquire, as soon as possible, into all breaches of international humanitarian law, including those committed in non-international armed conflicts. In this way they can show their commitment to this important mechanism of international humanitarian law, and their desire to shed light on alleged breaches of the law.**

It should be pointed out that the role of the Commission is not to pass judgement on States, but to assist them in improving the application of the law.

## **4.2 Penal sanctions**

An important part of international humanitarian law is concerned with the repression of breaches of its rules, given that sanctions are an integral part of every coherent legal system, and that the threat of punishment has a dissuasive effect.

### *4.2.1 National measures*

The war crimes alleged by a party to a conflict almost always involve acts committed by the soldiers of the adverse party. It is therefore useful to point out that the obligation to suppress breaches of international humanitarian law and to repress grave breaches thereof requires the authorities to exercise great vigilance concerning acts committed by members of their own armed forces. As previously mentioned, this implies taking the necessary measures at the national level, especially by introducing these breaches into their penal codes.

In many countries, judges cannot base a judgement directly on international treaty law; the relevant provisions of that law should therefore be incorporated into the national legislation. The introduction of these provisions into the national penal

system is indispensable, moreover, since the Geneva Conventions and Additional Protocol I contain no indication of the penalties to be applied to the various breaches.

To be effective during armed conflicts, moreover, repression must be carried out within a context of strict discipline in the conduct of hostilities and of determination throughout the whole military hierarchy. It is the laxity of commanders that turns soldiers into bandits.

**The International Conference for the Protection of War Victims is invited to emphasize the duty of military commanders to inform their subordinates of their obligations under international humanitarian law, to do everything to avoid breaches of its rules and, if necessary, to repress or report any breaches committed to the authorities.**

#### 4.2.2 *International measures*

[...]

### **4.3 *Reparation for damages***

Additional Protocol I of 1977 contains one short article entitled "Responsibility" (Article 91) which specifies that a party to the conflict which violates the provisions of the 1949 Geneva Conventions or of Protocol I shall, if the case demands, be liable to pay compensation, and that it shall also be responsible for all acts committed by persons forming part of its armed forces.

This article confirms a rule which is today accepted as being part of customary law and was already stated, in almost identical terms, in Article 3 of the Hague Convention No IV of 1907. Moreover, an article common to the four Geneva Conventions emphasizes that no High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred as a result of the commission of grave breaches of the Conventions. This provision entails first of all criminal responsibility, but it also implies that, irrespective of the outcome of an armed conflict, no decision or agreement can dispense a State from the responsibility to make reparation for damages caused to the victims of breaches of international humanitarian law or to pay compensation for those damages.

This responsibility applies first of all in the context of relations among States and has acquired a new dimension with the reaffirmation and development of the rules governing the conduct of hostilities. A State which has laid mines indiscriminately, or which has caused other unlawful damage to the environment, for example, is under the obligation to make reparation (in particular by carrying out mine-clearing operations) or pay compensation.

The problems arising in connection with reparation for damages to persons and individual compensation are more complex for the following reasons:

- Application for reparation or compensation can be made only via the State; this often makes the process and its outcome uncertain.



- Although legally a clear distinction should be drawn between them, confusion may arise between damages attributed to violations of the right to engage in warfare (*jus ad bellum*) and those attributed to breaches of international humanitarian law (*jus in bello*), and thus dilute the responsibility to make reparation.
- The international obligation to provide reparation which exists under international humanitarian law does not apply to non-international armed conflicts. However, in the internal situations brought about by these conflicts the national legal mechanisms which should enable victims to obtain reparation or compensation often fail to function adequately.

In practice there are of course cases in which the victims of breaches of international humanitarian law have obtained compensation.

Nevertheless the vast majority of victims do not receive the compensation to which they are entitled. A shocking example is provided by the innumerable children who have lost a limb to an exploding mine and have not even been granted the modest compensation of an artificial limb.

Of particular interest in this connection is the study by the Sub-Commission of the Human Rights Commission on the right of the victims of flagrant violations of human rights and fundamental freedoms to restitution, compensation and readaptation.

**The International Conference for the Protection of War Victims should make it clear that it wishes procedures to be set up to provide reparation for damage inflicted on the victims of violations of international humanitarian law and award compensation to them, so as to enable them to receive the benefits to which they are entitled.**

**Document No. 40, ICRC, Protection Policy**

[See also **Case No. 41**, ICRC, Assistance Policy]

[Source: International Committee of the Red Cross, *Protection Policy*, *IRRC*, Vol. 90, No. 871 (September 2008); available at [www.icrc.org](http://www.icrc.org). Footnotes omitted.]

**ICRC Protection policy****Institutional Policy****1. Introduction**

The International Committee of the Red Cross (ICRC) has always undertaken activities that aim to protect lives and human well-being and secure respect for the individual. Its mission is to:

*“... protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles ...”*

The ICRC’s multidisciplinary operational response capacity, in which protection and assistance are combined, and its special relationship with international humanitarian law (IHL) make the institution unlike any other. Protection has always occupied a unique place within the ICRC. It is at the core of the organization’s identity and is the motive force of its activities.

[...]

**2. Definitions and framework for action****2.1. Definitions**

The four Geneva Conventions of 1949 refer to “protection” several times without actually defining the term. The Statutes of the International Red Cross and Red Crescent Movement (Movement) introduced the notions of “protection” and “assistance” in 1952. This two-pronged terminology aimed to give specific meaning to what was once termed “humanitarian activities.” “Protection” and “assistance” are intrinsically linked and are inseparable elements of the ICRC’s mandate.

The term “protection” has several literal meanings. Broadly speaking, four spheres of action are involved in protection: political, military or security, legal (including judicial), and humanitarian. Every actor with a role in protecting persons, or an obligation to do so, belongs to one of them.

### *2.1.1. The ICRC's definition of protection*

Protection aims to ensure that authorities and other actors respect their obligations and the rights of individuals in order to preserve the safety, physical integrity and dignity of those affected by armed conflict and other situations of violence.

Protection includes efforts to prevent or put a stop to actual or potential violations of IHL and other relevant bodies of law or norms.

Protection relates firstly to the causes of, or the circumstances that lead to, violations – mainly by addressing those responsible for the violations and those who may have influence over the latter – and secondly to their consequences.

This definition of protection also includes activities that seek to make individuals more secure and to limit the threats they face, by reducing their vulnerability and/or their exposure to risks, particularly those arising from armed hostilities or acts of violence.

Protection remains a constant concern for the ICRC. Promoting and strengthening IHL and other relevant norms and responding to humanitarian needs are, for the ICRC, always linked endeavours. The ICRC combines activities related to the causes of human suffering – especially those that seek to address the causes of violations – with activities to alleviate human suffering, particularly those in response to the consequences of, and the needs created by, such violations.

“Protection” as defined above thus refers to those types of activity that are unambiguously definable as “protection”<sup>3</sup> and to be distinguished from:

- other activities carried out within a protection framework or those that aim to have an indirect protection impact, particularly assistance activities that seek to alleviate or to overcome the consequences of violations;
- the permanent concern of the ICRC to ensure that its action does not have an adverse impact on, or create new risks for, individuals or populations (the precept to “do no harm”).

### *2.1.2. Violations*

Generally, legal rules exist to protect individuals and to limit the use of violence. Figuratively speaking, these rules may be said to be a type of barrier between individuals and the dangers that threaten them: authorities and other actors are responsible for the maintenance of this barrier.

Based on the definition of protection given above, violations play a central role in protection work.

A violation may be defined as disregard for a formal obligation. The ICRC extends the definition to include disregard for widely accepted standards. The concept of “violation” must therefore be interpreted broadly. Besides the failure to comply with binding norms (hard law), it must also include failures to observe non-binding norms (soft law), relevant traditions and customs, the spirit of the law, and humanitarian principles.

This concept of “violation” is quite similar to that of the more widely used “abuse.”

A violation may be intentional, linked to a deliberately repressive practice or strategy. Or it may be unintentional, the result of a technical, material, financial or structural incapacity to provide certain basic services. This definition of “violation” therefore includes not only acts of violence and arbitrary abuse of power or discriminatory practices, but also the failure to fulfil the obligation to assist people in need. Violations can also come in less immediately obvious guises, such as the economic or social ostracism of part of the population.

Violations almost always result in human suffering and humanitarian consequences for the individual or group concerned. It is these consequences that trigger the ICRC’s response.

Authorities bear the primary responsibility for ensuring the application of legal rules and of other widely accepted norms regulating behaviour. They and other actors must acknowledge and respect the rights of individuals and take measures to fulfil their obligations in this regard. Authorities and other actors are in fact, the primary guarantors of respect for the lives and the dignity of individuals, and also directly responsible for ensuring their security.

### *2.1.3. Risks, vulnerability, and the need for protection*

The concept of risk, with regard to violations, concerns the probability of their commission. More generally, “risk” is created by the cumulative impact of:

- the probability of dangers or threats resulting from a deliberate practice of authorities and other actors or from unintended consequences (structural breakdown or incapacity, adverse consequences of even lawful actions during the conduct of hostilities or during law enforcement operations);
- the vulnerability of persons.

In any given context, dangers or threats are assessed on the basis of precedents and probabilities. The interpretation of events – especially the analysis of the means employed by authorities and other actors, or of the goals they pursue – makes possible the identification of population groups potentially “at risk.”

Vulnerability is an inherent element of risk. It reflects the fragility of an individual or group confronted by hazards or aggression. It denotes a deficiency or shortage, although the latter might not be tangible. Put more precisely, vulnerability reflects the incapacity of persons or population groups to offer resistance to arbitrary acts or violence, as well as their lack of access to services. Vulnerability is determined by specific factors such as legal or social situation, or socio-political, economical and personal characteristics (gender and age, for instance).

Protection needs arise when victims, or potential victims, of violations are unable to defend their basic interests and no longer benefit from the basic respect they are entitled to from authorities and other actors who have control over them or on whom they depend.

Protection needs are determined by analysing:

- actual or probable violations – their nature, gravity, scope, frequency and duration;
- actual or potential victims of violations, and the specific vulnerabilities that result from their being the object of violations;
- the urgency to respond, based on the response of authorities and other actors and on the ability of existing institutions and regulatory mechanisms to address key protection issues.

This process for defining protection needs enables the ICRC to:

- determine the severity of a particular crisis: emerging crisis/pre-crisis phase, acute crisis, chronic crisis or post-crisis period;
- make a decision on the extent of its involvement;
- establish priorities.

## **2.2. Framework for protection**

### *2.2.1. Normative framework for intervention*

#### **ICRC responsibilities vary according to the context.**

The ICRC directly responds to protection needs in four types of situation as defined by IHL, the Statutes of the Movement, and its own institutional policies:

- international armed conflicts;
- non-international armed conflicts;
- internal disturbances;
- other situations of internal violence.

In addition, some contexts are of a mixed nature and combine some of the characteristics of the situations mentioned above. ICRC protection work might also be required after the end of one of these situations (to handle direct consequences or during a transition period).

The ICRC's mandate (defined below) unambiguously imposes a responsibility on the organization to act in international armed conflicts; this corresponds with the obligation of States to allow the ICRC to undertake certain activities in these contexts. This responsibility is less explicit, and consequently decreases, as one moves down the list of situations given above. In internal disturbances and other situations of internal violence, the ICRC's main responsibility is to examine each case and to offer its services where appropriate. The less stringent the ICRC's mandate, the more its decision to act is shaped exclusively by humanitarian considerations. In these situations the decision to act is based on the nature and the extent of identified needs; the ICRC also carefully considers the extent to which its action, experience and expertise would provide an added value.

**Action based on a precise framework of reference**

The framework of reference consists of four elements:

- The legal rules and other norms applicable, which are determined by the legal classification of the situation (the main question is whether IHL applies) and other specific aspects of the context, such as whether the country in question has ratified IHL treaties and other instruments of international law.
- The ICRC's mandate. The ICRC has a clearly defined and internationally recognized role to promote implementation of and respect for IHL as well as the development and dissemination of this body of law. The role of the ICRC in relation to other bodies of law and norms depends on the circumstances and the context, and is governed by its institutional policies.

In international armed conflicts, the ICRC also has tasks and operational prerogatives in the field of protection that are set out in the four Geneva Conventions and their Additional Protocols and confirmed by the Statutes of the Movement and by the International Conference of the Red Cross and Red Crescent (International Conference).

With regard to non-international armed conflicts, internal disturbances or other situations of internal violence, the Statutes of the Movement and various resolutions of the International Conference – which constitute a basis for ICRC action – also mention protection activities in a variety of ways.

The Central Tracing Agency (CTA) is a special case. It is an institution that was originally established for situations of international armed conflict in accordance with the provisions of the four Geneva Conventions and Additional Protocol I of 1977, and with the Statutes of the Movement. Its effectiveness and later resolutions of the International Conference have widened the range of its activities to non-international armed conflicts and other situations of violence; more recently, the CTA has begun to assist in restoring family links (RFL) during natural disasters and in other situations in which National Red Cross and Red Crescent Societies (National Societies) are involved.

[See Document No. 34, ICRC, Tracing Service]

The CTA carries out four types of activity:

- activities to benefit persons affected and services that are provided directly to them: RFL, efforts to clarify the fate of the missing, the transfer of people, and the provision of travel and other documents;
- activities and services for the benefit of National Societies, particularly coordination and technical assistance for their tracing services;
- activities for States (e.g. assisting in the establishment of a national information bureaus as provided for by IHL);
- management of data on persons who require individual follow-up.

On the basis of the 1997 Seville Agreement and its 2005 Supplementary Measures adopted by the Council of Delegates of the Movement [See Document No. 32, The Seville Agreement], the ICRC has been given the lead role for activities related to the work of the CTA. Broadly speaking, this covers all activities associated with RFL.

Within the Movement, the ICRC's leading role in protection activities is generally recognized: it develops guidelines, provides technical advice and, where it is operational, coordinates activities.

- The Fundamental Principles of the Movement: humanity, neutrality, independence, impartiality, universality, voluntary service and unity.
- The ICRC's institutional policies and other internal reference documents.

[...]

### *2.2.3. ICRC action is an integral element in creating an environment conducive to the provision of protection*

Ensuring respect for human dignity and for the rights of individuals depends on a number of factors. The ICRC's protection work cannot be conceived and carried out in isolation. It contributes to the creation of a favourable environment, along with other actors. The parties that bear different responsibilities and carry out a variety of activities include the following:

- authorities and other actors concerned: they have the primary responsibility and their omissions/violations trigger the need for separate but complementary action by other bodies;
- States other than that to which the authorities concerned belong: they are responsible for ensuring respect for IHL and for various other duties based on the United Nations Charter;
- external regulatory mechanisms, in particular other members of the international community, the international media, international NGOs, UN agencies and bodies of international justice; and internal regulatory mechanisms, (e.g. associations for the defence of certain groups or communities);
- persons who are, or who may in the future be, affected: circumstances permitting, they can take measures of their own to avoid risks and to protect themselves, their families and their communities.

The ICRC implements protection strategies that are complementary to those of other actors; it also tries to avoid confusion.

[...]

## **5. Operational response and beneficiaries**

The beneficiaries of the ICRC's protection activities – persons deprived of their liberty; the civilian population and other affected persons not in detention; separated family members or persons listed as missing – cannot be rigidly categorized. Affected persons may benefit from both generic (in behalf of all three categories) and specific (in behalf of some but not all categories) protection activities.

### 5.1. Generic activities

The ICRC directly implements its protection action through a wide range of activities in which it has expertise. It carries them out in combinations that are adapted to the problems it encounters, the context, and the available possibilities. [...]

The aim of all ICRC activities is to improve the situation of victims of violations and of persons at risk. However, the organization distinguishes between two major categories of activity:

- activities targeting those responsible for violations: these aim to reduce the threat posed by authorities and other actors and to strengthen the protection they are meant to offer;
- activities developed directly to benefit affected individuals and communities: these aim to reduce vulnerability and exposure to violence.

[...]

Representations – written or oral – are central to the ICRC's protection activities. Bilateral and confidential representations – general or in behalf of particular individuals – form the ICRC's preferred approach. The purpose of these representations is to forcefully remind authorities of their responsibilities: they are basic negotiating tools in protection issues.

The bilateral and confidential approach [...] may not always be successful. When it does not yield tangible results it may be complemented – in exceptional cases, replaced – by discreet representations to third parties (States, international and regional organizations, or various individual personalities or entities who may be able to exercise a positive influence on the situation) or by public denunciation.

Discreet representations to third parties are usually conceived to precede public denunciation [...].

These steps may be accompanied or preceded by other measures such as:

- developing the law and standards
- reminding the parties concerned of applicable law and relevant standards
- promoting knowledge of the law and relevant standards with a view to changing attitudes towards them
- providing structural support for the implementation of the law and relevant standards in order to strengthen the capacity of authorities and other actors to integrate IHL provisions and other fundamental rules protecting persons into domestic legislation and national systems. The objectives of these activities vary according to the authorities in question, who might be:
  - weapon bearers, including security forces (police and other State forces);
  - legislative authorities;
  - educational authorities;
  - detaining or prison authorities;



- judicial authorities;
- health and other authorities with normative responsibilities.

The decision to act and the actual choice of activities depend on the political will of the authorities and other actors to effect lasting change, as well as their degree of structural capacity and cohesion. The potential for problems related to perceptions of the ICRC's activities (particularly in relation to its structural support for law enforcement and systems of judicial administration) is another important consideration.

- acting as a neutral intermediary
- aiming to directly reduce the vulnerability of persons and their exposure to risk through:
  - registration/follow-up of individuals at risk;
  - strengthening the capacity of communities, families and individuals for empowerment and self-protection;
  - risk education;
  - provision of aid and services aimed at reducing exposure to risk.

The ICRC's presence, particularly within affected communities, can have a potentially dissuasive effect.

## **5.2. Activities to benefit persons deprived of their liberty**

Being deprived of one's liberty is psychologically undermining: it makes people more vulnerable and markedly dependent on detaining authorities. The ICRC recognizes that the intrinsic vulnerability of all detainees can be exacerbated by a number of factors: the personal characteristics of detainees, the prevailing political and military situation, and the practices of authorities and other actors.

### *5.2.1. The ICRC's general approach to issues related to persons deprived of their liberty*

The ICRC:

- identifies the problems encountered by detainees;
- analyses the circumstances in which persons are deprived of their liberty;
- is guided by the normative international framework for the treatment of persons deprived of their liberty;
- operates within a precise methodological framework;
- strives to ensure that the rights of persons deprived of their liberty are respected throughout the period of their detention: this can have significant consequences for the protection strategy, the length of the ICRC's involvement, and the expertise and resources required.

Visits to persons deprived of their liberty form the basis of the ICRC's approach. They are, in principle, a prerequisite of all protection activities to benefit such persons. These

visits are carried out in accordance with established ICRC practice that is uniformly applied and has to be accepted beforehand by authorities and other actors concerned. The ICRC's methods guarantee professionalism and credibility and enable the ICRC to assess the situation as accurately as possible, whilst safeguarding the interests of detainees. They make it possible to analyse specific systemic issues, identify problems, assess conditions of detention, and carry on a dialogue with detainees and detaining authorities. They can also have a dissuasive effect on the commission of violations and be of value, in psychosocial terms, to detainees.

#### *5.2.2. Persons deprived of their liberty who are of direct concern to the ICRC*

Besides its responsibilities under IHL, the ICRC acts primarily to benefit persons deprived of their liberty in relation to situations that trigger its intervention. Broadly speaking – and as dictated by circumstances – the ICRC concerns itself with detainees who have no effective means of protecting themselves from abuse or arbitrary acts, who are neglected, who do not or who no longer have access to the most basic services they are entitled to receive from the authorities, or who are subject to the arbitrary behaviour of those exercising power over them.

The following categories of detainee are of direct concern to the ICRC:

- protected persons deprived of their liberty in a situation of international armed conflict;
- persons deprived of their liberty in relation to a situation of non-international armed conflict;
- persons deprived of their liberty not in relation to a situation of international or non-international armed conflict, but the conditions of whose detention are affected by the conflict;
- persons deprived of their liberty in relation to a situation of internal disturbances;
- persons deprived of their liberty in relation to some other situations of internal violence who are regarded by the authorities and other actors as actual or potential opponents or as threats (owing to their nationality, ethnic origins, religion or other consideration), or others who have been arrested as a means of intimidation;
- persons deprived of their liberty in a situation of internal disturbances or some other situation of internal violence who do not or who no longer receive the minimum protection they are entitled to from the authorities or who are subject to the arbitrary behaviour of those exercising power over them.

In situations other than those in which the ICRC is expressly mandated to act in behalf of persons deprived of their liberty, the organization's decision to offer its services is determined by the gravity of humanitarian needs and by the urgency of responding to them, whatever the causes of the protection problems or the reasons for detaining the persons concerned.

The ICRC deals specifically with the vulnerability of certain detainees, for reasons of age, gender, because they are under sentence of death, owing to their status as detained migrants, etc.

The ICRC insists – in all contexts – on preserving its independence in determining which categories of person deprived of their liberty it is interested in. Negotiations for access to detainees must ensure that no category of detainee is excluded and that the ICRC will be permitted the greatest latitude possible in its work.

### *5.2.3. Scope of ICRC intervention*

The ICRC concerns itself with the following matters:

- the behaviour and actions of those responsible for making arrests, conducting interrogations and taking decisions related to detention;
- the material conditions of detention;
- access to medical care;
- the management and care of persons deprived of their liberty.

Its interventions focus on certain protection problems and violations:

- enforced disappearances and undisclosed detention;
- summary executions;
- torture and other forms of ill-treatment;
- problems created by violations of the physical or moral integrity of detainees and of their dignity and of the obligation to provide the essential necessities for their survival:
  - problems related to water and food;
  - problems related to personal hygiene and sanitation facilities in places of detention;
  - problems related to health and access to medical care;
  - problems related to material conditions of accommodation;
  - problems related to the management of detainees;
- violations of minimum judicial guarantees and procedural safeguards;
- violations of respect for family unity:
  - problems related to maintaining contact between detainees and their families.

[...]

### **5.3. Activities to benefit the civilian population and other affected persons not in detention**

The ICRC is conscious that the forms of repression and abuse to which the civilian population and other affected persons might be subjected and the risks to which they might be exposed, as well as the adverse consequences of conflict, are potentially very varied.

The ICRC requires the fulfilment of certain pre-conditions and the taking of certain steps before implementing its protection framework. These pre-conditions are as follows:

- a minimum amount of access to victims and witnesses of violations;
- safety of ICRC staff (e.g. the extent to which the ICRC's mandate is recognized and accepted by authorities and other actors, or the degree to which security guarantees are provided for the ICRC's activities);
- safety of victims and other persons contacted by the ICRC (e.g. the extent to which guarantees are provided that persons in contact with the ICRC will not be subjected to reprisals);
- identification of and contact with pertinent authorities and other actors.

#### *5.3.1. The ICRC's general approach to problems faced by the civilian population and other affected persons*

The ICRC:

- analyses the problems faced by affected persons; it does so by exploiting its access to reliable and pertinent information, which is collected either by its own delegates or through a network of contacts;
- is mindful of the specific difficulties of analysing the conduct of hostilities, for instance, their impact – direct and indirect – on civilians, as well as the difficulties of analysing the use of force during law enforcement operations;
- is guided by the international normative framework applicable to various situations;
- operates within a precise methodological framework that enables it to undertake activities even when the conditions for its humanitarian work are only partially met.

#### *5.3.2. Persons and objects of concern to the ICRC*

- Civilians and combatants, or other weapon bearers, who are hors de combat or are no longer participating in hostilities.
- Objects specifically protected under IHL.

- All persons affected by internal disturbances or other situations of violence. This refers to persons who are not or who are no longer participating in acts of violence or against whom violence was used unlawfully when they took part in acts of violence.

The ICRC seeks to contribute to the protection of all those persons affected by violence, and those who are at risk, without discrimination. Nevertheless, it makes every effort to respond to the specific needs of certain categories of person (e.g. children, women, refugees, internally displaced persons, or international migrants).

#### *5.3.3. Scope of ICRC intervention*

The ICRC concerns itself with the following matters:

- the actions of weapon bearers and of the various authorities with responsibilities pertaining to the civilian population;
- the access to medical care and other basic services for individuals or population groups;
- the vulnerability of individuals or population groups and their exposure to risk.

The ICRC's interventions focus on violations, and the humanitarian problems that have been identified, by examining the following:

#### **The use of force – means and methods:**

- in the conduct of hostilities, including the impact – direct and indirect – of hostilities and of the weapons that are used;
- in law enforcement operations.

#### **The treatment of persons:**

- assaults on and threats to the lives, security and physical and moral integrity of persons;
- denial of basic health services and violation of the obligation to ensure access to basic necessities for survival;
- violations of respect for family unity;
- violations of rules related to missing persons and their families;
- violations of rules regarding the free movement of persons;
- the consequences of the unlawful or arbitrary destruction or expropriation of private property;
- disruption of access to education or to places of worship in situations of occupation.

#### *5.3.4. ICRC protection activities*

In addition to the generic protection activities mentioned above [...], the ICRC undertakes specific activities to benefit the civilian population and other affected persons not in detention, depending on the nature and intensity of the situation, such as:

- ICRC accompaniment (ICRC delegates accompanying individuals or groups of civilians, thereby placing them under the protection of the red cross emblem);
- evacuation of persons at risk;
- establishment of protected areas;
- provision of RFL services.

#### **5.4. Activities to benefit separated family members and the missing**

The ICRC is conscious that the well-being of individuals is largely dependent on the preservation of their ties to loved ones.

Efforts to ascertain the fate of the missing entail the undertaking of a wide range of complementary and closely coordinated activities. The ICRC is committed to addressing issues related to persons who are unaccounted for (missing persons) and to assisting their families. Its activities in this regard are adapted to the context and to the period of time that has elapsed since the persons concerned were reported missing. Some of these activities necessitate close collaboration with the authorities concerned and with all parties to the conflict, and take place mainly during post-crisis or transition periods.

##### *5.4.1. The ICRC's general approach to problems faced by separated family members and missing persons*

The ICRC:

- determines its course of action after analysing needs and estimating the length of its engagement; it also examines the causes of ruptures in contact and communication (e.g. displacement, restricted access to means of communication and family contact, absence of records of people who have been executed or who have died in detention);
- acts within a precise methodological framework and employs rigorous working procedures that demand the following: speed in processing cases (which requires the assistance of the Movement's Family News Network, reliability in data management and transmission, protection of personal data, which varies according to the situation and the amount of time that has passed);
- carries out, in addition to RFL, activities that aim to prevent the severance of – ties and to respond to the specific material and psychological needs of persons who are directly affected, as well as to the needs of their families. The ICRC's efforts to ascertain the fate of the missing take a number of different forms: managing human remains, conducting forensic studies, providing support for families, integrating relevant norms into domestic legislation,

ensuring that members of the armed forces are equipped with the necessary means of identification, etc.;

- sets up effective information, communication and tracing systems that enable the development of various tools that are adaptable to extremely varied needs and operational environments.

#### *5.4.2. Persons of concern to the ICRC*

- Separated family members: persons who have lost contact with their families as a consequence of an armed conflict or other situation of violence, or after a natural disaster.
- The missing: persons whose families have no news of them or who, based on reliable information, are listed as missing in relation to a situation of armed conflict or other situation of violence, or after a natural disaster.
- Persons deprived of their liberty who are individually monitored by the ICRC or who are held in places of detention visited by the organization.
- Relatives of the persons mentioned above.

Attention is paid to the specific needs of certain groups (children, women, internally displaced persons, refugees, or migrants). This is particularly the case with regard to children who are separated from their families or who are on their own (unaccompanied).

[...]

#### *5.4.4. ICRC protection activities*

Besides the generic protection activities mentioned above (see 5.1.), the ICRC carries out the following protection activities:

- registration/monitoring of persons at risk
- tracing individuals;
- operating a system that enables separated family members to correspond and to exchange documents;
- producing various certificates and issuing travel documents;
- reuniting family members;
- promoting and/or setting up mechanisms tasked with clarifying the fate of missing persons: the collection and management of information about the dead, the location, identification and recovery of human remains, etc.;
- providing support for the families of missing persons.

**Case No. 41, ICRC, Assistance Policy**

[Source: ICRC Assistance Policy (Adopted by the Assembly of the International Committee of the Red Cross on 29 April 2004) Public version; *IRRC*, September 2004, Vol. 86, No. 855, p. 677; available on <http://www.icrc.org>]

**ICRC Assistance Policy**

**(Adopted by the Assembly of the International Committee  
of the Red Cross on 29 April 2004)**

**Public version****1. Introduction**

In recent decades, the ICRC's assistance activities have diversified and its assistance programmes have expanded. This development is due to a variety of factors that have caused the concept of humanitarian assistance to evolve well beyond mere emergency responses.

Emergency response itself has become increasingly complex, seeking to be more "intelligent" in order to achieve maximum effectiveness and to minimize the adverse consequences that humanitarian aid can have. In many situations, conflicts have become entrenched, forcing assistance work to cover the longer term, to meet needs that are at once urgent and recurrent, or even chronic. As a result, humanitarian work must be adapted and, very often, a link established between emergency and rehabilitation programmes in order to promote support or mobilization activities, stimulate adaptation mechanisms and persuade the authorities concerned to shoulder their responsibilities.

The ICRC is also faced with a proliferation of actors carrying out humanitarian work and the diversity of their areas of specialization, their abilities and their working methods, a situation that has fostered a spirit both of complementarity and of competition. Under the Seville Agreement [See Document No. 32, The Seville Agreement], the ICRC acts as the International Movement of the Red Cross and the Red Crescent's "lead agency" in the event of armed conflict and guides the other components in carrying out activities that, more often than not, are linked to assistance programmes. At the same time, the growing insecurity in some situations, which can go as far as the rejection of humanitarian aid, has forced the ICRC to modify its approaches and strategies. [...]

The ICRC has the capacity to act rapidly and effectively in the event of an acute crisis. It strives to play a role in preventing events that are disastrous in humanitarian terms. At the same time, it must continue to meet certain essential needs in chronic crises and sometimes even in post-crisis situations.

The ICRC's programmes in the areas of health, water and habitat, and economic security are a key aspect of this approach. [...]

The aim of this policy paper – a practical, action oriented tool – is threefold:



- to guide decision making on matters having to do with assistance, so as to ensure a professional, coherent, integrated approach that meets the essential needs of individuals and communities affected by armed conflict and other violent situations;
- to clarify and affirm the position of assistance work and of the Assistance Division within the ICRC, thereby helping to provide the organization with a strong identity;
- to serve as a reference framework for the formulation of thematic guidelines applicable to different areas of assistance. [...]

## 2. ICRC action

In accordance with Article 5.2 of the Statutes of the International Red Cross and Red Crescent Movement, [See Document No. 31, Statutes of the International Red Cross and Red Crescent Movement] the ICRC takes action in connection with international armed conflicts, non-international armed conflicts and internal disturbances. Under Article 5.3 of the Statutes, it may also furnish assistance in situations other than the above-mentioned. In these circumstances, the ICRC's task is to provide protection and assistance for civilian and military victims.

In terms of priority, the ICRC takes action in situations where its work has added value for the affected population, and more specifically where:

- its role as a neutral and independent organization and intermediary facilitates access to those in need and to the authorities concerned;
- its integrated approach to assistance and protection can promote respect for the rights of the individual in accordance with the letter and spirit of the law (be it international humanitarian law, human rights law or refugee law);
- its presence in and knowledge of a given situation lend it particular legitimacy;
- it can mobilize the capacity and skills needed to provide essential aid.

The ICRC's strategy is based on a combination of five modes of action: persuasion, mobilization, denunciation, support and substitution/direct provision of services. Persuasion and mobilization are the preferred modes of action when it seeks to stop or prevent violations of international humanitarian law and to make the authorities aware of their responsibilities while urging them to meet the essential needs of the affected group. This also applies to preserving their dignity. Denunciation is reserved for exceptional cases. Support and substitution/direct provision are the preferred modes of action when what is needed is to help supply essential services or to take responsibility for them when the authorities are unable to do so. [...]

Assistance must always be regarded as forming part of an overall ICRC strategy. This necessarily entails close cooperation among all programmes and all levels of decision making.

### **3. Guiding Principles**

#### ***3.1. Taking the affected group and its needs into account***

The ICRC seeks to work in close proximity to the affected group. The organization must take account of the local value systems and the group's specific vulnerabilities and perception of its needs.

#### ***3.2. Effective humanitarian assistance of high quality***

ICRC programmes must be planned, implemented and monitored in accordance with the highest professional standards. [...]

#### ***3.3. Ethical norms***

When providing assistance, the ICRC must respect certain ethical standards, namely the applicable principles of the Movement, the principle of do no harm, and the principles set out in the relevant codes of conduct. [...]

#### ***3.4. Responsibilities within the Movement***

As a component of the Movement, the ICRC must discharge its responsibilities in compliance with the Seville Agreement and the Statutes of the Movement currently in force. During armed conflict or internal disturbances and in their direct aftermath, the ICRC has a dual responsibility: its responsibility as a humanitarian organization for carrying out the specific activities arising from its mandate and its responsibility for coordinating the international action taken by any components of the Movement involved in an operation or wishing to contribute to it. [...]

### **4. Strategies**

#### ***4.1. Overall analysis of the situation and needs***

The ICRC conducts an overall analysis of each situation in which it is involved (security and economic, political, social, environmental and cultural aspects) in order to identify the problems and needs of the affected groups in terms of resources and services and their relationship with the various actors involved. It especially endeavours to determine whether there have been violations of international humanitarian law and, if so, whether or not they are deliberate. [...]

#### ***4.2. Integrated approach***

The ICRC's assistance work is flexible and wide-ranging. Its aim is to meet the essential needs of the affected group. The assistance integrated approach is based on a concept of overall health and includes the supply of and/or access to safe drinking water, food, a habitat and basic health care and health services. [...]

#### ***4.3. Combining different modes of action***

The ICRC uses persuasion, mobilization and, where necessary, denunciation to induce the authorities to meet their obligation to provide essential services for the affected groups. Where the ICRC considers that its efforts are not going to bring about a

satisfactory, timely response from the authorities, and that the problem is a serious one, it may simultaneously engage in appropriate support and/or substitution/direct provision activities. [...]

#### *4.3.1 Persuasion*

It is the fundamental responsibility of ICRC staff, [...] to determine the extent to which the authorities fail to meet their obligation to provide essential services (because they are unwilling and/or unable to do so) and the scale of the emergency that this has created. [...]

#### *4.3.2 Support for local structures/partners*

The ICRC provides support for local structures and partners wherever it considers that they constitute a viable means of ensuring access by the group affected to basic goods and services. [...]

#### *4.3.3 Substitution/direct provision of services*

The decision to substitute for the authorities and to provide a direct service for those affected depends on the urgency and gravity of the needs to be met. [...]

#### *4.3.4 Mobilization*

The ICRC may mobilize third parties who will endeavour to persuade the authorities to shoulder their responsibilities or, failing that, will strive either directly (themselves) or indirectly (by supporting others) to assist those affected. [...]

#### *4.3.5 Denunciation*

In case of important and repeated violations of international humanitarian law the ICRC may, in accordance with its policy guidelines and thus in exceptional cases, take steps to denounce those responsible.

### **4.4. Coordination**

Insofar as this does not jeopardize its independence, neutrality or security, the ICRC promotes coordination of its activities with those of other actors to ensure the greatest possible complementarity of diverse efforts to provide those in need with humanitarian aid. [...]

### **4.5. Sharing tasks and responsibilities**

The ICRC considers sharing tasks and responsibilities with other humanitarian organizations, formally or informally, insofar as this does not undermine its independence, its neutrality, its security, its access to areas affected by conflict or its ability to carry out protection activities. [...]

### **4.6. Partnerships**

The ICRC develops and maintains a network of local and international partners. Its activities are carried out in cooperation with these partners only where their working methods and policies are compatible with the ICRC's objectives, strategies and principles

[...]. Other components of the Movement are the ICRC's preferred, but not exclusive, partners.

#### **4.7. Adaptation and innovation**

If the strategies described above do not offer a suitable solution to a particular problem, the ICRC will consider drawing up other strategies, taking into account the many variables in the regional, national and international environment (in particular, security).

### **5. Action in the field of assistance**

Unmet essential needs are what drive ICRC assistance work. The decision making process leading to any action is based on two levels of analysis.

#### **5.1. First level: the ICRC identifies the groups for whom assistance is a priority**

To this end, it relies on the following criteria:

##### *5.1.1 Category of persons affected:*

- persons specifically protected by international humanitarian law (for example, prisoners of war, persons deprived of their freedom, the wounded and sick, civilians and the shipwrecked);
- persons currently or potentially at risk owing to their nationality, religion, ethnic origin, sex, gender [...].

##### *5.1.3 Gravity of problems [...]*

##### *5.1.4 Anticipated impact of action [...]*

#### **5.2. Second level: for each group identified, the ICRC defines the form that the operation will take**

##### *5.2.1 Integration within overall ICRC action [...]*

##### *5.2.2 Coherence of assistance activities*

Assistance activities are oriented by the public health pyramid, which requires an integrated approach in the areas of water and habitat, economic security and health services. The result is a welldefined range of integrated activities. [...]

##### *5.2.3 Capacity to carry out core activities*

Among the wide range of activities carried out by humanitarian agencies in response to the needs of affected groups, the ICRC, drawing on its experience, has defined a set of activities it regards as core. These activities, whose level of priority and implementation depend on the context, are as follows:

- supply, storage and distribution of drinking water;
- environmental sanitation and waste management;

- energy supply for key installations such as hospitals, water treatment plants and water distribution networks, and appropriate technologies for cooking and heating;
- transitional human settlements (spatial planning, design and setting up of camps, construction of appropriate shelter);
- distribution of food rations;
- distribution of essential household items;
- distribution of seed, farming tools, fertilizer and fishing tackle;
- rehabilitation of agriculture and irrigation;
- livestock management;
- revival of small trade and handicrafts;
- minimum package of activities derived from primary health care (PHC);
- support for victims of sexual violence;
- pre-hospital care and medical evacuation of the wounded;
- emergency hospital care (surgery, obstetrics, paediatrics, internal medicine) and hospital management;
- repair/upgrading of medical facilities and other buildings;
- therapeutic feeding;
- physical rehabilitation programmes;
- health in detention. [...]

#### *5.2.4 Partnerships*

Where this sets no constraints on its independence or neutrality, the ICRC may undertake activities in partnership with one or more other actors, in particular other components of the Movement. [...]

#### *5.2.5 Diversification of activities*

Diversification may be considered where the above-mentioned core activities do not meet the needs identified in the most appropriate manner or where there is no possibility of a partnership. [...]

#### *5.2.6 Other parameters to be considered*

Action may also be considered where:

- assistance activities can serve as a launching pad for protection;
- assistance activities facilitate the positioning and promote the acceptability of the ICRC. [...]

### 5.2.7 Feasibility of action [...]

## 5.3. Implementation

The ICRC adapts its response to the situation.

In acute crises, the ICRC seeks to maintain a rapid response operational capacity. This will help strengthen its identity as an organization that works in close proximity to the affected groups and is effective in dealing with emergencies, while at the same time taking security constraints into account.

In pre-crisis situations, the ICRC takes action insofar as possible to prevent what could be a disaster in humanitarian terms, either by supporting existing systems or by mobilizing other entities to do so. In chronic crises, the ICRC focuses on finding sustainable solutions to the problems it encounters. In particular, it explores the possibility of handing over its programmes to the authorities concerned – by strengthening the capacity of their services – or to other organizations. In cases where it has a residual responsibility, the ICRC continues its activities.

In post-crisis situations, the ICRC shoulders its residual responsibilities.

### 5.3.1 Water and habitat

Water and habitat programmes are designed to ensure access to safe water (for both drinking and household use) and to a safe living environment. The ultimate aim is to help reduce the rates of mortality and morbidity and the suffering caused by the disruption of the water supply system or damage to the habitat. [...]

### 5.3.2 Economic security

The main purpose of economic security programmes is to preserve or restore the ability of households affected by armed conflict to meet their essential needs. [...]

### 5.3.3 Health

ICRC activities to promote health are designed to ensure that the affected groups have access to basic preventive and curative care meeting universally recognized standards. To this end, the organization assists local or regional health services, which it sometimes has to replace temporarily. [...]

## 6. Operational directives

### 6.1. Involving the affected group in programme planning and management

Insofar as possible, the affected group must be involved in identifying its own needs and in designing and implementing programmes to meet those needs. The ICRC acts to build the capacity of competent local bodies capable of taking responsibility for assistance activities or playing an active part in the ICRC's work.

## **6.2. Assessing the situation – integrated needs and background analysis**

The assessment of assistance needs must be based on an information network that is as broad as possible and must include a wide range of issues and areas of endeavour. These must encompass not only assistance related areas of activity, but also those relating to protection of the group concerned and security. Various possible scenarios should be taken into account (for example, “what is likely to happen if no assistance is provided”). [...]

## **6.5. Entry and exit strategies**

Entry and exit strategies must be provided for in the initial plans and, for exit strategies in particular, must be drawn up together with the other actors concerned. This will promote community participation and support for the programme, right from the start, and will make it possible to identify in good time potential partners for the exit process later on. Exit strategies must be transparent and flexible. [...]

## **6.6. Monitoring**

From the beginning, a system is put in place for situation monitoring and performance monitoring. [...]

## **DISCUSSION**

1. a. Who has the responsibility to assist the population in times of armed conflict? Does the ICRC have a right or a duty to provide assistance? (GC I-IV, Arts 9/9/9/10 respectively; GC IV, Arts 23 and 59-60; P I, Arts 17, 69 and 70; P II, Art. 18)
- b. Under IHL, may the ICRC act as a substitute for authorities without their consent? May States reject humanitarian aid if they fail to meet their obligations to provide essential services? (GC I-IV, Arts 9/9/9/10 respectively; P I, Arts 17 and 70; P II, Art. 18)
- c. What is the legal value of the Statutes of the International Red Cross and Red Crescent Movement? Could the ICRC extend its mandate to include situations other than armed conflicts and internal disturbances? Should it do so?
2. a. What are the terms and conditions of ICRC assistance? To which provisions of IHL does the ICRC refer? When does it decide to start assistance activities?
- b. Why is denunciation an exceptional mode of action for the ICRC?
- c. Why is it necessary for humanitarian assistance to go beyond mere emergency responses? What kind of activities does this encompass? Has such an extension a legal basis in IHL?
3. a. Does IHL provide for the intervention of many humanitarian actors? Why is it said that the proliferation of humanitarian actions fosters a spirit of both complementarity and competition? Under international law, who should be in charge of coordinating humanitarian actions?
- b. Why does the ICRC insist on developing partnerships “insofar as it does not jeopardize its independence and neutrality”?
4. Why is it fundamental to involve affected communities in assistance programmes and to avoid as far as possible replacing authorities and local services? How does the ICRC do this?

**Case No. 42, Water and Armed Conflicts****A. Dying for Water**

[Source: ZEMMALI Ameur, «Dying for Water», in *Forum. War and Water*, ICRC, Geneva, 1998, pp. 31-35]

In modern armed conflicts, even were the general prohibition under international law on the use of poison to be complied with, water could still be contaminated as a direct result of military operations against water installations and works. Indeed, destroying or rendering useless part of a water production system is sometimes enough to paralyse the system as a whole. If repair work is held up because of continuing hostilities or for other reasons, such as a shortage of spare parts or inadequate or poor maintenance and cleaning procedures, there is an obvious and considerable risk of contamination, shortages or epidemics. [...]

An occupying power may [...] expropriate land, thus swallowing up springs and wells; may totally or partially prohibit the people in the occupied territories from irrigating the land, from using the water sources and watercourses to grow crops or run or develop their holdings as going concerns; may prevent the occupied population from siphoning off surface or groundwater or reaching aquifers; and may impose pumping quotas. [...]

These are all so many ways in which the occupied territory can be emptied of its original inhabitants. Of course, such moves do not affect just the population but also crops and livestock. [...]

In civil wars, which today account for most of the armed conflicts in the world, the use of water by the belligerent parties constitutes a serious threat to the population concerned. The expression “environmental or eco-refuge”, which has become fashionable recently to describe people displaced as a result of the effects of armed conflicts or other disasters on their natural environment, is symptomatic of the serious damage these can do. Just taking as an example the hostilities carried out in a period of internal conflict, destroying or rendering useless a source of drinking water or a safe water supply can in very short order deprive the local population of an essential commodity; in the case of a “hostile” population or a population in an arid region, it is easy to imagine just what the outcome would be.

While thirst may sap the morale of troops on the battlefield, the lack of a safe water supply may force a population into exile and condemn crops and livestock to wither and die. To attack water is to attack an entire way of life. [...]

**War's effect on access to water**

[...] What can a peasant farmer do when faced with an armed soldier who blocks his access to water for personal use, for livestock or for irrigation? What's to be said when a hydraulic plant, water installations, supplies and irrigation works or the path leading to them have been mined? [...]



Despite the neutrality of humanitarian assistance, relief personnel are not spared the ill-treatment meted out to civilians. Repairing and restoring water installations, works and facilities require complex operations which involve bringing together the necessary technical expertise, equipment and manpower. Any action against one of these components hampers the others and makes access to water well high or completely impossible, thereby heightening the risks to the civilian population despite the protection it is granted under international law.

### **What the law says**

Although international humanitarian law applicable in armed conflicts contains no specific regulations on water protection, it does have a number of rules relating to the subject. First it should be remembered that this branch of international law primarily seeks to protect any individual who is in the hands or in the power of the enemy, and that the assistance or relief which is their due is inconceivable without a guaranteed minimum level of health and hygiene – in other words, without water, which is the life-giving element in any and all circumstances.

Humanitarian law is also designed to protect civilian objects, including those indispensable to the survival of the civilian population. Article 29 of the Convention on the law relating to the non-navigational uses of international watercourses [available on <http://www.un.org/>], adopted by the General Assembly of the United Nations in 1997, stipulates:

“International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules”.

General protection under the law applicable to armed conflicts extends to more than international watercourses, and the four main prohibitions laid down in that law are worth noting:

- the ban on employing poison or poisonous weapons;
- the ban on destroying, confiscating or expropriating enemy property;
- the ban on destroying objects indispensable to the survival of the civilian population;
- the ban on attacking works or installations containing dangerous forces.

The four prohibitions, to which should be added the provisions on environmental protection, are expressly mentioned in the instruments relating to international armed conflicts, and the last two are also laid down in the law applicable to non-international armed conflicts. Starvation as a method of warfare is explicitly prohibited regardless of the nature of the conflict, and the concept of objects essential for the survival of the civilian population includes drinking-water installations and supplies and irrigation works. Immunity for indispensable objects is waived only when these are used solely for the armed forces or in direct support of military action. Even then, the adversaries must refrain from any action which could reduce the population to starvation or deprive it of essential water.

On the subject of works or installations containing dangerous forces, humanitarian law explicitly mentions dams, dykes and nuclear electrical generating sections. Even where these are military objectives, it is forbidden to attack them when such action could release dangerous forces and consequently cause heavy losses among the civilian population. The ban also extends on the same terms to other military objectives at or in the vicinity of such facilities. Immunity from attack is waived only when one or other of the works, installations or facilities is used in regular, significant and direct support of military operations and if attacks are the only feasible way to terminate such support.

So as best to ensure the protection of the civilian population and civilian objects, humanitarian law provides for certain precautionary measures including their removal from the vicinity of military objectives and their protection against dangers resulting from military operations. Reprisals against civilian objects are forbidden, and this explicitly applies to objects indispensable to the survival of the civilian population and works or installations containing dangerous forces.

The appropriate sanctions are incurred when such prohibitions are breached. Among the acts considered war crimes under humanitarian law are the following “grave breaches”: extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, indiscriminate attacks on the civilian population or civilian objects, and attacks against works or installations containing dangerous forces. In addition, international criminal law has just extended the list of war crimes and applied them to non-international armed conflicts as well. Among the acts committed in international armed conflicts and classified as war crimes in the Statute of the International Criminal Court adopted on 17 July 1998, [...] are attacks which cause widespread, long-lasting and severe damage to the natural environment, employing poison or poisonous weapons, intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions. [...]

## B. Berlin Rules on Water Resources

[Source: Berlin Rules on Water Resources, adopted by Resolution No. 2/2004 of the 71<sup>st</sup> Conference of the International Law Association, held in Berlin, Germany, 16-21 August 2004, available on <http://www.ila-hq.org>]

[...]

### CHAPTER X: PROTECTION OF WATERS AND WATER INSTALLATIONS DURING WAR OR ARMED CONFLICT

#### Article 50: Rendering Water Unfit for Use

Combatants shall not poison or render otherwise unfit for human consumption water indispensable for the health and survival of the civilian population.

*Commentary:* The prohibition of poisoning of drinking water is a rule of customary international law. Annex to the IV<sup>th</sup> Hague Convention Respecting the Laws and Customs of War on Land, art. 23 (a). Civilians are entitled to an adequate water supply

under all circumstances. Hence the prohibition of any action, whatever the motive, which would have the effect of denying the civilian population of the necessary water supply. The rule has been expanded to protect all vital human needs, a concept that in these Rules means water necessary to assure human health and survival. [...] This principle is also found in Protocol I [...], art. 54.

### **Article 51: Targeting Waters or Water Installations**

1. Combatants shall not, for military purposes or as reprisals, destroy or divert waters, or destroy water installations, if such actions would cause disproportionate suffering to civilians.
2. In no event shall combatants attack, destroy, remove, or render useless waters and water installations indispensable for the health and survival of the civilian population if such actions may be expected to leave the civilian population with such inadequate water as to cause its death from lack of water or force its movement.
3. In recognition of the vital requirements of any party to a conflict in the defense of its national territory against invasion, a party to the conflict may derogate from the prohibitions contained in paragraphs 1 and 2 within such territories under its own control where required by imperative military necessity.
4. In any event, waters and water installations shall enjoy the protection accorded by the principles and rules of international law applicable in war or armed conflict and shall not be used in violation of those principles and rules.

*Commentary:* Paragraph 1 introduces a proportionality limitation on the destruction or diversion of water and water installations. Protocol I contains no specific rule on proportionality regarding water resources. The rule in paragraph 1 reflects the general rule of proportionality in armed conflict. No rule provides an absolute prohibition against an otherwise legitimate means of warfare, solely on account of potential incidental civilian damage. For example, damming or diverting a river in order to enable movement of troops cannot be outlawed automatically because of potential harm to civilians. The criterion for prohibition must be harm to civilians disproportionate to the military advantage. [...] Paragraph 2 comes from several provisions found in Protocol I, primarily art. 54 of the Protocol. The protection of ecological integrity during wars or armed conflicts is provided in Article 52.

Yoram Dinstein described art. 54 as “unjustifiable and utopian” because “the legality of siege warfare has not been contested in classical international law” and “if the destruction of foodstuffs sustaining the civilian population in a besieged town is excluded, how can a siege be a “siege?” [Footnote 22: Yoram Dinstein, *Siege Warfare and the Starvation of Civilians*, in *HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD; ESSAYS IN HONOUR OF FRITS KALSHOVEN* 145-46 (Astrid Delissen & Gerard Tania eds 1991).] The official commentary on Protocol I by the International Committee of the Red Cross concedes that the “statement of this general principle [prohibiting starvation of population as a method of warfare] is innovative and a significant progress of the law.” The U.S. Department of State has taken the position that the provisions of Protocol I that “starvation of civilians is not to

be used as a method of warfare” are among those provisions that “should be observed and in due course recognized as customary law, even if they have not already achieved that status.” The U.S. Naval Military Manual also recognizes this as a customary rule. While it would be advisable for States to mark such installations clearly to minimize the risk of damaging them, international humanitarian law does not require this. See Additional Protocol I, Annex I.

Paragraph 3 recognizes an exception for nations destroying water installations as an act of national self defense. See Protocol I, art. 54(5). Even then, States may derogate from the obligation not to damage water facilities only when compelled by dire (imperative) military necessity. Nor is there any prohibition in international law against denying water to enemy armed forces. The U.S. Army Field Manual states in fact that there is no prohibition against “measures being taken to dry up springs, to divert rivers and aqueducts from their courses.” Presumably this refers to springs, etc., used by the military and not necessary for civilian survival. [...] Paragraph 4 merely reinforces the point that waters and water installations are subject to protection under the law of war and armed conflict.

### **Article 52: Ecological Targets**

Combatants shall not, for military purposes or as reprisals, destroy or divert waters, or destroy water installations, when such acts would cause widespread, long-term, and severe ecological damage prejudicial to the health or survival of the population or if such acts would fundamentally impair the ecological integrity of waters.

*Commentary:* Protocol I contains two general provisions relating to ecological harm, Arts 35 and 55. Art. 55, with its emphasis on health and survival of the population is of greater relevance to water resources. The text here follows that of Protocol I, art. 55, except that the word “care” is infelicitous in the circumstances, applying a weak and vague criterion. It is arguable that the provision of Protocol I regarding ecological damage and this Article are not yet customary law. Consistent with the emphasis on ecological concerns in these Rules, this Article extends protection to the fundamental ecological integrity of the waters in question. The allegations made after the Gulf War that the Iraqi actions violated the laws of war by impairing the ecological integrity of Kuwait and the Gulf region suggest that the law is at least moving in this direction. The Advisory Opinion on the Use of Nuclear Weapons suggests that customary international law does indeed prohibit the causing of widespread, long term, and severe ecological damage prejudicial to the health or survival of the population. [...] This broader approach also appears to be required by the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

### **Article 53: Dams and Dikes**

1. In addition to the other protections provided by these Rules, combatants shall not make dams and dikes the objects of attack, even where these are military objectives, if such an attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

2. This protection ceases if the dam or dike is used for other than its normal function and in regular, significant, and direct support of military operations and such attack is the only feasible way to terminate such use.

*Commentary:* This Article reproduces from Protocol I, art. 56(1), (2), with editorial changes. The rule apparently is not yet customary law. This rule “raises serious doubts about, for example the RAF “dambusters” raid during the Second World War, although the principal dams concerned “undoubtedly supplied power for a vital war industry.” The 1992 German Military Manual interprets “significant and direct support of military operations” as comprising “for instance, the manufacture of weapons, ammunition and defense materiel. The mere possibility of use by armed forces is not subject to these provisions.” [...]

#### **Article 54: Occupied Territories**

1. An occupying State shall administer water resources in an occupied territory in a way that ensures the sustainable use of the water resources and that minimizes environmental harm.
2. An occupying State shall protect water installations and ensure an adequate water supply to the population of an occupied territory.

*Commentary:* Under customary international law, an occupying State is only the administrator with a usufruct of State property. The U.S. Army Field Manual stipulates that the occupier “should not exercise his rights in such a wasteful and negligent manner as seriously to impair its value.” Applying this criterion to water resources requires the occupier to limit the use of water resources so as to ensure sustainability and to minimize environmental harm. The Fourth Geneva Convention, art. 55, stipulates that “[t]o the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population.” This Article strengthens the rule as regards water supply and the obligation is made absolute. The language in the Madrid Armed Conflict Rules, art. VI, is more specific and detailed; whether it makes a real change is debatable. [...]

#### **Article 55: Effect of War or Armed Conflict on Water Treaties**

1. Treaties creating legal regimes for an international watercourse or part thereof are not terminated by war or armed conflict between the parties to the treaty.
2. Such Treaties or parts thereof shall be suspended only where military necessity requires suspension and where suspension does not violate any provision of this Chapter.

*Commentary:* The rules of international law relating to the effect of armed conflict on validity of treaties are not entirely settled. The customary rule apparently is represented by Lord McNair’s statement that “State rights of a permanent character, connected with sovereignty and status and territory, such as those created or recognized by a treaty of peace are not affected by the outbreak of war between the contracting parties.” [Footnote 24: A.D. MCNAIR, THE LAW OF TREATIES 705 (2<sup>nd</sup> ed. 1961).] [...]

**DISCUSSION**

1.
  - a. Do the Geneva Conventions and Protocol I sufficiently address the protection of water as an object indispensable for the survival of the civilian population in international and non-international armed conflicts?
  - b. Why are rules concerning water essential in warfare?
  - c. Do the four main prohibitions mentioned in the article (A. Dying for Water) provide adequate protection of water?
2.
  - a. Is not water needed for the civilian population by definition a civilian object that consequently may not be attacked? (HR, Art. 23(g); P I, Art. 52, CIHL, Rules 7-10)
  - b. Is it sufficient to treat water like food under IHL? According to IHL, may foodstuffs destined for combatants be attacked and destroyed? (P I, Arts 52 and 54; CIHL, Rules 7-10 and 54)
  - c. Shouldn't water be considered a medical material? May such a material destined for combatants be attacked and destroyed under IHL? Could water be considered a medicine? (GC I, Art. 33)
3. Is water an object indispensable to the survival of the civilian population? Does an attack on an object indispensable to the survival of the civilian population violate IHL? Even though that object may simultaneously be a military objective? If such an object is a military objective, is it lawful to attack it as long as the attack is proportionate and necessary? (P I, Art. 54; CIHL, Rule 54)
4. What does the adoption of Resolution 2/2004 mean for the protection of water in armed conflicts? Does it extend the pre-existing protection? Does it simply confirm this protection?
5. Do you agree with Yoram Dinstein's description of Art. 54? Could the prohibition of starvation as a method of warfare be recognized as customary law? Why?
6. Could any or all of the provisions in the Berlin Rules on Water Resources be considered as customary law? Which ones?

**Case No. 43, ICRC, Customary International Humanitarian Law****A. ICRC Report 1995**

[Source: *International Humanitarian Law: From Law to Action: Report on the Follow-up to the International Conference for the Protection of War Victims*, Presented by the International Committee of the Red Cross, in consultation with the International Federation of the Red Cross and Red Crescent Societies, at the 26<sup>th</sup> International Conference of the Red Cross and Red Crescent, Geneva, 3-7 December 1995, Commission I, Question 2 of the Agenda; reproduced in: *IRRC*, No. 311, March-April 1996, pp. 194-222; available on [www.icrc.org](http://www.icrc.org)]

**INTERNATIONAL HUMANITARIAN LAW: FROM LAW TO ACTION:  
REPORT ON THE FOLLOW-UP TO THE INTERNATIONAL CONFERENCE  
FOR THE PROTECTION OF WAR VICTIMS**

[...]

**2. Customary rules of International Humanitarian Law****2.1 The invitation to the ICRC**

Recommendation II of the Intergovernmental Group of Experts proposes that “*the ICRC be invited to prepare, with the assistance of experts on IHL representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies*”.

**2.2 The ICRC's objective**

The ICRC is ready to assume this task in order to attain a practical humanitarian objective, that is, to determine what rules are applicable to humanitarian problems that are not covered by treaty provisions, or whose regulation under the treaties can be clarified by practice.

There may be no treaty-based rule governing a problem where no treaty contains such a rule, or when the treaty rule is not applicable in a particular conflict because the State concerned is not bound by the treaty codifying the rule in question.

Knowledge of customary rules is also of vital importance when it comes to determining what rules apply to armed forces operating under the aegis of organizations which are not formally parties to the international humanitarian law treaties, such as the United Nations.

### ***2.3 Importance of the report in regard to international armed conflicts***

As far as international armed conflicts are concerned, the question is not of much practical interest in relation to matters governed by the Geneva Conventions of 1949, since 185 States are bound by those treaties.

Admittedly, under the constitutional system of some States, customary rules – in contrast to treaty rules – are directly applicable in domestic law. As explained elsewhere in this report [...], the States party nonetheless have the obligation to enact legislation that ensures the incorporation of international humanitarian law into the domestic legal regime, so that all its rules, and not just those considered as customary, can and must be applied by the executive and judiciary.

Indeed, it would theoretically be very difficult to determine practice and gauge its acceptance in this respect since States, being almost all party to the Geneva Conventions, act either in conformity with or in violation of their treaty obligations. Can such behaviour also form the basis of customary rules?

As for matters governed by Additional Protocol I of 1977, the question is of more practical interest since this treaty has not yet been universally accepted. But considering that there are 137 States party, customary international humanitarian law certainly cannot be determined on the basis of the behaviour of the 54 States that are not yet bound by it. Furthermore, the evolution of international customary law has not been halted by its codification in Protocol I. Quite the contrary, it has been strongly influenced by the drafting of Protocol I and by the behaviour of States vis-à-vis this treaty.

### ***2.4 Importance of the report in regard to non-international armed conflicts***

As regards non-international armed conflicts, the rules governing the protection of persons in the power of a party to a conflict have been partially codified in Article 3 common to the Geneva Conventions and in Additional Protocol II, and often do no more than spell out the “hard core” of international human rights law applicable at all times.

The establishment of customary rules will be of particular importance in another area of the law governing non-international armed conflicts, that of the conduct of hostilities. This covers mainly the use of weapons and the protection of civilians from the effects of hostilities.

In the area of the conduct of hostilities, the treaty rules specifically applicable to non-international armed conflicts are in fact very rudimentary and incomplete.

For this reason, knowledge of customary rules will be especially necessary when the ICRC prepares a model manual on the law of armed conflicts for use by armed forces and when governments produce their national manuals. Indeed, in keeping with the recommendations of the Intergovernmental Group of Experts, these manuals should also cover non-international armed conflicts [...].

It will have to be determined in this regard to what extent a State may use against its own citizens methods and means of combat which it has agreed not to employ



against a foreign enemy in an international armed conflict. The potential impact on international customary law of the practice of non-governmental entities involved in non-international armed conflicts and the extent of acceptance they show will also have to be determined. Finally, the question will arise as to the degree to which practices adopted under national law by the parties involved in a non-international conflict reflect acceptance of the tenets of international law.

### ***2.5 ICRC procedure and consultations***

To prepare the report, the ICRC intends initially to ask researchers from different geographical regions to assemble the necessary factual material. Without wishing to opt for one or other of the different theories of international customary law, or attempting to define its two elements – the observance of a general practice and acceptance of this practice as law – the ICRC believes that, to establish a universal custom, the report must encompass all forms of practice and all cases of acceptance of this practice as law: not only the conduct of belligerents, but also the instructions they issue, their legislation, and statements made by their leaders; the reaction of other States at the diplomatic level, within international forums, or in public statements; military manuals; general declarations on law, including resolutions of international organizations; and, lastly, national or international court decisions.

Account needs to be taken of all forms of State practice, so as to permit all States – and not only those embroiled in armed conflict – to contribute to the formation of customary rules.

Basing customary law exclusively on actual conduct in armed conflicts would, moreover, be tantamount to accepting the current inhumane practices as law. Yet at the International Conference for the Protection of War Victims, States rejected such practices unanimously, as does public opinion.

The ICRC will entrust the factual material assembled to experts representing different geographical regions and different legal systems, asking them to draft reports on existing custom in various areas of international humanitarian law where such an exercise would meet a priority humanitarian need. These reports will be discussed in 1997 at meetings of experts representing governments, National Societies and their Federation, and international, intergovernmental and non-governmental organizations. On the basis of the experts' reports and of the discussions, the ICRC will summarize the material in a report which, together with any recommendations, will be submitted to States and to the international bodies concerned before the holding of the subsequent International Conference of the Red Cross and Red Crescent.

### ***2.6 The fundamental importance of treaty law***

Although the report to be prepared concerns customary law, the ICRC remains convinced of the need for universal participation in the treaties of international humanitarian law and of the necessity to continue the work of codifying this law. It is very difficult to base uniform application of the law, military instruction and the repression of breaches on custom, which by definition is in constant evolution, is

still difficult to formulate and is subject to controversy. In the meantime, the report requested of the ICRC should go some way towards improving the protection of victims of armed conflicts. [...]

## **B. ICRC, Study on Customary International Humanitarian Law**

[Source: ICRC Press release No.05/17 17 March 2005, "Customary law study enhances legal protection of persons affected by armed conflict"; available on [www.icrc.org](http://www.icrc.org)]

Geneva (ICRC) – Following more than eight years of research, the International Committee of the Red Cross (ICRC) has made public a study of customary international humanitarian law applicable during armed conflict. [...]

By identifying 161 rules of customary international humanitarian law, the study enhances the legal protection of persons affected by armed conflict. "This is especially the case in non-international armed conflict, for which treaty law is not particularly well developed," said [ICRC President] Mr Kellenberger. "Yet civil wars often result in the worst suffering. The study clearly shows that customary international humanitarian law applicable in non-international armed conflict goes beyond the rules of treaty law. For example, while treaty law covering internal armed conflict does not expressly prohibit attacks on civilian objects, customary international humanitarian law closes this gap. Importantly, all conflict parties – not just States but also rebel groups, for example – are bound by customary international humanitarian law applicable to internal armed conflict."

In addition to treaty law such as the Geneva Conventions and their Additional Protocols, customary international humanitarian law is a major source of rules applicable in times of armed conflict. While treaty law is based on written conventions, customary international humanitarian law derives from the practice of States as expressed, for example, in military manuals, national legislation or official statements. A rule is considered binding customary international humanitarian law if it reflects the widespread, representative and uniform practice of States accepted as law.

In late 1995, the International Conference of the Red Cross and Red Crescent commissioned the ICRC to carry out the study. It was researched by ICRC legal staff and dozens of experts representing different regions and legal systems, including academics and specialists drawn from governments and international organizations. The experts reviewed State practice in 47 countries as well as international sources such as the United Nations, regional organizations and international courts and tribunals.

"The ICRC fully respected the academic freedom of the authors and editors of the study," said Mr Kellenberger. "It considers the study an accurate reflection of the current state of customary international humanitarian law. The ICRC will make use of it in its work to protect and assist victims of armed conflict worldwide. I also expect scholars and governmental experts to use the study as a basis for discussions on current challenges to international humanitarian law."

## C. List of Customary Rules of International Humanitarian Law

[Source: "Annex to Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict," by Jean-Marie Henckaerts, *IRRC*, Volume 87, No. 857, March 2005, pp. 198-212; available on [www.icrc.org](http://www.icrc.org)]

### Annex. List of Customary Rules of International Humanitarian Law

This list is based on the conclusions set out in Volume I of the study on customary international humanitarian law. As the study did not seek to determine the customary nature of each treaty rule of international humanitarian law, it does not necessarily follow the structure of existing treaties. The scope of application of the rules is indicated in square brackets. The abbreviation IAC refers to customary rules applicable in international armed conflicts and the abbreviation NIAC to customary rules applicable in non-international armed conflicts. In the latter case, some rules are indicated as being "arguably" applicable because practice generally pointed in that direction but was less extensive.

### THE PRINCIPLE OF DISTINCTION

#### Distinction between Civilians and Combatants

- Rule 1.* The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. [IAC/NIAC]
- Rule 2.* Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. [IAC/NIAC]
- Rule 3.* All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel. [IAC]
- Rule 4.* The armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates. [IAC]
- Rule 5.* Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians. [IAC/NIAC]
- Rule 6.* Civilians are protected against attack, unless and for such time as they take a direct part in hostilities. [IAC/NIAC]

#### Distinction between Civilian Objects and Military Objectives

- Rule 7.* The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects. [IAC/NIAC]
- Rule 8.* In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction,

capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage. [IAC/NIAC]

*Rule 9.* Civilian objects are all objects that are not military objectives. [IAC/NIAC]

*Rule 10.* Civilian objects are protected against attack, unless and for such time as they are military objectives. [IAC/NIAC]

### **Indiscriminate Attacks**

*Rule 11.* Indiscriminate attacks are prohibited. [IAC/NIAC]

*Rule 12.* Indiscriminate attacks are those:

- (a) which are not directed at a specific military objective;
- (b) which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. [IAC/NIAC]

*Rule 13.* Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited. [IAC/NIAC]

### **Proportionality in Attack**

*Rule 14.* Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited. [IAC/NIAC]

### **Precautions in Attack**

*Rule 15.* In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]

*Rule 16.* Each party to the conflict must do everything feasible to verify that targets are military objectives. [IAC/NIAC]

*Rule 17.* Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]

- Rule 18.* Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [IAC/NIAC]
- Rule 19.* Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [IAC/NIAC]
- Rule 20.* Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit. [IAC/NIAC]
- Rule 21.* When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects. [IAC/arguably NIAC]

### **Precautions against the Effects of Attacks**

- Rule 22.* The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks. [IAC/NIAC]
- Rule 23.* Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas. [IAC/ arguably NIAC]
- Rule 24.* Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives. [IAC/arguably NIAC]

## **SPECIFICALLY PROTECTED PERSONS AND OBJECTS**

### **Medical and Religious Personnel and Objects**

- Rule 25.* Medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. [IAC/NIAC]
- Rule 26.* Punishing a person for performing medical duties compatible with medical ethics or compelling a person engaged in medical activities to perform acts contrary to medical ethics is prohibited. [IAC/NIAC]
- Rule 27.* Religious personnel exclusively assigned to religious duties must be respected and protected in all circumstances. They lose their protection

if they commit, outside their humanitarian function, acts harmful to the enemy. [IAC/NIAC]

*Rule 28.* Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. [IAC/NIAC]

*Rule 29.* Medical transports assigned exclusively to medical transportation must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. [IAC/NIAC]

*Rule 30.* Attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited. [IAC/NIAC]

### **Humanitarian Relief Personnel and Objects**

*Rule 31.* Humanitarian relief personnel must be respected and protected. [IAC/ NIAC]

*Rule 32.* Objects used for humanitarian relief operations must be respected and protected. [IAC/NIAC]

### **Personnel and Objects Involved in a Peacekeeping Mission**

*Rule 33.* Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited. [IAC/NIAC]

### **Journalists**

*Rule 34.* Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities. [IAC/NIAC]

### **Protected Zones**

*Rule 35.* Directing an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited. [IAC/NIAC]

*Rule 36.* Directing an attack against a demilitarised zone agreed upon between the parties to the conflict is prohibited. [IAC/NIAC]

*Rule 37.* Directing an attack against a non-defended locality is prohibited. [IAC/NIAC]

**Cultural Property**

- Rule 38.* Each party to the conflict must respect cultural property:
- A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.
  - B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.
- [IAC/NIAC]
- Rule 39.* The use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity.
- [IAC/NIAC]
- Rule 40.* Each party to the conflict must protect cultural property:
- A. All seizure of or destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited.
  - B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.
- [IAC/NIAC]
- Rule 41.* The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory. [IAC]

**Works and Installations Containing Dangerous Forces**

- Rule 42.* Particular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or in their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population. [IAC/ NIAC]

**The Natural Environment**

- Rule 43.* The general principles on the conduct of hostilities apply to the natural environment:
- A. No part of the natural environment may be attacked, unless it is a military objective.
  - B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.
  - C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.
- [IAC/NIAC]

- Rule 44.* Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimise, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions. [IAC/ arguably NIAC]
- Rule 45.* The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon. [IAC/arguably NIAC]

### **SPECIFIC METHODS OF WARFARE**

#### **Denial of Quarter**

- Rule 46.* Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited. [IAC/ NIAC]
- Rule 47.* Attacking persons who are recognised as *hors de combat* is prohibited. A person *hors de combat* is:
- (a) anyone who is in the power of an adverse party;
  - (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or
  - (c) anyone who clearly expresses an intention to surrender;
- provided he or she abstains from any hostile act and does not attempt to escape. [IAC/NIAC]
- Rule 48.* Making persons parachuting from an aircraft in distress the object of attack during their descent is prohibited. [IAC/NIAC]

#### **Destruction and Seizure of Property**

- Rule 49.* The parties to the conflict may seize military equipment belonging to an adverse party as war booty. [IAC]
- Rule 50.* The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity. [IAC/ NIAC]
- Rule 51.* In occupied territory:
- (a) movable public property that can be used for military operations may be confiscated;
  - (b) immovable public property must be administered according to the rule of usufruct; and
  - (c) private property must be respected and may not be confiscated;
- except where destruction or seizure of such property is required by imperative military necessity. [IAC]
- Rule 52.* Pillage is prohibited. [IAC/NIAC]



**Starvation and Access to Humanitarian Relief**

- Rule 53.* The use of starvation of the civilian population as a method of warfare is prohibited. [IAC/NIAC]
- Rule 54.* Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited. [IAC/NIAC]
- Rule 55.* The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control. [IAC/NIAC]
- Rule 56.* The parties to the conflict must ensure the freedom of movement of authorised humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted. [IAC/NIAC]

**Deception**

- Rule 57.* Ruses of war are not prohibited as long as they do not infringe a rule of international humanitarian law. [IAC/NIAC]
- Rule 58.* The improper use of the white flag of truce is prohibited. [IAC/NIAC]
- Rule 59.* The improper use of the distinctive emblems of the Geneva Conventions is prohibited. [IAC/NIAC]
- Rule 60.* The use of the United Nations emblem and uniform is prohibited, except as authorised by the organisation. [IAC/NIAC]
- Rule 61.* The improper use of other internationally recognised emblems is prohibited. [IAC/NIAC]
- Rule 62.* Improper use of the flags or military emblems, insignia or uniforms of the adversary is prohibited. [IAC/arguably NIAC]
- Rule 63.* Use of the flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict is prohibited. [IAC/arguably NIAC]
- Rule 64.* Concluding an agreement to suspend combat with the intention of attacking by surprise the enemy relying on that agreement is prohibited. [IAC/NIAC]
- Rule 65.* Killing, injuring or capturing an adversary by resort to perfidy is prohibited. [IAC/NIAC]

**Communication with the Enemy**

- Rule 66.* Commanders may enter into non-hostile contact through any means of communication. Such contact must be based on good faith. [IAC/NIAC]
- Rule 67.* *Parlementaires* are inviolable. [IAC/NIAC]

*Rule 68.* Commanders may take the necessary precautions to prevent the presence of a *parlementaire* from being prejudicial. [IAC/NIAC]

*Rule 69.* *Parlementaires* taking advantage of their privileged position to commit an act contrary to international law and detrimental to the adversary lose their inviolability. [IAC/NIAC]

## WEAPONS

### General Principles on the Use of Weapons

*Rule 70.* The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited. [IAC/ NIAC]

*Rule 71.* The use of weapons which are by nature indiscriminate is prohibited. [IAC/NIAC]

### Poison

*Rule 72.* The use of poison or poisoned weapons is prohibited. [IAC/NIAC]

### Biological Weapons

*Rule 73.* The use of biological weapons is prohibited. [IAC/NIAC]

### Chemical Weapons

*Rule 74.* The use of chemical weapons is prohibited. [IAC/NIAC]

*Rule 75.* The use of riot-control agents as a method of warfare is prohibited. [IAC/ NIAC]

*Rule 76.* The use of herbicides as a method of warfare is prohibited if they:

- (a) are of a nature to be prohibited chemical weapons;
- (b) are of a nature to be prohibited biological weapons;
- (c) are aimed at vegetation that is not a military objective;
- (d) would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated; or
- (e) would cause widespread, long-term and severe damage to the natural environment.

[IAC/NIAC]

### Expanding Bullets

*Rule 77.* The use of bullets which expand or flatten easily in the human body is prohibited. [IAC/NIAC]

**Exploding Bullets**

- Rule 78.* The anti-personnel use of bullets which explode within the human body is prohibited. [IAC/NIAC]

**Weapons Primarily Injuring by Non-detectable Fragments**

- Rule 79.* The use of weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited. [IAC/NIAC]

**Booby-traps**

- Rule 80.* The use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or with objects that are likely to attract civilians is prohibited. [IAC/NIAC]

**Landmines**

- Rule 81.* When landmines are used, particular care must be taken to minimise their indiscriminate effects. [IAC/NIAC]
- Rule 82.* A party to the conflict using landmines must record their placement, as far as possible. [IAC/arguably NIAC]
- Rule 83.* At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal. [IAC/NIAC]

**Incendiary Weapons**

- Rule 84.* If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]
- Rule 85.* The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*. [IAC/NIAC]

**Blinding Laser Weapons**

- Rule 86.* The use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited. [IAC/NIAC]

## TREATMENT OF CIVILIANS AND PERSONS *HORS DE COMBAT*

### Fundamental Guarantees

- Rule 87.* Civilians and persons *hors de combat* must be treated humanely. [IAC/NIAC]
- Rule 88.* Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status or on any other similar criteria is prohibited. [IAC/NIAC]
- Rule 89.* Murder is prohibited. [IAC/NIAC]
- Rule 90.* Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited. [IAC/NIAC]
- Rule 91.* Corporal punishment is prohibited. [IAC/NIAC]
- Rule 92.* Mutilation, medical or scientific experiments or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited. [IAC/NIAC]
- Rule 93.* Rape and other forms of sexual violence are prohibited. [IAC/NIAC]
- Rule 94.* Slavery and the slave trade in all their forms are prohibited. [IAC/NIAC]
- Rule 95.* Uncompensated or abusive forced labour is prohibited. [IAC/NIAC]
- Rule 96.* The taking of hostages is prohibited. [IAC/NIAC]
- Rule 97.* The use of human shields is prohibited. [IAC/NIAC]
- Rule 98.* Enforced disappearance is prohibited. [IAC/NIAC]
- Rule 99.* Arbitrary deprivation of liberty is prohibited. [IAC/NIAC]
- Rule 100.* No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees. [IAC/NIAC]
- Rule 101.* No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. [IAC/NIAC]
- Rule 102.* No one may be convicted of an offence except on the basis of individual criminal responsibility. [IAC/NIAC]
- Rule 103.* Collective punishments are prohibited. [IAC/NIAC]
- Rule 104.* The convictions and religious practices of civilians and persons *hors de combat* must be respected. [IAC/NIAC]
- Rule 105.* Family life must be respected as far as possible. [IAC/NIAC]

**Combatants and Prisoner-of-War Status**

- Rule 106.* Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status. [IAC]
- Rule 107.* Combatants who are captured while engaged in espionage do not have the right to prisoner-of-war status. They may not be convicted or sentenced without previous trial. [IAC]
- Rule 108.* Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial. [IAC]

**The Wounded, Sick and Shipwrecked**

- Rule 109.* Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction. [IAC/NIAC]
- Rule 110.* The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones. [IAC/NIAC]
- Rule 111.* Each party to the conflict must take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property. [IAC/NIAC]

**The Dead**

- Rule 112.* Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction. [IAC/NIAC]
- Rule 113.* Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited. [IAC/NIAC]
- Rule 114.* Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them. [IAC]
- Rule 115.* The dead must be disposed of in a respectful manner and their graves respected and properly maintained. [IAC/NIAC]

- Rule 116.* With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves. [IAC/NIAC]

### **Missing Persons**

- Rule 117.* Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate. [IAC/NIAC]

### **Persons Deprived of their Liberty**

- Rule 118.* Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention. [IAC/NIAC]
- Rule 119.* Women who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women. [IAC/NIAC]
- Rule 120.* Children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units. [IAC/NIAC]
- Rule 121.* Persons deprived of their liberty must be held in premises which are removed from the combat zone and which safeguard their health and hygiene. [IAC/NIAC]
- Rule 122.* Pillage of the personal belongings of persons deprived of their liberty is prohibited. [IAC/NIAC]
- Rule 123.* The personal details of persons deprived of their liberty must be recorded. [IAC/NIAC]
- Rule 124.*
- A. In international armed conflicts, the ICRC must be granted regular access to all persons deprived of their liberty in order to verify the conditions of their detention and to restore contacts between those persons and their families. [IAC]
  - B. In non-international armed conflicts, the ICRC may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their families. [NIAC]
- Rule 125.* Persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities. [IAC/NIAC]
- Rule 126.* Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable. [NIAC]

*Rule 127.* The personal convictions and religious practices of persons deprived of their liberty must be respected. [IAC/NIAC]

*Rule 128.*

- A. Prisoners of war must be released and repatriated without delay after the cessation of active hostilities. [IAC]
- B. Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities. [IAC]
- C. Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist. [NIAC]

The persons referred to may continue to be deprived of their liberty if penal proceedings are pending against them or if they are serving a sentence lawfully imposed.

### **Displacement and Displaced Persons**

*Rule 129.*

- A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand. [IAC]
- B. Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand. [NIAC]

*Rule 130.* States may not deport or transfer parts of their own civilian population into a territory they occupy. [IAC]

*Rule 131.* In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated. [IAC/NIAC]

*Rule 132.* Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist. [IAC/NIAC]

*Rule 133.* The property rights of displaced persons must be respected. [IAC/ NIAC]

### **Other Persons Afforded Specific Protection**

*Rule 134.* The specific protection, health and assistance needs of women affected by armed conflict must be respected. [IAC/NIAC]

*Rule 135.* Children affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]

- Rule 136.* Children must not be recruited into armed forces or armed groups. [IAC/NIAC]
- Rule 137.* Children must not be allowed to take part in hostilities. [IAC/NIAC]
- Rule 138.* The elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]

## IMPLEMENTATION

### Compliance with International Humanitarian Law

- Rule 139.* Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control. [IAC/NIAC]
- Rule 140.* The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity. [IAC/NIAC]
- Rule 141.* Each State must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law. [IAC/NIAC]
- Rule 142.* States and parties to the conflict must provide instruction in international humanitarian law to their armed forces. [IAC/NIAC]
- Rule 143.* States must encourage the teaching of international humanitarian law to the civilian population. [IAC/NIAC]

### Enforcement of International Humanitarian Law

- Rule 144.* States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law. [IAC/NIAC]
- Rule 145.* Where not prohibited by international law, belligerent reprisals are subject to stringent conditions. [IAC]
- Rule 146.* Belligerent reprisals against persons protected by the Geneva Conventions are prohibited. [IAC]
- Rule 147.* Reprisals against objects protected under the Geneva Conventions and Hague Convention for the Protection of Cultural Property are prohibited. [IAC]
- Rule 148.* Parties to non-international armed conflicts do not have the right to resort to belligerent reprisals. Other countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited. [NIAC]

### Responsibility and Reparation

- Rule 149.* A State is responsible for violations of international humanitarian law attributable to it, including:



- (a) violations committed by its organs, including its armed forces;
  - (b) violations committed by persons or entities it empowered to exercise elements of governmental authority;
  - (c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and
  - (d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.
- [IAC/NIAC]

*Rule 150.* A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused. [IAC/ NIAC]

### **Individual Responsibility**

- Rule 151.* Individuals are criminally responsible for war crimes they commit. [IAC/ NIAC]
- Rule 152.* Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders. [IAC/NIAC]
- Rule 153.* Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible. [IAC/NIAC]
- Rule 154.* Every combatant has a duty to disobey a manifestly unlawful order. [IAC/ NIAC]
- Rule 155.* Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered. [IAC/NIAC]

### **War Crimes**

- Rule 156.* Serious violations of international humanitarian law constitute war crimes. [IAC/NIAC]
- Rule 157.* States have the right to vest universal jurisdiction in their national courts over war crimes. [IAC/NIAC]
- Rule 158.* States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. [IAC/NIAC]
- Rule 159.* At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons

related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes. [NIAC]

*Rule 160.* Statutes of limitation may not apply to war crimes. [IAC/NIAC]

*Rule 161.* States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects. [IAC/NIAC]

## D. A US Government Response to the ICRC Study

[Source: John B. Bellinger, III and William J. Haynes II, "A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", *IRRC*, Vol. 89, No. 866 (June 2007), pp. 443-471, available on [www.icrc.org](http://www.icrc.org). Footnotes omitted]

### A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*

**John B. Bellinger, III and William J. Haynes II**

The United States welcomes the ICRC *Customary International Humanitarian Law* study's discussion of the complex and important subject of the customary "international humanitarian law" and it appreciates the major effort that the ICRC and the Study's authors have made to assemble and analyze a substantial amount of material. The United States shares the ICRC's view that knowledge of the rules of customary international law is of use to all parties associated with armed conflict, including governments, those bearing arms, international organizations, and the ICRC. Although the Study uses the term "international humanitarian law," the United States prefers the "law of war" or the "laws and customs of war".

Given the Study's large scope, the United States has not yet been able to complete a detailed review of its conclusions. The United States recognizes that a significant number of the rules set forth in the Study are applicable in international armed conflict because they have achieved universal status, either as a matter of treaty law or – as with many provisions derived from the Hague Regulations of 1907 – customary law. Nonetheless, it is important to make clear – both to the ICRC and to the greater international community – that, based upon the U.S. review thus far, the United States is concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules. Accordingly, the United States is not in a position to accept without further analysis the Study's conclusions that particular rules related to the laws and customs of war in fact reflect customary international law.

[...]

This is not intended to suggest that each of the U.S. methodological concerns applies to each of the Study's rules, or that the United States disagrees with every single rule contained in the study – particular rules or elements of those rules may well be applicable in the context of some categories of armed conflict. Rather, the United

States hopes to underline by its analysis the importance of stating rules of customary international law correctly and precisely, and of supporting conclusions that particular rules apply in international armed conflict, internal armed conflict, or both. [...]

### Methodological Concerns

There is general agreement that customary international law develops from a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris*. Although it is appropriate for commentators to advance their views concerning particular areas of customary international law, it is ultimately the methodology and the underlying evidence on which commentators rely – which must in all events relate to State practice – that must be assessed in evaluating their conclusions.

### State practice

Although the Study's introduction describes what is generally an appropriate approach to assessing State practice, the Study frequently fails to apply this approach in a rigorous way.

- First, for many rules proffered as rising to the level of customary international law, the State practice cited is insufficiently dense to meet the “extensive and virtually uniform” standard generally required to demonstrate the existence of a customary rule.
- Second, the United States is troubled by the type of practice on which the Study has, in too many places, relied. The initial U.S. review of the State practice volumes suggests that the Study places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict. Although manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations. The United States also is troubled by the extent to which the Study relies on non-binding resolutions of the General Assembly, given that States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing to do with a belief that the propositions in it reflect customary international law.
- Third, the Study gives undue weight to statements by non-governmental organizations and the ICRC itself, when those statements do not reflect whether a particular rule constitutes customary international law accepted by States.
- Fourth, although the Study acknowledges in principle the significance of negative practice, especially among those States that remain non-parties to relevant treaties, that practice is in important instances given inadequate weight.
- Finally, the Study often fails to pay due regard to the practice of specially affected States. A distinct but related point is that the Study tends to regard as equivalent the practice of States that have relatively little history of participation in armed conflict and the practice of States that have had a greater extent and depth of

experience or that have otherwise had significant opportunities to develop a carefully considered military doctrine. The latter category of States, however, has typically contributed a significantly greater quantity and quality of practice.

### ***Opinio juris***

The United States also has concerns about the Study's approach to the *opinio juris* requirement. In examining particular rules, the Study tends to merge the practice and *opinio juris* requirements into a single test. In the Study's own words,

"it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. More often than not, one and the same act reflects both practice and legal conviction. ... When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*."

The United States does not believe that this is an appropriate methodological approach. Although the same action may serve as evidence both of State practice and *opinio juris*, the United States does not agree that *opinio juris* simply can be inferred from practice. Both elements instead must be assessed separately in order to determine the presence of a norm of customary international law. For example, Additional Protocols I and II to the Geneva Conventions contain far-reaching provisions, but States did not at the time of their adoption believe that all of those instruments' provisions reflected rules that already had crystallized into customary international law; indeed, many provisions were considered ground-breaking and gap-filling at the time. One therefore must be cautious in drawing conclusions as to *opinio juris* from the practice of States that are parties to conventions, since their actions often are taken pursuant to their treaty obligations, particularly inter se, and not in contemplation of independently binding customary international law norms. Even if one were to accept the merger of these distinct requirements, the Study fails to articulate or apply any test for determining when state practice is "sufficiently dense" so as to excuse the failure to substantiate *opinio juris*, and offers few examples of evidence that might even conceivably satisfy that burden.

The United States is troubled by the Study's heavy reliance on military manuals. The United States does not agree that *opinio juris* has been established when the evidence of a State's sense of legal obligation consists predominately of military manuals. Rather than indicating a position expressed out of a sense of a customary legal obligation, in the sense pertinent to customary international law, a State's military manual often (properly) will recite requirements applicable to that State under treaties to which it is a party. Reliance on provisions of military manuals designed to implement treaty rules provides only weak evidence that those treaty rules apply as a matter of customary international law in non-treaty contexts. Moreover, States often include guidance in their military manuals for policy, rather than legal, reasons. For example, the United States long has stated that it will apply the rules in its manuals whether the conflict is characterized as international or non-international, but this clearly is not intended to indicate that it is bound to do so as a matter of law in non-international conflicts. Finally, the Study often fails to distinguish between military publications prepared

informally solely for training or similar purposes and those prepared and approved as official government statements. This is notwithstanding the fact that some of the publications cited contain a disclaimer that they do not necessarily represent the official position of the government in question.

A more rigorous approach to establishing *opinio juris* is required. It is critical to establish by positive evidence, beyond mere recitations of existing treaty obligations or statements that as easily may reflect policy considerations as legal considerations, that States consider themselves legally obligated to follow the courses of action reflected in the rules. In this regard, the practice volumes generally fall far short of identifying the level of positive evidence of *opinio juris* that would be necessary to justify concluding that the rules advanced by the Study are part of customary international law and would apply to States even in the absence of a treaty obligation.

[...]

### **Illustrative Comments on Four Rules in the Study**

[...]

#### ***Rule 31: "Humanitarian relief personnel must be respected and protected."***

[...] It is clearly impermissible intentionally to direct attacks against humanitarian relief personnel as long as such personnel are entitled to the protection given to civilians under the laws and customs of war.

Rule 31, however, sets forth a much broader proposition without sufficient evidence that it reflects customary international law. The Study fails to adduce a depth of operational State practice to support that rule. Had it examined recent practice, moreover, its discussion might have been more sensitive to the role of State consent regarding the presence of such personnel (absent a UN Security Council decision under Chapter VII of the UN Charter) and the loss of protection if such personnel engage in particular acts outside the terms of their mission. The Study summarily dismisses the role of State consent regarding the presence of humanitarian relief personnel but fails to consider whether a number of the oral statements by States and organizations that it cites actually reflected situations in which humanitarian relief personnel obtained consent and were acting consistent with their missions. To be clear, these qualifications do not suggest that humanitarian relief personnel who have failed to obtain the necessary consent, or who have exceeded their terms of mission short of taking part in hostilities, either in international or internal armed conflicts, may be attacked or abused. Rather, it would be appropriate for States to take measures to ensure that those humanitarian relief personnel act to secure the necessary consent, conform their activities to their terms of mission, or withdraw from the State. [...]

*Terms of mission limitation*

Rule 31 also disregards the obvious fact that humanitarian relief personnel who commit acts that amount to direct participation in the conflict are acting inconsistent with their mission and civilian status and thus may forfeit protection. [...]

*Non-international armed conflicts*

Although the Study asserts that Rule 31 applies in both international and non-international armed conflict, the Study provides very thin practice to support the extension of Rule 31 to non-international armed conflicts, citing only two military manuals of States Parties to AP II and several broad statements made by countries such as the United Kingdom and United States to the effect that killing ICRC medical workers in a non-international armed conflict was “barbarous” and contrary to the provisions of the laws and customs of war. The Study contains little discussion of actual operational practice in this area, with citations to a handful of ICRC archive documents in which non-state actors guaranteed the safety of ICRC personnel. Although AP II and customary international law rules that apply to civilians may provide protections for humanitarian relief personnel in non-international armed conflicts, the Study offers almost no evidence that Rule 31 as such properly describes the customary international law applicable in such conflicts.

[...]

***Rule 45: “The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited.” (First sentence)***

[...] [T]he Study fails to demonstrate that Rule 45, as stated, constitutes customary international law in international or non-international armed conflicts, either with regard to conventional weapons or nuclear weapons. [...]

*Specially affected States*

[...]

In addition to maintaining that Articles 35(3) and 55 are not customary international law with regard to the use of weapons generally, specially affected States possessing nuclear weapon capabilities have asserted repeatedly that these articles do not apply to the use of nuclear weapons. For instance, certain specially affected States such as the United States, the United Kingdom, Russia, and France so argued in submissions to the International Court of Justice (“ICJ”). [...]

***Rule 78: “The anti-personnel use of bullets which explode within the human body is prohibited.”***

Although anti-personnel bullets designed specifically to explode within the human body clearly are illegal, and although weapons, including exploding bullets, may not

be used to inflict unnecessary suffering, Rule 78, as written, indicates a broader and less well-defined prohibition. The rule itself suffers from at least two problems. First, it fails to define which weapons are covered by the phrase “bullets which explode within the human body.” To the extent that the Study intends the rule to cover bullets that could, under some circumstances, explode in the human body (but were not designed to do so), State practice and the ICRC’s Commentary on the 1977 Additional Protocol reflect that States have not accepted that broad prohibition. Second, there are two types of exploding bullets. The first is a projectile designed to explode in the human body, which the United States agrees would be prohibited. The second is a high-explosive projectile designed primarily for anti-matériel purposes (not designed to explode in the human body), which may be employed for anti-matériel and anti-personnel purposes. Rule 78 fails to distinguish between the two. If, as the language suggests, the Study is asserting that there is a customary international law prohibition on the anti-personnel use of anti-matériel [*sic*] exploding bullets, the Study has disregarded key State practice in this area. [...]

#### *Non-international armed conflict*

The Study also asserts that Rule 78 is a norm of customary international law applicable in non-international armed conflicts. [...] In fact, the Study’s only evidence of *opinio juris* in this regard is the failure, in military manuals and legislation cited previously, to distinguish between international and non-international armed conflict. Since governments normally employ, for practical reasons unrelated to legal obligations, the military ammunition available for international armed conflict when engaged in non-international armed conflict, and since there is ample history of the use of exploding bullets in international armed conflict, the Study’s claim that there is a customary law prohibition applicable in non-international armed conflict is not supported by examples of State practice. [...]

#### **Rule 157: “States have the right to vest universal jurisdiction in their national courts over war crimes.”**

[...]

The Study [...] does not offer adequate support for the contention that Rule 157, which is stated much more broadly, represents customary international law.

#### *Clarity of the asserted rule*

If Rule 157 is meant to further the overall goal of the Study to “be helpful in reducing the uncertainties and the scope for argument inherent in the concept of customary international law,” it must have a determinate meaning. The phrase “war crimes,” however, is an amorphous term used in different contexts to mean different things. The Study’s own definition of this term, laid out in Rule 156, is unspecific about whether particular acts would fall within the definition. For the purpose of these comments, we assume that the “war crimes” referred to in Rule 157 are intended to be those listed in the commentary to Rule 156. These acts include grave breaches of the Geneva

Conventions and AP I, other crimes prosecuted as “war crimes” after World War II and included in the Rome Statute, serious violations of Common Article 3 of the Geneva Conventions, and several acts deemed “war crimes” by “customary law developed since 1977,” some of which are included in the Rome Statute and some of which are not.

Assuming this to be the intended scope of the rule, we believe there are at least three errors in the Study’s reasoning regarding its status as customary international law. First, the Study fails to acknowledge that most of the national legislation cited in support of the rule uses different definitions of the term “war crimes,” making State practice much more diverse than the Study acknowledges. Second, the State practice cited does not actually support the rule’s definition of universal jurisdiction. Whereas Rule 157 envisions States claiming jurisdiction over actions with no relation to the State, many of the State laws actually cited invoke the passive or active personality principle, the protective principle, or a territorial connection to the act before that State may assert jurisdiction. Furthermore, the Study cites very little evidence of actual prosecutions of war crimes not connected to the forum State (as opposed to the mere adoption of legislation by the States). [...]

## Conclusion

The United States selected these rules from various sections of the Study, in an attempt to review a fair cross-section of the Study and its commentary. Although these rules obviously are of interest to the United States, this selection should not be taken to indicate that these are the rules of greatest import to the United States or that an in-depth consideration of many other rules will not reveal additional concerns. In any event, the United States reiterates its appreciation for the ICRC’s continued efforts in this important area, and hopes that the discussion in this article, as well as the responses to the Study by other governments and by scholars, will foster a constructive, in-depth dialogue with the ICRC and others on the subject.

## E. ICRC’s Response to US Comments

[Source: Jean-Marie Henckaerts, “*Customary International Humanitarian Law: a response to US comments*,” IRRIC Vol. 89, No. 866 (June 2007), pp. 473-488; available on [www.icrc.org](http://www.icrc.org). Footnotes omitted]

### ***Customary International Humanitarian Law: a response to US comments***

**Jean-Marie Henckaerts**

## Introduction

[...]

The comments on the Study provided by two of the most prominent US government lawyers, John Bellinger, Legal Adviser of the Department of State, and William Haynes, General Counsel of the Department of Defense, are the first formal comments to be received by the ICRC at governmental level. [...]



As one of the co-authors of the Study, I have been given an opportunity to respond to these comments. Below are my principal observations. As the main thrust of the US comments deals with the methodology of the Study, my response focuses largely on methodological issues as well. [...]

## 1. State practice

### *Density of practice*

While it is agreed that practice has to be “extensive and virtually uniform” in order to establish a rule of customary international law, there is no specific mathematical threshold for how extensive practice has to be. This is because the density of practice depends primarily on the subject-matter. Some issues arise more often than others and generate more practice. One only has to compare, for example, the practice with regard to targeting and to the white flag of truce. Questions of targeting – for example the distinction between civilians and combatants and between civilian objects and military objectives – are discussed every day in connection with various armed conflicts, are addressed in nearly every military manual, analysed in international fora, in judgments, and so forth. Practice on the protection of the white flag of truce, on the other hand, is rather sparse. In general, the topic is rarely discussed, as there are relatively few concrete cases. Nevertheless, whatever practice there is on the protection of the white flag of truce is uniform and confirms the continued validity of the rule, regardless of limited practice. Such a differentiated approach is inevitable in any area of international law.

[...]

In addition, the nature of the rule has to be taken into account – whether it is prohibitive, obligatory or permissive. Prohibitive rules for example, of which there are many in humanitarian law, are supported not only by statements recalling the prohibition in question but also by abstention from the prohibited act. Hence, rules such as the prohibition of use of certain weapons, for example blinding laser weapons, are supported by the continued abstention from using such weapons. However, it is difficult to quantify this abstention, which occurs every day in every conflict in the world.

Permissive rules, on the other hand, are supported by acts that recognize the right to behave in a given way but that do not, however, require such behaviour. This will typically take the form of states taking action in accordance with those rules, together with the absence of protests by other states. The rule that states have the right to vest universal jurisdiction in their courts over war crimes (Rule 157) is such a rule. There are now numerous cases of national prosecution on the basis of universal jurisdiction, without objection from the state concerned – in particular the state of nationality of the accused, for war crimes in both international and non-international armed conflicts. It is true that there are relatively few cases of prosecution on the basis of universal jurisdiction, compared to the number of war crimes possibly committed. But this is so because a foreign court is not necessarily a convenient forum to investigate and prosecute persons suspected of having committed war crimes in their own or a third country, not because of a belief that states are not entitled to prosecute on the

basis of universal jurisdiction. [...] But this does not mean that the practice is not dense enough, as suggested, to demonstrate the existence of a customary rule, in particular as we are dealing with a permissive rule. [...]

### ***Types of practice considered***

A study on customary international law has to look at the combined effect of what states say and what they actually do. As a result, “operational State practice in connection with actual military operations” was collected and analysed. [...]

But an examination of operational practice alone is not enough. In order to arrive at an accurate assessment of customary international law one has to look beyond a mere description of actual military operations and examine the legal assessment of such operations. [...] When a given operational practice is generally accepted – for example military installations are targeted – this supports the proposition underlying that practice, namely that military installations constitute lawful military targets. But when an operational practice is generally considered to be a violation of existing rules – for example civilian installations are targeted – that is all it is, a violation. Such violations are not of a nature to modify existing rules; they cannot dictate the law. This explains why acts such as attacks against civilians, pillage and sexual violence remain prohibited notwithstanding numerous reports of their commission. The conclusion that these acts are considered to be violations of existing rules can be derived only from the way they are received by the international community through verbal acts, such as military manuals, national legislation, national and international case-law, resolutions of international organizations and official statements. These verbal acts provide the lens through which to look at operational practice.

### ***Weight of resolutions***

As a result of the above considerations, the Study had to take into account resolutions adopted by states in the framework of international organizations, in particular the United Nations and regional organizations. As indicated, the Study is premised on the recognition that “resolutions are normally not binding in themselves and therefore the value accorded to any particular resolution depends on its content, its degree of acceptance and the consistency of State practice outside it”. A list containing the voting record of all cited General Assembly resolutions was therefore included in the Study and used during the assessment. Most importantly, resolutions were always assessed together with other state practice and were not used to tip the balance in favour of a rule being customary.

### ***Weight of ICRC statements***

As explained in the introduction to the Study, official ICRC statements, in particular appeals and memoranda on respect for international humanitarian law, have been included as relevant practice because the ICRC has international legal personality. The practice of the organization is particularly relevant in that it has received an official mandate from states “to work for the faithful application of international humanitarian

law applicable in armed conflicts and ... to prepare any development thereof". The Study did not, however, use ICRC statements as primary sources of evidence supporting the customary nature of a rule. They are cited to reinforce conclusions that were reached on the basis of state practice alone. Hence, ICRC practice likewise never tipped the balance in favour of a rule being customary.

State reactions to ICRC memoranda or appeals would clearly be a more important source of evidence. [...]

### ***Weight of NGO statements***

NGO statements were included in Volume II under the category of "Other Practice", which served as a residual category of materials that were not given any weight in the determination of what is customary. The term "practice" in this context was not at all used to denote any form of state (or other) practice that contributes to the formation of customary international law. [...]

### ***Weight of practice from non-party states***

The Study in no way assumed that a rule is customary merely because it is contained in a widely ratified treaty. [...]

The distinction between contracting parties and non-contracting parties was taken into consideration in the assessment of each rule. To this effect, a list of ratifications for all cited treaties was included in the Study, and so-called "negative lists" were used – lists of countries that are not party to relevant treaties – to identify practice of non-party states. [...] This also means that to the extent that different treaties contain the same or similar rules, a state's practice and ratification record have to be matched up with respect to all relevant treaties. Although the United States is not a party to Additional Protocol I, for example, it is a party to Protocol II and Amended Protocol II to the Convention on Certain Conventional Weapons (CCW), which contain a number of rules that are identical to those in Additional Protocol I. Thus while the United States has not supported the principle of distinction, the prohibition of indiscriminate attacks and the principle of proportionality through ratification of Additional Protocol I, it has supported these rules *inter alia* through ratification of Amended Protocol II to the CCW, which applies in both international and non-international armed conflicts.

In addition, a number of provisions in Additional Protocol I were not found to be customary, as a result of the weight accorded to negative practice of states that remain non-parties to the Protocol. This was the case, for example, for the presumption of civilian status in case of doubt, the prohibition of attacks on works and installations containing dangerous forces, the relaxed requirement for combatants to distinguish themselves and the prohibition of reprisal attacks against civilians as contained in Additional Protocol I. [...]

### ***Specially affected states***

The Study did duly note the contribution of states that have had “a greater extent and depth of experience” and have “typically contributed a significantly greater quantity and quality of practice”. [...]

Hence, it is clear that there are states that have contributed more practice than others because they have been “specially affected” by armed conflict. Whether, as a result of this, their practice counts more than the practice of other states is a separate question. [...]

Nevertheless, with respect to Rule 45 on widespread, long-term and severe damage to the environment, the Study notes that France, the United Kingdom and the United States have persistently objected to the rule being applicable to nuclear weapons. As a result, we acknowledge that with respect to the employment of nuclear weapons, Rule 45 has not come into existence as customary law. With regard to conventional weapons, however, the rule has come into existence but may not actually have much meaning, as the threshold of the cumulative conditions of long-term, widespread and severe damage is very high. The existence of this rule under customary international law is supported, in part, by the abstention from causing such damage. The United States may be considered a persistent objector with respect to Rule 45 in general, including for conventional weapons, but that is a case the United States would have to make.

## **2. *Opinio juris***

Although the commentaries on the rules in Volume I do not usually set out a separate analysis of practice and *opinio juris*, such an analysis did in fact take place for each and every rule to determine whether the practice attested to the existence of a rule of law or was inspired merely by non-legal considerations of convenience, comity or policy. [...] Hence, the Study did not simply infer *opinio juris* from practice. [...] It is true that it can never be proven that a state votes in favour of a resolution condemning acts of sexual violence, for example, because it believes this to reflect a rule of law or as a policy decision (and it could be both). However, the totality of the practice on that subject indicates beyond doubt that the prohibition of sexual violence is a rule of law, not merely a policy.

In the same vein, military manuals and teaching manuals may put forward propositions that are based on law, but may also contain instructions based on policy or military considerations that go beyond the law (although they may never fall below the law). This distinction was always kept in mind. Rules that were supported by military manuals were, considering the totality of practice, supported by practice of such a nature as to conclude that a rule of law was involved and not merely a policy consideration or a consideration of military or political expediency that can change from one conflict to the next. For example, the fact that the United States has decided, as a matter of policy rather than law, that it “will apply the rules in its manuals whether the conflict is characterized as international or non-international” was recognized as a policy decision in the Study. Hence, US military manuals are never cited as supporting evidence for rules applicable in non-international armed conflicts.

Finally, it was considered that teaching manuals authorized for use in training represent a form of state practice. In principle, a state will not allow its armed forces to be taught on the basis of a document whose content it does not endorse. As a result, training manuals, instructor handbooks and pocket cards for soldiers were considered as reflecting state practice. [...]

### 3. Formulation of rules

Any description of customary rules inevitably results in rules that in many respects are simpler than the detailed rules to be found in treaties. It may be difficult, for example, to prove the customary nature of each and every detail of corresponding treaty rules. [...]

For example, in connection with Rules 31 and 55 on the protection of humanitarian relief personnel and access for humanitarian relief missions respectively, the issue of consent to receive such personnel and missions is openly discussed in the commentary and there was no intention to go beyond the content of the Additional Protocols. The problem lay in the formulation of a rule that would cover both international and non-international armed conflicts. It was problematic to use the term “consent from the parties”, including consent from armed opposition groups, in a rule that would cover both international and non international armed conflicts. It is also clear that, by reading these rules together with Rule 6, humanitarian relief personnel lose their protection when they take a direct part in hostilities.

[...]

As to the formulation of Rule 78 on exploding bullets, the wording was carefully chosen and clearly is not a literal transcription of the St. Petersburg Declaration, thereby reflecting the evolution of state practice. On the other hand, the wording that only projectiles “designed” or “specifically designed” to explode within the human body are prohibited was not used, because this requires proof of the intent of the designer of the projectile. Instead the formulation used in Rule 78 is based on the understanding that projectiles that foreseeably detonate within the human body in their normal use do so as a result of their design, though perhaps not through specific intent, and that it is the explosion of projectiles within the human body which states have sought to prevent through practice in this field. The argument that states have allegedly used anti-matériel exploding bullets that “may have tended to detonate on impact or within the human body” is not accompanied by evidence that they actually did so detonate. The argument therefore does not provide evidence of “foreseeable” detonation, as outlined above and in the text explaining Rule 78, and so does not contradict it.

[...]

### 4. Implications

First, the conclusion of the Study that a significant number of rules contained in the Additional Protocols to the Geneva Conventions have achieved the status of customary international law applicable to all states is supported by the evidence proffered. This

should not come as a surprise, as many of them were already customary in 1977, exactly thirty years ago. It is true, on the other hand, that a number of provisions in the Protocols were new in 1977, but they have become customary in the thirty years since their adoption because they have been extensively and virtually uniformly accepted in practice. In addition, as pointed out above, a number of their provisions have not become customary because they are not uniformly accepted in practice.

[...]

Second, the conclusion of the Study that many rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in non-international armed conflict is the result of state practice to this effect. States set this evolution in motion as early as 1949 with the adoption of common Article 3 and their subsequent practice confirmed it. They built further on this practice and in 1977, now 30 years ago, adopted Additional Protocol II, the first-ever treaty devoted entirely to the regulation of non-international armed conflict. This process has been further accelerated since the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda in 1993 and 1994 respectively.

Indeed, developments of international humanitarian law since the wars in the former Yugoslavia and Rwanda point towards an application of many areas of humanitarian law to non-international armed conflicts. For example, every humanitarian law treaty adopted since 1996 has been made applicable to both international and non-international armed conflicts. Furthermore, in 2001, Article 1 of the CCW was amended so as to extend the scope of application of all existing CCW Protocols to cover non-international armed conflict. [See Document No. 12, Amendment to Article 1 of the 1980 Convention, in Order to Extend it to Non-International Armed Conflicts]

The criminal tribunals and courts set up, first for the former Yugoslavia and Rwanda and later for Sierra Leone, deal exclusively or mostly with violations committed in non-international armed conflicts. Similarly, the investigations and prosecutions currently under way before the International Criminal Court are related to violations committed in situations of internal armed conflict. These developments are also sustained by other practice such as military manuals, national legislation and case-law, official statements and resolutions of international organizations and conferences. In this respect particular care was taken in Volume I to identify specific practice related to non-international armed conflict and, on that basis, to provide a separate analysis of the customary nature of the rules in such conflicts. Finally, where practice was less extensive in non-international armed conflicts, the corresponding rule is acknowledged to be only “arguably” applicable in non-international armed conflicts.

When it comes to “operational practice” related to non-international armed conflicts, there is probably a large mix of official practice supporting the rules and of their outright violation. To suggest, therefore, that there is not enough practice to sustain such a broad conclusion is to confound the value of existing “positive” practice with the many violations of the law in non-international armed conflicts. This would mean that we let violators dictate the law or stand in the way of rules emerging. The result

would be that a whole range of heinous practices committed in non-international armed conflict would no longer be considered unlawful and that commanders ordering such practices would no longer be responsible for them. This is not what states have wanted. They have wanted the law to apply to non-international armed conflicts and they have wanted commanders to be responsible and accountable. As a result, the expectations of lawful behaviour by parties to non-international armed conflicts have been raised to coincide very often with the standards applicable in international armed conflicts. This development, brought about by states, is to be welcomed as a significant improvement for the legal protection of victims of what is the most endemic form of armed conflict, non-international armed conflicts.

State practice and customary humanitarian law have thus filled important gaps in the treaty law governing non-international armed conflicts. The divide between the law on international and non-international armed conflicts, in particular concerning the conduct of hostilities, the use of means and methods of warfare and the treatment of persons in the power of a party to a conflict, has largely been bridged. But this is not to say that the law on international and non-international armed conflicts is now the same. Indeed, concepts such as occupation and the entitlement to combatant and prisoner-of-war status still belong exclusively to the domain of international armed conflicts. Consequently, the Study also contains a number of rules whose application is limited to international armed conflict, and a number of rules whose formulation differs for international and non-international armed conflicts.

[...]

## DISCUSSION

1.
  - a. In your opinion, what are the main findings of the ICRC study? With regard to international armed conflicts? To non-international armed conflicts?
  - b. Which rules go beyond the existing treaty law applicable to each category of armed conflicts?
  - c. Which rules go less far than the corresponding treaty rules? Which treaty rules (in the fields covered by the study) have not been found to be customary?
  - d. What are the risks of the ICRC study and what opportunities does it present?
2.
  - a. What are the advantages of treaty rules over customary rules in protecting the victims of war? What are the advantages of customary rules over treaty rules?
  - b. How can there be customary humanitarian law if the practice in armed conflicts is inhumane?
3.
  - a. As IHL is a well codified branch of international law, why and when is it necessary to determine the rules of customary IHL?
  - b. Are there particularities in creating or assessing customary law in the field of international humanitarian law (compared e.g. with the law of treaties or the law of the sea)?
4. Why should (only) the customary rules of IHL apply to operations of UN peacekeeping forces? Does that not beg the question whether UN military operations are governed by the same rules as those of States? Is there any practice on this very question?
5. Is the customary rule always less detailed than the corresponding treaty rule? For which types of treaty rules is it difficult to find a detailed customary rule?

6. What is the relationship between general principles and customary law? Are rules which may be deduced from general principles or from other rules more important than rules based on practice?
7. What is the relevance of the Martens Clause for assessing customary international humanitarian law? [See **Document No. 1**, The Hague Regulations, Preamble]
8.
  - a. In matters regulated by Protocol I, did the study have to analyse only the practice of the then 33 States not party to it or also the practice of the then 163 States Parties? How can one determine whether an act by a State Party respecting or violating the Protocol also counts as practice for customary international law? Can you imagine an example of such “treaty practice” clearly counting or clearly not counting as practice for customary law? Are the same criteria applicable in assessing acts of respect for and violations of treaty obligations?
  - b. Did the study have to focus, as far as States Parties are concerned, on their practice before they became bound by the treaty? Is the development of customary IHL frozen or at least slowed down by a successful codification (*lato sensu*)? Or is it on the contrary speeded up by crystallization of the treaty norms, which then triggers conformity of State practice with those rules?
  - c. How could State behaviour in drafting Protocol I be relevant for customary international law? Do statements made at the Diplomatic Conference drafting Protocol I count as State practice for the development of customary IHL? Which of such statements carry greater weight than others?
  - d. How could the behaviour of States vis-à-vis Protocol I, since its drafting, be relevant? Does widespread State participation in an IHL treaty make its rules customary? Does such participation count as State practice?
  - e. Can violations of treaty obligations count as custom?
9. Are the answers given to question 8 the same when asked with regard to the Geneva Conventions (instead of Protocol I), which have been universally ratified? Can you explain any differences?
10. Must humanitarian behaviour adopted for policy reasons be distinguished from behaviour adopted out of a sense of legal obligation? How can the distinction be made between these motives? In particular in the event of omissions?
11.
  - a. Do all expressions of custom listed in Part A, para. 2.5, of the Case constitute practice? Or do some of them rather express *opinio juris*? Or do all of them express practice and *opinio juris*?
  - b. How widespread must practice be in the field of IHL to lead to a customary rule?
  - c. Is the practice of some States more important than that of others? Are some States specially affected by IHL? What about States affected by armed conflicts? States with large armed forces? States with detailed military manuals?
  - d. Does the practice of belligerents and of non-belligerents count equally?
  - e. What kind of rules of customary IHL could be derived from “operational practice”, i.e. the actual practice of belligerents? May one thus limit those contributing to the formation of customary law to belligerents? How can one establish such practice? Does it count even if it is contrary to official declarations? Are reports of humanitarian organizations on “violations” useful? Does every act of a combatant constitute State practice? Is it at least State practice when the combatant is not punished? Are difficulties of knowing operational practice a reason for giving it less weight in establishing customary IHL? [See also **Case No. 211**, ICTY, The Prosecutor v. Tadic, A., Jurisdiction, para. 99]



- f. When compiling State practice with a view to establishing customary IHL, may one ignore certain instances of practice as “violations”? How does one know that a certain act is a violation before knowing the rule? Should violators be allowed to dictate the rules? Should they be allowed to change existing rules of customary IHL by their violation? To stand in the way of new rules of customary IHL emerging?
  - g. Can customary IHL be derived from abstract State acts such as diplomatic statements, undertakings and declarations? By belligerents? By non-belligerents? By both?
12. Must practice in international and in non-international armed conflicts be analyzed separately to determine customary IHL? If yes, what if the classification of a given conflict was controversial? Does practice in international and that in non-international armed conflicts each influence the other?
13. Is customary IHL of non-international armed conflicts binding upon armed groups fighting in such conflicts? Are all rules found in the ICRC study to be applicable in non-international armed conflicts realistic for all armed groups involved in such conflicts?
14. a. What weight should be given to military manuals? Should they be taken into account only as State practice? Cannot they also reflect *opinio juris*? Do you think that governments include certain rules of IHL in their military manuals only for political considerations, and not out of a sense that they are bound by the rule?
- b. Do you agree with the US position (*Part D*) that one should distinguish between “military publications prepared informally solely for training or similar purposes and those prepared and approved as official government statements”? What do you think of Jean-Marie Henckaerts’s response, i.e. that “a state will not allow its armed forces to be taught on the basis of a document whose content it does not endorse. As a result, training manuals, instructor handbooks and pocket cards for soldiers were considered as reflecting state practice”?
15. a. Whose practice should be taken into account when assessing practice? Is it exclusively that of States? Or may other entities’ practice also be taken into consideration, such as that of international organizations, that of non-governmental organizations, or that of the ICRC?
- b. If only State practice is to be taken into account, may any State practice be considered? Or should it be restricted to operational conduct? To official statements made in official fora? What weight should be given to UN General Assembly resolutions? To other international and regional governmental organizations? To statements by States made during the *travaux préparatoires* of a treaty?
- c. Does the practice of armed groups in non-international armed conflicts contribute to customary IHL applicable in such conflicts?
- d. When does the practice of parties to non-international armed conflicts respecting their obligations under national law contribute to customary IHL? How would you assess the *opinio juris*? Is an acceptance of the practice as international law necessary to make it customary IHL?
- e. Are non-governmental armed groups bound by customary law?
- f. If States refuse to improve the protection of victims of non-international armed conflicts through treaties bringing the applicable rules closer to those of international armed conflicts, can one expect (to see) such a result from a study of customary law?
16. Is it possible to clearly separate practice from *opinio juris*? Aren’t they linked? Would not an analysis of *opinio juris* separated from practice result in a theoretical and hypothetical work?

17. (*See Rule 31 of the Study*)
  - a. Do you agree with the US position that a reference to State consent should be included in the phrasing of the rule? Under IHL, do humanitarian personnel enjoy a different protection according to whether their presence has been accepted by the State? Do the treaty rules reflect the role of State consent? If yes, do the treaty rules condition protection to State consent? (P I, Art. 71; P II, Art. 18)
  - b. What does “terms of mission” mean? Do humanitarian personnel lose their protection under IHL if they act outside the terms of their mission? Does acting outside the terms of mission necessarily mean participating in hostilities?
  - c. Do you think that Rule 31 should include a reference to the loss of protection in the case of direct participation in hostilities? Or do you agree with Jean-Marie Henckaerts that Rule 31 should be read in conjunction with Rule 6?
18. (*See Rule 78 of the Study*) May a State, in a non-international armed conflict, use means and methods prohibited in international armed conflicts? From a moral and political point of view? From a legal point of view? Could a study of State practice answer the latter question? A study of actual State behaviour? Did practice in both international and non-international armed conflicts, or only in the latter, have to be studied in order to answer that question?
19. (*See Rule 157 of the Study*)
  - a. When establishing a customary obligation to prosecute war crimes, does it matter that States use a different definition of war crimes? If most States recognize the same acts as war crimes? If one can at least find a common core of conduct generally considered by States as war crimes?
  - b. Do you think that the right to exercise universal jurisdiction over war crimes has not attained customary status? For this, is it necessary that States actually prosecute war crimes under universal jurisdiction? Does not the fact that States allow their national courts to prosecute war crimes under universal jurisdiction already show that States consider it as a right?

**Case No. 44, ICRC, The Question of the Emblem****A. ICRC, Diplomatic Conference on the Additional Emblem is postponed**

[Source: ICRC, *Information on the emblem No. 5*, 13 October 2000, <http://www.icrc.org>]

**13-10-2000 Diplomatic conference on additional emblem postponed**

On 12 October the Swiss government informed the ICRC and the International Federation that it had decided to postpone the diplomatic conference on the emblem until early 2001. The prospects for a successful diplomatic conference were good until a change occurred in the international climate as a result of events in the Middle East. The priority for both the Movement and the Swiss authorities is to make sure the conditions are right for the states party to the Geneva Conventions to adopt the draft 3<sup>rd</sup> protocol creating an additional emblem.

Despite the delay in holding the conference, confidence remains high in Geneva that a successful outcome will be achieved when the conference is convened early next year. This optimism is based on the substantial progress that has already been made on the text of the draft protocol. The text reflects wide consensus on essential principles, including the creation of an additional emblem and the importance of the universality of the Movement.

The clear commitment of the Movement's leadership to find a solution as quickly as possible remains as strong as ever. The progress in discussions with governments made during 2000 encouraged the conviction that a solution to emblem problems could be found by the end of this year. With the Swiss government's firm commitment to continue active consultations with the States party to the Geneva Conventions, there is confidence that the draft protocol will now be adopted in 2001.

Meanwhile the revised version of the draft 3<sup>rd</sup> protocol will be sent to states and National Societies. It will form the basis for the ongoing consultations, particularly on the use and form of the additional emblem.

The postponement of the diplomatic conference will also probably mean the postponement of the 28<sup>th</sup> International Conference planned for 14 November. This had been called to revise the statutes of the Movement in the light of the 3<sup>rd</sup> additional protocol to the Geneva Conventions. A decision on this will be taken by the Standing Commission in the coming days.

## **B. 28<sup>th</sup> International Conference of the Red Cross and Red Crescent, Resolution 3, Adoption of resolution 5 of the Council of Delegates 2003**

[Source: 28<sup>th</sup> International Conference of the Red Cross and Red Crescent, Resolution 3, Adoption of the Resolution 5 of the Council of Delegates 2003; available on <http://www.icrc.org/ihl>]

The 28<sup>th</sup> International Conference of the Red Cross and Red Crescent, *recalling* Resolution 3 (27<sup>th</sup> International Conference) adopted on 6 November 1999, *adopts* Resolution 5 adopted by the Council of Delegates on 1<sup>st</sup> December 2003 (see annex).

### **RESOLUTION 5 OF THE COUNCIL OF DELEGATES 2003**

The Council of Delegates,

*taking note* of the report submitted by the Standing Commission as requested by the 27<sup>th</sup> International Conference of the Red Cross and Red Crescent, held in Geneva in 1999, and Resolution 6 of the Council of Delegates in 2001,

*reiterating* the commitment of the International Red Cross and Red Crescent Movement to achieve, with the support of the States Parties to the 1949 Geneva Conventions, a comprehensive and lasting solution to the question of the emblem, on the basis of the proposed draft Third Protocol Additional to the Geneva Conventions, once it is adopted, as soon as circumstances permit,

*recalling* the legal and protective value of the emblems used by the International Red Cross and Red Crescent Movement, which, by virtue of their inclusion in the Geneva Conventions and continuous practice for over a century, have become universally recognised symbols of impartial and neutral aid and protection to the victims of war, natural disasters and other catastrophes,

1. *welcomes* the work of the Standing Commission, its Special Representative on the Emblem and its ad hoc Working Group, the ICRC and the International Federation to develop the basis for a comprehensive and lasting solution to the question of the emblem;
2. *further welcomes* the progress made since the 27<sup>th</sup> International Conference, in particular the drafting of the proposed Third Protocol Additional to the Geneva Conventions on the Emblem (12 October 2000) as well as the adoption of Resolution 6 of the 2001 Council of Delegates;
3. *deeply regrets* developments which have made it impossible to bring the process to its expected outcome with the adoption of the draft Third Additional Protocol;
4. *recalls* the Fundamental Principles of the Red Cross and Red Crescent, in particular the principle of universality;

5. *underlines* the urgency of reinforcing measures for the protection of war victims, medical personnel and humanitarian workers in all circumstances, and the significance in this context of the proposed Third Additional Protocol;
6. *requests* the Standing Commission to continue to give high priority to securing, as soon as circumstances permit, a comprehensive and lasting solution to the question of the emblem, in cooperation with the Swiss government as depositary of the Geneva Conventions and with other concerned governments and components of the Movement, on the basis of the proposed draft Third Additional Protocol;
7. *requests* the Special Representative of the Standing Commission on the Emblem to bring this resolution to the attention of the 28<sup>th</sup> International Conference of the Red Cross and Red Crescent.

## **C. Final Act of the Diplomatic Conference on the adoption of the Third Protocol additional to the Geneva Conventions**

[Source: Final Act of the Diplomatic Conference on the adoption of the Third Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an Additional Distinctive Emblem (Protocol III), in "Adoption of an Additional Distinctive Emblem," *IRRC*, Vol. 88, No. 186 (March 2006), available on [www.icrc.org](http://www.icrc.org). Footnotes omitted]

### **FINAL ACT OF THE DIPLOMATIC CONFERENCE ON THE ADOPTION OF THE THIRD PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE ADOPTION OF AN ADDITIONAL DISTINCTIVE EMBLEM (PROTOCOL III)**

1. The Diplomatic Conference convened by the Swiss Federal Council, as the depositary of the Geneva Conventions of 1949 and their Additional Protocols of 1977, with a view to adopting the Third Protocol Additional to the Geneva Conventions, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), was held in Geneva, Switzerland, from 5 to 8 December 2005.
2. The delegations of 144 High Contracting Parties to the Geneva Conventions participated in the Conference. [...]
4. The International Committee of the Red Cross (ICRC), the International Federation of the Red Cross and Red Crescent Societies (IFRC), and the Standing Commission of the Red Cross and Red Crescent participated in the work of the Conference as experts.  
[...]
15. The President informed the Conference that, following the Informal Discussions among High Contracting Parties on 12-13 September 2005, Switzerland, as the depositary of the Geneva Conventions, had conducted intensive consultations. These latter led to the signing of a Memorandum of Understanding (MoU) and an Agreement on Operational Arrangements (AoA) between Magen David Adom in Israel (MDA) and the Palestine Red Crescent Society (PRCS) on 28 November 2005

in Geneva, which were concluded in an effort to facilitate the adoption of Protocol III and to pave the way for the admission of both societies to the International Red Cross and Red Crescent Movement at the next International Conference of the Red Cross and the Red Crescent.

[...]

18. In accordance with agenda item 10, the Conference proceeded to the adoption of Protocol III. [...]
23. Having [...] obtained the necessary two-thirds majority in accordance with Article 37 para. 1 of the rules of procedure, the Conference adopted on 8 December 2005 the Third Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem whose certified true copies of the English, French and Spanish texts are annexed to this Final Act [...].

## D. The Third Additional Protocol

[Source: Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005; available at [www.icrc.org](http://www.icrc.org)]

[See Document No. 8, The Third Protocol Additional to the Geneva Conventions]

### **Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)**

**8 December 2005**

#### **Preamble**

*The High Contracting Parties,*

[PP1] *Reaffirming* the provisions of the Geneva Conventions of 12 August 1949 (in particular Articles 26, 38, 42 and 44 of the First Geneva Convention) and, where applicable, their Additional Protocols of 8 June 1977 (in particular Articles 18 and 38 of Additional Protocol I and Article 12 of Additional Protocol II), concerning the use of distinctive emblems,

[PP2] *Desiring* to supplement the aforementioned provisions so as to enhance their protective value and universal character,

[PP3] *Noting* that this Protocol is without prejudice to the recognized right of High Contracting Parties to continue to use the emblems they are using in conformity with their obligations under the Geneva Conventions and, where applicable, the Protocols additional thereto,

[...]

[PP5] *Stressing* that the distinctive emblems are not intended to have any religious, ethnic, racial, regional or political significance,

[...]

[PP7] *Recalling* that Article 44 of the First Geneva Convention makes the distinction between the protective use and the indicative use of the distinctive emblems,

[...]

[PP9] *Recognizing* the difficulties that certain States and National Societies may have with the use of the existing distinctive emblems,

[...]

*Have agreed on the following:*

### **Article 1 – Respect for and scope of application of this Protocol**

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.
2. This Protocol reaffirms and supplements the provisions of the four Geneva Conventions of 12 August 1949 (“the Geneva Conventions”) and, where applicable, of their two Additional Protocols of 8 June 1977 (“the 1977 Additional Protocols”) relating to the distinctive emblems, namely the red cross, the red crescent and the red lion and sun, and shall apply in the same situations as those referred to in these provisions.

### **Article 2 – Distinctive emblems**

1. This Protocol recognizes an additional distinctive emblem in addition to, and for the same purposes as, the distinctive emblems of the Geneva Conventions. The distinctive emblems shall enjoy equal status.
2. This additional distinctive emblem, composed of a red frame in the shape of a square on edge on a white ground, shall conform to the illustration in the Annex to this Protocol. This distinctive emblem is referred to in this Protocol as the “third Protocol emblem”.
3. The conditions for use of and respect for the third Protocol emblem are identical to those for the distinctive emblems established by the Geneva Conventions and, where applicable, the 1977 Additional Protocols.
4. The medical services and religious personnel of armed forces of High Contracting Parties may, without prejudice to their current emblems, make temporary use of any distinctive emblem referred to in paragraph 1 of this Article where this may enhance protection.

### **Article 3 – Indicative use of the third Protocol emblem**

1. National Societies of those High Contracting Parties which decide to use the third Protocol emblem may, in using the emblem in conformity with relevant national legislation, choose to incorporate within it, for indicative purposes:

- a) a distinctive emblem recognized by the Geneva Conventions or a combination of these emblems; or
  - b) another emblem which has been in effective use by a High Contracting Party and was the subject of a communication to the other High Contracting Parties and the International Committee of the Red Cross through the depositary prior to the adoption of this Protocol. [...]
2. A National Society which chooses to incorporate within the third Protocol emblem another emblem in accordance with paragraph 1 above, may, in conformity with national legislation, use the designation of that emblem and display it within its national territory.
3. National Societies may, in accordance with national legislation and in exceptional circumstances and to facilitate their work, make temporary use of the distinctive emblem referred to in Article 2 of this Protocol.
4. This Article does not affect the legal status of the distinctive emblems recognized in the Geneva Conventions and in this Protocol, nor does it affect the legal status of any particular emblem when incorporated for indicative purposes in accordance with paragraph 1 of this Article.

#### **Article 4 – International Committee of the Red Cross and International Federation of Red Cross and Red Crescent Societies**

The International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, and their duly authorized personnel, may use, in exceptional circumstances and to facilitate their work, the distinctive emblem referred to in Article 2 of this Protocol.

#### **Article 5 – Missions under United Nations auspices**

The medical services and religious personnel participating in operations under the auspices of the United Nations may, with the agreement of participating States, use one of the distinctive emblems mentioned in Articles 1 and 2.

#### **Article 6 – Prevention and repression of misuse**

1. The provisions of the Geneva Conventions and, where applicable, the 1977 Additional Protocols, governing prevention and repression of misuse of the distinctive emblems shall apply equally to the third Protocol emblem. In particular, the High Contracting Parties shall take measures necessary for the prevention and repression, at all times, of any misuse of the distinctive emblems mentioned in Articles 1 and 2 and their designations, including the perfidious use and the use of any sign or designation constituting an imitation thereof.
2. Notwithstanding paragraph 1 above, High Contracting Parties may permit prior users of the third Protocol emblem, or of any sign constituting an imitation thereof, to continue such use, provided that the said use shall not be such as would appear, in time of armed conflict, to confer the protection of the Geneva Conventions and,



where applicable, the 1977 Additional Protocols, and provided that the rights to such use were acquired before the adoption of this Protocol.

### Article 7 – Dissemination

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that this instrument may become known to the armed forces and to the civilian population.

[...]

### DISCUSSION

1. [See **Document No. 8**, The Third Protocol Additional to the Geneva Conventions]
  - a. Why has the International Red Cross and Red Crescent Movement encountered problems arising from a plurality of protective emblems? Do you think there are more demands for additional emblems, or more demands for a single emblem? Who makes such demands? Which of these demands are more influential?
  - b. Do the problems have something to do with the statement made in the Preamble to Protocol III regarding the absence of any religious connotation in the red cross emblem [PP5]? Has this claim been harder to make since the acceptance of the second emblem, the red crescent? What impact does this have on the principle of universality? Did the adoption of Additional Protocol III put an end to the religious connotations that some see in the emblem? In the context of Art. 2 and/or Art. 3 thereof?
  - c. What dangers to the emblem's authority does the use of additional emblems entail? Does the addition of an emblem, as set out in Protocol III, undermine one of its Fundamental Principles, i.e. neutrality? Does Protocol III serve to increase the protection of war victims?
  - d. Why does the International Red Cross and Red Crescent Movement refuse to abandon the existing emblems in favour of a new single emblem? For whom would such a change have created the most problems: the ICRC, the National Societies, the Federation, the States, or the victims of armed conflicts? What kind of problems would it/they have had?
  - e. Do the Conventions and the Protocols protect emblems other than the red cross? If yes, which ones? Who may use these other emblems? (GC I, Art. 38; GC II, Art. 41; P I, Arts 8(1) and 18; P I, Annex I, Arts 4-5; P II, Art. 12)
  - f. Before the adoption of Protocol III, were there emblems used by the National Societies and medical units that were not protected by the Conventions and the Protocols? If yes, which ones? Why were they not protected? Why did some States want emblems other than the red cross or crescent to be used by their National Societies and medical units?
2.
  - a. Which mechanisms were available to adopt the new emblem? Was a diplomatic conference the only possibility?
  - b. Was a new separate treaty necessary? Couldn't a new emblem have been introduced by revising Annex I of Protocol I? Doesn't Protocol I provide a procedure for amendments (P I, Arts 97-98; P II, Art. 24) Yet how likely was it that all of the 192 States Parties (to the Conventions) would have agreed on such a revision? Particularly if a whole new treaty had to be approved?

- c. Mustn't the Statutes of the Movement also be amended? [See **Document No. 31**, Statutes of the International Red Cross and Red Crescent Movement, Art. 20] Would it not have proved easier to amend the Statutes than to amend the Conventions?
  - d. Would amending the Statutes without amending the Conventions be a violation of the Conventions? If not, what practical effects would only amending the Statutes have?
3. Who may use the emblem? In which circumstances and subject to which conditions? When may it or must it be used as a protective device? For indicative purposes? What is the objective of the emblem in these two cases? How can it be ensured that this objective is achieved? (GC I, Arts 39-43; P I, Art. 18; P III, Arts 2-5)
4. For which reasons do you think the Council of Delegates decided to exclude the possibility of abandoning the current emblems as one of the solutions to the problems arising from a plurality of emblems?
5.
  - a. Why was the negotiation process for the adoption of draft Protocol III suspended after violence resumed in the Middle East as from the end of 2000?
  - b. Why was this conflict more likely than any other to stop the process of adopting the new emblem?
  - c. What is the status of the Palestine Red Crescent? And of the Israeli Magen David Adom (red shield of David)? Why were these two National Societies not part of the Movement? Was the reason for this in both cases a problem linked to the emblem? [See **Document No. 31**, Statutes of the International Red Cross and Red Crescent Movement, Art. 4]
  - d. Was the question of the emblem the only obstacle to the admission of these two National Societies into the Movement? What other obstacles, if any, had to be overcome for the "Palestine Red Crescent" to become a member of the Movement? Do you know of other National Societies in a situation similar to that of the "Palestine Red Crescent" before its admission as a member? Which ones?
  - e. Do you know of other National Societies that are in the same situation as was Israel's Magen David Adom? Which ones? Will the adoption of Protocol III lead to a solution for these other National Societies too?
  - f. Under Protocol III, may the medical services of the Israeli armed forces now use the red shield of David as a protective emblem? May the National Society, the Magen David Adom, use the red shield of David as an indicative emblem?

**Case No. 45, ICRC, Disintegration of State Structures**

[Source: Preparatory Document Drafted by the International Committee of the Red Cross for the First Periodical Meeting on International Humanitarian Law, Geneva, January 19-23, 1998; original document in French, footnotes partially omitted.]

**I. THE DISINTEGRATION OF STATE STRUCTURES**

Under international law, a State is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.

The disintegration of State structures seems to occur when the third constitutive element of statehood, a government in effective control, fades away. [...]

A situation of this type has roots that go much deeper than a mere rebellion or *coup d'état*. It involves the implosion of national institutions, authority, law and order, in short the body politic as a whole. It also implies the breakdown of a set of values on which the State's legitimacy is based, often resulting in a withdrawal of the population into a form of nationalism which is based on religious or ethnic affiliation and which becomes a residual and viable form of identity. In most cases, when State structures collapse, the maintenance of law and order as well as other forms of authority fall into the hands of various factions. The State itself does not physically disappear, but gradually loses the capacity to carry out the normal functions of government.

The disintegration of the State occurs at various levels of intensity and may affect different parts of the country. At the low end of the spectrum, the government may remain in office but have only little control over the population and the territory. At a higher level of disintegration, certain crucial structures may formally remain in operation, so that the State can still be legitimately represented before the international community but is nevertheless composed of several warring factions. The government is in effect no longer characterized by uncontested power and a monopoly on the use of force. The regular armed forces, which are often one of the only institutions remaining in these weakened States, also gradually fall apart. A particularly alarming development is the proliferation of veritable private armies and "security" detachments, which are often nothing but branches of conglomerates with economic interests and which are free of any real State control.

The next level in the process is marked by the total implosion of government structures, so that the State is no longer legitimately represented before the international community. Chaos and crime – already widespread during the preceding phases and often foreshadowing total disintegration – become generalized and the factions no longer exercise effective control over their members and have no clearly established chain of command. There are no valid representatives with whom humanitarian organizations can talk and insecurity becomes a real problem.

The armed conflicts which arose or evolved in such a context have brought and continue to bring humanitarian organizations face to face with new challenges and

growing difficulties. These conflicts have been defined in turn “destructured” or “anarchic”. [...] We have chosen to use the term “anarchic” conflicts in this document.

## **II. “ANARCHIC” CONFLICTS**

### **1. Characteristics**

On the basis of an analysis of several conflicts involving the disintegration of State structures in which the ICRC and other humanitarian organizations have found it most difficult to perform their work and to keep their bearings, the essential characteristics of these internal conflicts may be described as follows:

- the disintegration of the organs of the central government, which is no longer able to exercise its rights or perform its duties in relation to the territory and the population;
- the presence of many armed factions;
- divided control of the national territory;
- the breakdown of the chain of command within the various factions and their militias.

These characteristics are generally closely interconnected. They are fundamental and cumulative, for in the absence of any one of them, the conflict in question would not be “anarchic” within the meaning we ascribe to it. On the other hand, they may be found, and hence a conflict may be described as “anarchic”, only at a certain stage in the hostilities. [...]

### **2. The effects in humanitarian terms**

Internal conflicts, which were financed from abroad during the years of the Cold War, now tend to be waged within an autarkic kind of war economy based on robbery and illicit traffic. This has led to a splintering of guerrilla movements, which the providers of external aid had, often artificially, regarded as united. When a movement or faction relies exclusively on robbery and contraband for its subsistence, it is drawn into a spiral of crime in which every small group, or even every individual, acts for himself.

The ICRC has found from its direct experience in the field that these effects tend to be greater in “anarchic conflicts”. Indeed, in conflicts that take place amid the disintegration of State structures, the civilian population is often directly at stake, since the aim of each faction is to acquire living space.

The main humanitarian effects of this type of conflict are:

1. Humanitarian organizations are obliged to establish and to maintain at all times contacts with each of the various factions and with a plethora of their representatives. This is necessary in order for them to understand the social, political and economic context in which they are called upon to work; to thwart attempts at manipulating humanitarian assistance on the part of various factions

wishing to cultivate or acquire supporters through the distribution of humanitarian aid; and to ensure the safety of local and expatriate humanitarian staff. The extreme individualization of the factions has made contacts and negotiations very uncertain. Every soldier – adult or child – virtually becomes a spokesperson, or in any case someone with whom to negotiate.

2. The more fragmented the territory is by fighting between the factions involved in a conflict, the less civilians will be likely to identify with the dominant local faction, and therefore remain in their places of origin. This leads to mass population movements, both within the national borders (internally displaced people) and beyond them (refugees). [...]
3. Because of the prevailing chaos, discipline among the troops is rare and in extreme cases every combatant is his own commander. Accordingly, the concept of a “war ethic” becomes a delusion, while rape, kidnapping, hostage-taking, looting and other penal-law crimes become practically commonplace. Total lack of discipline combined with the stress of combat and fear always leads to wanton violence. In these contexts, efforts to spread knowledge of the rules of military conduct, of principles such as respect for the red cross/red crescent emblem and for humanitarian organizations, are meeting with increasing obstacles, which call for innovative approaches. The message to be conveyed can no longer, as in more traditional conflicts, be addressed to members of the hierarchy in the hope that it will be passed on to their subordinates. [...]
4. The loose structure characteristic of factions and their militia makes it more and more difficult, if not impossible, to distinguish between combatants and civilians. This has always been a problem in internal conflicts, particularly because guerrillas made their social basis – the “masses” – an important factor of their struggle. This phenomenon is accentuated in “anarchic” conflicts, for during most of the time the militiamen mingle with civilians, often without wearing a uniform or any other distinguishing sign. An additional problem is thus created for humanitarian organizations, which are finding it more and more difficult to ensure that only civilians benefit from humanitarian assistance.
5. The anarchy that results from the disintegration of the State undermines the values that lie at the very heart of humanitarian action and international humanitarian law. The breakdown of the set of values symbolic of the State fosters a strong identity-related component which makes principles such as impartiality unacceptable to the parties to a conflict and even to individuals. The obvious consequence is increased risk for all those present. In this framework, it is even more difficult for humanitarian organizations to respect a nonetheless vitally important work ethic in all circumstances. The latter includes refusing to make any compromises when it comes to their operational methods of action, for this can only have a negative impact on all aid agencies in the future.
6. In this context of disintegration, new, more immediate and tangible interests have appeared: they reflect local and/or regional economic concerns and often the personal interests of faction leaders or of groups with links to organized crime

networks. The primacy of this race for personal and direct profit over the collective interest also exposes humanitarian workers to growing risks, since the factions will not hesitate to appropriate the goods those workers administer with a view to assisting the victims of armed conflicts. The humanitarian organizations are no longer considered as independent purveyors of relief but as an economically “interesting” component. [...]

7. At the same time, in “anarchic” conflicts, humanitarian organizations are often compelled to take the place of State structures or services that no longer exist. This is particularly striking in the case of medical activities. [...]

Once the State has imploded, a paradox is created: humanitarian action becomes both more necessary and more difficult, if not impossible. This is because the hierarchical structure of the parties to the conflict is insufficient to enable them to respect international humanitarian law, and also because that structure is inadequate for providing humanitarian organizations with the minimum security conditions they need in order to operate. [...]

### **III. APPLICABILITY AND APPLICATION OF INTERNATIONAL HUMANITARIAN LAW**

States that are in the process of disintegration are nevertheless [...] subject to international law, even in the absence of a government able to ensure the continuity of the State’s functions. By the same token, the treaties to which the failed State is a party remain in force.

Human rights instruments play only a minor role in such situations since their implementation depends largely on the existence of effective State structures. A more prominent role is played by international humanitarian law instruments applicable in armed conflicts [...]. This is because international humanitarian law is binding not only upon States but also upon non-State entities, such as insurgent groups, the armed factions taking part in the hostilities, and the individuals belonging to them.

The emergence of “anarchic” conflicts, however, raises questions of both the applicability and the application of international humanitarian law.

#### **1. Applicability of Article 3 common to the 1949 Geneva Conventions**

Common Article 3 obliges the parties to a non-international armed conflict to respect certain minimum humanitarian rules [...].

Accordingly, the main questions with regard to the applicability of common Article 3 in “anarchic” conflicts are (a) whether the factions participating in such a conflict constitute “parties to the conflict” and (b) whether the intensity and form of the hostilities between these factions are characteristic of an armed conflict.

**(a) Definition of a “party to the conflict”**

Common Article 3 does not define the term “party to the conflict”. [...] The general consensus of expert opinion is that armed groups opposing a government must have a minimum degree of organization and discipline – enough to enable them to respect international humanitarian law – in order to be recognized as a party to the conflict.

[...] The question therefore arises as to whether, in situations where there is a proliferation of warring factions characterized by their lack of organization, these factions qualify as “parties to the conflict” and hence common Article 3 can be considered to apply?

Given the humanitarian purpose of common Article 3, its scope of application must be as wide as possible and should not be limited by unduly formal requirements. It is revealing in this respect that various recent UN Security Council resolutions have called upon “all parties to the conflict” to respect international humanitarian law, and this also in the context of such “anarchic conflicts” as those in Somalia and Liberia.

[Footnote 7 reads: See, e.g., S.C. Res. 814, 26 March 1993, para. 13 “[...] reiterates its demand that all Somali parties, including movements and factions, immediately cease and desist from all breaches of international humanitarian law [...]”; S.C. Res. 788, 19 November 1992, para. 5 “[...] calls upon all parties to the conflict [in Liberia] [...] to respect strictly the provisions of international humanitarian law.”]

**(b) Existence of an armed conflict**

With regard to the term “armed conflict”, expert opinion has also and almost exclusively taken into account conflicts between a government and a rebel party, but not conflicts between different factions in a country. The experts moreover agree that internal tensions and disturbances, such as riots and isolated and sporadic acts of violence, do not constitute an armed conflict within the meaning of common Article 3.

In the cases cited above, however, the Security Council implicitly stated that hostilities linked to the disintegration of the State constituted an armed conflict. The International Court of Justice has declared for its part that the rules of common Article 3, in so far as they constitute “elementary considerations of humanity”, apply not only in cases of armed conflict, but in all situations by virtue of customary law.

[Footnote 8 reads: International Court of Justice, Reports of judgments, advisory opinions and orders: Case concerning military and paramilitary activities in and against Nicaragua, 27 June 1986, p. 114, para. 218. [...]]

There can thus be no doubt that the rules of Article 3 apply in an “anarchic” conflict. Moreover, when these rules are applicable, all individuals belonging to a faction have the duty to respect them.

**2. Applicability of Protocol II**

For Protocol II to be applicable requires, first of all, that a faction must be fighting against the government, thereby excluding situations of confrontation between non-governmental factions. Another condition laid down in Protocol II is that a party to a conflict must exercise such control over the national territory as to enable it to carry out sustained and concerted military operations and to implement the Protocol. Experience shows that this condition is hardly ever fulfilled by an armed faction party to an “anarchic” conflict. [...]

### **3. Application of the fundamental principles of common Article 3**

As referred to above, the International Court of Justice has declared that the rules laid down in common Article 3 correspond to “elementary considerations of humanity” which are binding on all individuals. Moreover, a number of Security Council resolutions, including those on “anarchic conflicts”, call upon all parties to respect international humanitarian law and reaffirm that those responsible for breaches thereof should be held individually accountable. It is therefore clear that these exceptional situations are not beyond the scope of the law. Quite the contrary, they are subject to a series of customary norms which are collectively binding on the various parties to the conflict and individually binding on each individual taking part in the hostilities. [...]

The problem posed by this type of conflict is therefore not so much that of which norms are applicable as it is that of their implementation. This can be said of all national and international legislation applicable on the territory of the State which is disintegrating. Since by definition the disintegration of the State carries with it the risk of non-compliance with the entire corpus of the law, it is in the interest of the international community to make sure, by means of cooperation and in accordance with the UN Charter, that such “no-law” zones do not come into existence.

Once the State has started to crumble and the armed conflict has broken out, it is the States’ duty to fulfil their obligation to “respect and ensure respect for” international humanitarian law in all circumstances, by not acting in a way that could lead to a further deterioration in the situation and potential breaches of humanitarian law.

### **4. The United Nations Charter**

As the Security Council’s resolutions tend to show, “anarchic” conflicts may give rise to humanitarian crises which can be considered to pose a threat to international peace and security. In such cases, political-military intervention within the framework defined in the UN Charter must remain a possibility so that activities to provide humanitarian assistance and protection for the groups of people in peril can be resumed. Indeed, political problems cannot be solved by humanitarian actions alone, and the members of the international community are not only bound to fulfil their obligations under humanitarian law but also to shoulder the responsibilities conferred on them in the UN Charter. [...]

## **IV. PROPOSALS**

[T]he weakening or the disintegration of the State impairs acceptance and even understanding of the rules and principles underpinning international humanitarian law and all humanitarian action.

The only way to avoid reaching this stage is to prevent State structures from collapsing. Yet there are many causes of disintegration, and the task of remedying them largely exceeds the competence of humanitarian agencies.

Humanitarian organizations, and the ICRC in particular, can help to ensure the survival, even in the most extreme situations, of respect for the principles governing humanitarian action and for the fundamental norms of international humanitarian law. [...]



## 1. Humanitarian action

### ***(a) Identification of local structures or groups***

For a better knowledge and understanding of the situations in which humanitarian agencies are called upon to act, local structures or groups which have survived the implosion of the State should be identified and supported as appropriate. In practically all conflict situations there are structures, traditional or not, that have continued to exist after the collapse of the State and that have taken over various of its functions. In Somalia, for example, the traditional clan system survived in spite of everything, and groups of women that had formed spontaneously and were greatly encouraged and supported made it easier for humanitarian organizations to provide food aid.

It is nevertheless important to realize that such alternative structures do not exist in every situation and that even where they do, they cannot really replace those of the State. [...]

### ***(b) The role of local customs***

Even more than the structures themselves, it is necessary to identify all the local reflexes, customs and “codes of honour” that are bound to exist and to survive, even in the societies most seriously affected by the breakdown of the State and by widespread conflict. These traditional rules are often bound up with religious beliefs and are generally safeguarded by the old people – the sages of the tribe or clan. It is the rules that are unwritten and uncoded but are nevertheless deeply rooted in the society, even one that has become highly disintegrated, which continue to be recognized and even respected, and which can facilitate humanitarian work.

### ***(c) Dissemination of humanitarian law and principles***

Spreading knowledge of the rules and fundamental principles of international humanitarian law presents a special challenge in “anarchic” conflicts because of the plethora of participants in the violence, who form small loosely-structured groups, and because of the difficulty of reaching them owing either to security problems or to the dim view they take of the presence of foreigners on their soil. Moreover, when there is a means of reaching these small groups, conveying to them a message centred on the principles of humanitarian law and persuading them to comply with the law, calls for an understanding of their environment and their motives and for a very great willingness to listen. [...]

### ***(d) Reducing the risks of humanitarian assistance***

Today, humanitarian organizations are *de facto* – by reason of the volume of assistance they inject into “anarchic” conflicts – first-rank players on the economic and social, and hence also on the political, scenes. Any humanitarian initiative has its inevitable corollary of a major outpouring of goods, which can alter the local economic and social fabric and can even fan the fighting among factions.

To counter these risks, recourse could be had to micro-projects – self-managed community kitchens, seed distributions, livestock vaccination campaigns or help to resume income-generating activities. Projects such as these lie midway between emergency operations and development programmes [...]. Micro-projects also make it possible to carry out very localized work, which not only provides support for the autarkic economy of countries in conflict where State structures have imploded, but also helps to combat the rise in banditry. When broad action is indispensable, humanitarian organizations must show even greater openness and lucidity in analysing the side-effects of their work. [...]

***(e) Training humanitarian personnel***

[...]

Emergency humanitarian work, in particular in the context of “anarchic” conflicts, requires faultless professionalism, itself based on thorough prior knowledge of the region, the local groups and cultures, the risks and ethics inherent to situations of this type. By the same token, humanitarian assistance for the people caught up in the conflict calls for close cooperation with local staff, on the basis of the same professional and ethical criteria.

**2. The role and responsibilities of the international community [...]**

***(a) The obligation to “ensure respect” for international humanitarian law***

[...] The collapse of civil society and the ungovernable outbreak of violence is a matter that concerns the entire international community. Indeed, Article 1 of the Geneva Conventions stipulates that the States must “ensure respect” for international humanitarian law. [...] There are nevertheless always a number of measures [States] can adopt, such as an arms embargo, the freezing of foreign assets, or a threat to reduce military and financial aid.

***(b) Taking account of new players in armed conflicts***

Consideration must be given to the means of involving the new players in modern conflicts in the application and dissemination of international humanitarian law. In today’s conflicts, in addition to the traditional participants in situations of armed violence, other types of protagonists have a direct or indirect role to play. They may be private militias in the service of commercial companies or paramilitary groups on orders from a government. They may be transnational companies or supranational economic players who could hold considerable sway over the parties to a conflict. They may be religious or political groups able to unite the masses around a message. [...]

**(c) *The need for an international jurisdiction***

It should be constantly borne in mind that the message concerning respect for the principles and rules of international humanitarian law will have very little impact if it is not accompanied by the prospect of punishment in the event of violations. This is true both for combatants, who know full well that the weakness or collapse of the chain of command is a guarantee of impunity, and for the society as a whole, since the breakdown of the State and the implosion of its functions, in particular the judiciary, clearly render the State incapable of fulfilling its obligation of bringing to trial the perpetrators of grave breaches of the law. The result is the abandoning of responsibility at all levels, which is both a cause and an effect of the disintegration of State structures. In the case of “anarchic” conflicts, where the legal system has become ineffective or has disappeared entirely, the establishment of an international criminal tribunal is of primary importance for ensuring the future application of and respect for international humanitarian law.

**(d) *Military intervention***

In the most serious cases, the Security Council may ask States to intervene militarily in accordance with Chapter VII of the UN Charter. Before engaging in such operations, however, it is essential to set precise objectives and to draw up a clear plan of action so as to avoid creating any confusion between the humanitarian and military spheres. While such operations cannot be considered humanitarian in and of themselves, they may make it possible to restore conditions in which international humanitarian law can be applied and humanitarian activities can be pursued.

**(e) *Prevention of armed conflicts***

The most adequate and cost-effective international action would of course consist in preventing the very outbreak of armed conflict, through monitoring and effective response to early warning signals. [...] It is often the follow-up to this early warning that is absent. [...]

**DISCUSSION**

1. a. What are the necessary conditions for application of Art. 3 common to the Geneva Conventions?
- b. Can the acts which “are and shall remain prohibited at any time and in any place whatsoever”, according to common Art. 3, only be committed in an armed conflict? Can they only be prohibited in an armed conflict? Can they only be prohibited for “parties to the conflict”? Which of these prohibitions need a minimum of structure to realistically be respected? Which can be respected by each individual?
- c. Does the wording of common Art. 3 clarify that it only prohibits acts which can be attributed to “parties to the conflict”?
- d. In “anarchic” conflicts do factions constitute “parties to the conflict” in such a way that common Art. 3 applies? Every faction or only some? Is the status of a faction as a “party to the conflict” generally more easily determined if the government uses armed forces to combat a rebel faction

than if rival factions fight each other? Particularly if such inter-faction hostilities involve numerous disorganized factions? Why is a minimum degree of organization and discipline within a faction relevant to its recognition as a “party to the conflict”?

- e. What constitutes “armed conflict” for purposes of applying common Art. 3? Does common Art. 3 provide a definition? What level of intensity must hostilities reach to constitute an “armed conflict” sufficient for the article’s application? Is sporadic violence sufficient for its application? An internal disturbance? What form must the hostilities take? Are hostilities between different, non-governmental factions in a country sufficient?
  - f. Does common Art. 3 perhaps apply in all situations? Does the ICJ in the case *Nicaragua v. US*, referred to in the document, actually state that common Art. 3 applies outside armed conflicts? [See **Case No. 153**, ICJ, *Nicaragua v. United States*, para. 218]? At least those rules in common Art. 3 which constitute “elementary considerations of humanity”?
  - g. Do you agree that internal tensions and disturbances, such as riots and isolated and sporadic acts of violence, are not covered by common Art. 3? Why? Because Art. 1(2) of Protocol II states that they are not armed conflicts? (P II, Art. 1(1))
2. What are the necessary conditions for application of Protocol II? (P II, Art. 1) Is the threshold for application of Protocol II different than for common Art. 3? If so, is it higher or lower than for application of common Art. 3?
  3. If IHL does not apply, is e.g. violence against civilians prohibited by international law? Are there customary norms that are binding for the various parties and individually for each person? Is it customary to respect those rules?
  4. What law protecting individuals caught up in “anarchic” conflicts applies if IHL instruments do not? Is international human rights law applicable in “anarchic” conflicts fought not by the State but by private factions? Are its rules adequate? Does the implementation of international human rights law depend more on the existence of effective State structures than does the implementation of IHL? Which mechanisms for the implementation of international human rights law can still function in “anarchic” conflicts?
  5.
    - a. What problems do you see for the implementation of IHL in “anarchic” conflicts? Which mechanisms for the implementation of IHL can still function in such conflicts? Which cannot?
    - b. What is the responsibility of the international community in “anarchic” conflicts? Are “anarchic” conflicts a threat to international peace and security? What can the UN Security Council do? What can States party to the Conventions do? What must they do? (GC I-IV, common Art. 1)
    - c. What measures can be taken by the ICRC or other humanitarian organizations to prevent such “anarchic” conflicts? What measures should be taken after hostilities have broken out? What do you think of the proposals mentioned here? Can you add to them?
    - d. What specific difficulties does a humanitarian organization encounter in such “anarchic” conflicts? With regard to its principles such as neutrality and impartiality? To its working methods in providing protection and assistance?

**Case No. 46, ICRC's Approach to Contemporary Security Challenges**

[Source: Official Statement available on <http://www.icrc.org>]

**Humanitarian security: "a matter of acceptance, perception, behaviour..."**

At a meeting in Geneva (31.03.04) ICRC operations director Pierre Krähenbühl outlined the organization's view of current threats to humanitarian work in conflict zones and reaffirmed its commitment to the principles of impartiality, independence and neutrality.

*Address given at the High-level Humanitarian Forum*

*Palais des Nations, Geneva*

*31 March 2004 [...]*

The year 2003 has undoubtedly been a difficult – and often dramatic – one for the conduct of humanitarian operations. There were threats and attacks deliberately targeting aid organizations and their personnel, something that has raised questions about the ability of these organizations to fulfil their mandate and generated a debate around the future of humanitarian action. There are important stakes in this debate for the ICRC and we would like to share some thoughts and indications about how the ICRC assesses these developments and how it plans to address some of their most significant implications.

**Evolving environments**

Conflict environments in today's world continue to be highly diverse in terms of causes, characteristics and typologies. At a global level, we note a renewed polarisation or radicalisation. This polarisation has taken on different forms but the one that is affecting the conflict environments most notably is the confrontation taking place between a number of states engaged in what has become known as the "fight against terrorism" and a series of radical non-state actors determined to oppose them and prepared to resort to the use of non-conventional methods which include attacks of deliberate terror against civilians and so-called soft targets, for example humanitarian organizations.

While a number of individual contexts are affected by these global trends, local causes remain predominant in assessing reasons for conflicts in many other parts of the globe: economic, social, health and other related issues.

**Implications for security**

Carrying out humanitarian activities in zones of armed conflict or internal violence has always been a dangerous undertaking. The ICRC currently has 10,000 staff members working in 75 countries. At every moment of the day they travel to areas that have seen fighting occur or cross front lines between opposing parties. They meet, negotiate or deal with the whole range of different arms carriers: from military to police, paramilitary to rebel, child soldier to mercenary.

Security of personnel and beneficiaries alike amounts to a crucial institutional responsibility: while working in contexts of armed conflict or situations of violence evidently implies being confronted with significant levels of risk, the ICRC has always sought to develop approaches and instruments of security management that limit, to the largest possible extent, exposure to such risks.

The “classic” security environment is commonly described as one where the main risk is of finding oneself at the wrong moment in the wrong place. It is worth noting – as we discuss some of the new features in terms of risks – that this type of security environment remains in the experience of the ICRC by far the most widespread in the world today.

This being said, in 2003, the ICRC was the victim of a series of deliberate attacks that claimed the lives of four colleagues in Afghanistan and Iraq. A fifth colleague was caught in cross-fire and killed in Baghdad. Several other organizations among which the Afghan Red Crescent Society, the UN family and NGOs suffered similar tragic losses.

While two out of the three deliberate attacks, specifically those north of Kandahar in March and south of Baghdad in July, appear to have been the result of an apparent association of the ICRC’s presence with the broader international political and military action in the contexts, the October car-bomb attack against the ICRC offices in Baghdad was a direct and planned targeting of the organization.

Was this a new element? Not specifically: being deliberately targeted in a given context has happened before. [...]

Therefore, what is new today? From an ICRC perspective, what is new in the present context is the global nature of the threat, the fact that it is not geographically circumscribed. The ICRC’s security concept was defined as an essentially context-based approach. A given delegation in the field evaluates its security environment on the basis of a series of institutional indicators – we call them our security pillars – among which acceptability figures prominently.

Today however, those indicators may appear favourable in a given context and actors coming from the outside could nevertheless target our staff.

A complicating factor is the fact that access to the groups carrying out these attacks is at present very difficult when not outright impossible. Yet for the ICRC, dialogue with all actors involved in or affecting the outcome of a given situation of conflict is a vitally important part of our operating procedures. Without such dialogue, it is impossible to achieve required levels of acceptability and thus impossible to reach populations at risk to carry out our protection and assistance activities.

In a polarised environment furthermore, there are expectations that any actor ought to take sides. One is friend or foe, ally or enemy. This makes it all the more complex for actors, such as the ICRC, who invoke principles of independence and neutrality, to get their message across. From this results a heightened question of perception of the legitimacy of humanitarian action and in particular of the ICRC’s neutral and independent way of operating.

This development entails two specific risks: **that of being rejected and that of being instrumentalised.**

It appears at present that any actor seen in one way or another to be contributing to the stabilization or transition efforts in Afghanistan or to the occupation of Iraq is potentially at risk. Since in addition the ICRC's identity is perceived in some circles as mainly Western – because of our funding, our emblem, our headquarters – the risk of being mistaken for an integral part of the broader political and military presence is high.

Regardless of what the motives might have been the ICRC has strongly condemned these attacks against its staff, which seriously affect its ability to provide protection and assistance to the extent required by the situations in Iraq and Afghanistan.

Another element of risk is that of being instrumentalised, in other words the risk of integration by some state actors of humanitarian action into the range of tools available to them in the conduct of their campaign against terrorist activities. A variety of expressions thereof have been noted in recent months. They include statements by some governments describing their military presence in Iraq and Afghanistan as "mainly humanitarian". The establishment of the Provincial Reconstruction Team (PRT) concept by the international forces in Afghanistan is another example. The ensuing blurring of lines between the role and objectives of political and military actors on the one hand and humanitarian actors on the other creates serious perception and operational problems for an organization such as the ICRC.

### **ICRC response**

How does the ICRC intend to address some the most pressing implications of the developments? I would like in responding to this question to share with you some of our current thinking and respond to certain of the ideas raised in the discussion paper submitted to us by OCHA for this meeting.

The ICRC security management concept is based on some of the following central parameters:

- The ICRC has a largely decentralised and bottom-up management culture. This applies equally to security management. The strong belief is that the closer one is to populations at risk, the better one is placed to analyse events and formulate strategies.
- To remain effective, this broad field autonomy has to unfold within clearly defined institutional frameworks: our mandate, principles and security concept.
- The ICRC approach to security management is that responsibility lies with the operational managers themselves. There is no separation between security management and operational management. [...]
- When the security unit attached to the department of operations was established at headquarters ten years ago, a central pre-condition set by operational field managers was that responsibility for security management would not be removed

from them. In that sense, the security unit has more of a watchdog function and focuses mainly on overall policy development, monitoring, support and training.

- The ICRC is also convinced that security – long-before becoming an issue of physical protection – is a matter of acceptance, perception of the organization, individual behaviour of a delegate and ability to listen, communicate and project a consistent and coherent image to all actors involved in a conflict. In other words, of being predictable: be seen to be doing what one says.

How does the earlier-described changing environment impact on this overall ICRC approach?

- In the face of tragedies such as last year's one could be tempted to further centralize decision-making at headquarters. The ICRC is convinced that it must maintain a decentralized approach.
- It needs to integrate the global nature of the threat, in other words the security management concept has to include approaches that can raise awareness and levels of preparedness for dangers that may develop beyond the borders of a given context and yet affect it.
- This also requires new ways of communicating with the different parties to a given situation. Meaning in particular to find ways of communication with those who may misunderstand or reject us today.
- It also means making a strong stand for neutral and independent humanitarian action. Old recipes for a different world? Not in our view certainly. Quite on the contrary a principled position maintained with conviction in the face of challenge.

Arguably, what the ICRC needs to be much more effective at are some of the following things:

- **improving the integration of national staff members into the security analysis and evaluation** carried out in respective contexts. [...] Similarly improving the dialogue on security with key national or local partners, such as our colleagues in National Red Cross or Red Crescent Societies.
- **explaining why impartiality or independence matter, why neutrality is relevant:**

Impartiality, we understand very simply as meaning that humanitarian action should benefit people regardless of their origin, race, gender, faith, etc. In that sense, no one should be deprived of assistance or protection because of what he or she believes in. [...]

Independence, we see as implying that our humanitarian action needs to be distinct – and perceived as so – from political decision-making processes. The reason for this is straightforward: in any conflict, parties will tend to reject humanitarian actors they suspect of having ulterior political motives.

This explains – and does not come as a surprise to you – why we are so adamant in our insistence in the respect for respective identities, mandates and operational



approaches. This is something we are pleased to note as figuring prominently in the discussion paper.

However, different types of integrated approaches – combining political, military, reconstruction and humanitarian tools – advocated by the UN on the one hand and a number of states on the other in our view conflict with this principle and the ICRC cannot and will not subscribe to such policies.

In this regard we would like to underline our concern with the references in the OCHA discussion paper to a commitment to “common action” such as the “withdrawal of humanitarian presence... in areas where there is a pattern of gross violations”. While understanding the intended purpose, we have experienced situations where such approaches of conditionality – in Afghanistan and Iraq for example saw populations abandoned under the pretext that a party, which the international community sought to ostracise or isolate, controlled them.

Neutrality is not always easy to make understood either. It is often taken for indifference. The ICRC is not neutral in the face of violations of international humanitarian law. What the ICRC does not do is take sides in a conflict or ascribe fault to one side or the other. We take a conflict as a fact and comment on the conduct of hostilities.

Neutrality is therefore a means to an end, not an end in itself. It is a tool to keep channels open for concrete action. We intend to keep the dialogue open with all parties; there are no actors yielding power over populations that we would refuse to talk to. We do not comment by that on their worthiness as interlocutors, nor do we thus grant them any particular status.

Advocacy for an independent and neutral humanitarian approach includes a claim to a clear distinction to be maintained between humanitarian action on the one hand and political-military action on the other. Not because the ICRC shies away from the military: to the contrary, we want and often have an active dialogue with them. Neither because we claim that there are not circumstances when other actors being incapable of fulfilling their missions – a military unit might be a last resort. We do on the other hand want to avoid the current blurring of lines produced by the characterisation of military “hearts and minds” campaigns or reconstruction efforts as humanitarian.

The ICRC has in that regard a problem with the Provincial Reconstruction Teams in Afghanistan. Not in regard to the strictly speaking military or security objectives they have set for themselves. In keeping with our neutrality, that is not a dimension we wish to comment on. We are however concerned because they integrate humanitarian responses into an overall military and security concept, in which responding to the needs of parts of the population can be a constituent part of a strategy to defeat an opponent or enemy. [...]

We realise that this might contribute to a feeling that the ICRC is once again keen to underline its “apartness”, that the world changes and the ICRC continues to insist on the same old recipes. Nothing is further from our mind. There are many very useful comments in the discussion paper, including illustrations of contradictions and

weaknesses within the broader humanitarian community. The ICRC has nothing to be complacent about and is keen to learn from the experience of others.

We are in that sense genuinely determined to engage with all humanitarian actors and other stakeholders in a transparent dialogue on these issues, both in specific conflict situations where analysis and threat assessment sharing is often vital, and in more conceptual debates where progress can be achieved in understanding respective interpretations of humanitarian action.

We recognize fully that there are today many other definitions of humanitarian action than ours. We are not claiming that all other actors should or can agree to our definition and operational philosophy. We also recognize that there have been and may well be in the future situations where our approach fails to produce the expected results and others may have to step in.

We strongly believe on the other hand that we need to make our position well known: it is important that we be able to convey what we will be part of, i.e. dialogue, consultation and coordination with others and what we will not be part of, i.e. coordination or integration by others. We are determined to maintain our principled operational approach in place, believing that it remains effective and necessary.

## DISCUSSION

1.
  - a. What is the meaning of “humanitarian”? What constitutes humanitarian action? Which objectives does humanitarian action seek to achieve? What is the aim of peacekeeping? And of conflict resolution?
  - b. What relationship exists between humanitarian endeavour and political action? Must they be completely separate? Can they be? Is it really possible for humanitarian organizations to maintain independence within such a symbiotic relationship? What form should this relationship take?
  - c. Must humanitarian action necessarily be neutral and impartial? Why?
2.
  - a. What risks to humanitarian organizations, their workers, and even the victims of conflict arise when humanitarian activities and political or military action become blurred?
  - b. Should military forces be engaged in humanitarian action? What are the risks and advantages of such an engagement?
  - c. Shouldn't humanitarian organizations benefit at least from military protection, particularly with the increasing use of violence against them? What are the risks of any armed protection? Against a party to the conflict? Against bandits? What is the difference between a party to the conflict and bandits? What if armed protection is the only way to reach the victims?
  - d. How would you explain this declining respect for humanitarian organizations? Does it stem from the fact that the types and nature of conflicts have changed? Or from an increase in peace operations? Or is it simply due to the lack of international commitment to peace efforts? Or finally, is it due to the great number of humanitarian organizations in the field?
3. How does the ICRC traditionally guarantee the security of its staff? Which of these methods are losing their efficiency because of which aspects of the present security environment?

4.
  - a. Is there a direct correlation between the increased number of humanitarian organizations working during a conflict and more effective achievement of humanitarian goals? If so, why? How can greater complementarity and division of labour be achieved?
  - b. What are the advantages and risks for the ICRC and for the war victims of increased coordination between the humanitarian organizations in the field? If the coordination includes the ICRC and is initiated by the UN?
  - c. Who should be responsible for this coordination? Who is currently responsible?

## Document No. 47, ICRC, New Weapons

## I. Article 36 of Additional Protocol I

[See **Document No. 6**, The First Protocol Additional to the Geneva Conventions]

### ARTICLE 36. New weapons

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

## II. ICRC Guide to the Legal Review of New Weapons, Means and Methods of Warfare

[Source: ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare. Measures to Implement Article 36 of Additional Protocol I of 1977*, January 2006, available on [www.icrc.org](http://www.icrc.org). Footnotes omitted.]

### A Guide to the Legal Review of New Weapons, Means and Methods of Warfare Measures to Implement Article 36 of Additional Protocol I of 1977

[...]

#### INTRODUCTION

The right of combatants to choose their means and methods of warfare is not unlimited. This is a basic tenet of *international humanitarian law* (IHL), also known as the *law of armed conflict* or the *law of war*.

[...]

The combatants' right to choose their means and methods of warfare is limited by a number of basic IHL rules regarding the conduct of hostilities, many of which are found in Additional Protocol I of 1977 on the protection of victims of international armed conflicts. [...]

The only other reference in international treaties to the need to carry out legal reviews of new weapons, means and methods of warfare is found in Article 36 of Additional Protocol I of 1977 [...].

The aim of Article 36 is to prevent the use of weapons that would violate international law in all circumstances and to impose restrictions on the use of weapons that would violate international law in some circumstances, by determining their lawfulness before they are developed, acquired or otherwise incorporated into a State's arsenal.

The requirement that the legality of all new weapons, means and methods of warfare be systematically assessed is arguably one that applies to *all* States, regardless of

whether or not they are party to Additional Protocol I. It flows logically from the truism that States are prohibited from using illegal weapons, means and methods of warfare or from using weapons, means and methods of warfare in an illegal manner. The faithful and responsible application of its international law obligations would require a State to ensure that the new weapons, means and methods of warfare it develops or acquires will not violate these obligations. Carrying out legal reviews of new weapons is of particular importance today in light of the rapid development of new weapons technologies.

Article 36 is complemented by Article 82 of Additional Protocol I, which requires that legal advisers be available at all times to advise military commanders on IHL and “on the appropriate instruction to be given to the armed forces on this subject.” Both provisions establish a framework for ensuring that armed forces will be capable of conducting hostilities in strict accordance with IHL, through legal reviews of planned means and methods of warfare.

Article 36 does not specify how a determination of the legality of weapons, means and methods of warfare is to be carried out. A plain reading of Article 36 indicates that a State must assess the new weapon, means or method of warfare in light of the provisions of Additional Protocol I and of any other applicable rule of international law. According to the ICRC’s Commentary on the Additional Protocols, Article 36 “implies the obligation to establish internal procedures for the purpose of elucidating the issue of legality, and the other Contracting Parties can ask to be informed on this point.” But there is little by way of State practice to indicate what kind of “internal procedures” should be established, as only a limited number of States are known to have put in place mechanisms or procedures to conduct legal reviews of weapons.

[...]

## **1. Material scope of application of the review mechanism**

### **1.1 Types of weapons to be subjected to legal review**

Article 36 of Additional Protocol I refers to “*weapons, means or methods of warfare*”. According to the ICRC’s Commentary on the Additional Protocols:

*“the words ‘methods and means’ include weapons in the widest sense, as well as the way in which they are used. The use that is made of a weapon can be unlawful in itself, or it can be unlawful only under certain conditions. For example, poison is unlawful in itself, as would be any weapon which would, by its very nature, be so imprecise that it would inevitably cause indiscriminate damage. (...) However, a weapon that can be used with precision can also be abusively used against the civilian population. In this case, it is not the weapon which is prohibited, but the method or the way in which it is used.”*

The material scope of the Article 36 legal review is therefore very broad. It would cover:

- weapons of all types – be they anti-personnel or anti-materiel, “lethal”, “non-lethal” or “less lethal” – and weapons systems;

- the ways in which these weapons are to be used pursuant to military doctrine, tactics, rules of engagement, operating procedures and counter-measures;
- all weapons to be acquired, be they procured further to research and development on the basis of military specifications, or purchased “off-the-shelf”;
- a weapon which the State is intending to acquire for the first time, without necessarily being “new” in a technical sense;
- an existing weapon that is modified in a way that alters its function, or a weapon that has already passed a legal review but that is subsequently modified;
- an existing weapon where a State has joined a new international treaty which may affect the legality of the weapon.

When in doubt as to whether the device or system proposed for study, development or acquisition is a “weapon”, legal advice should be sought from the weapons review authority.

A weapon or means of warfare cannot be assessed in isolation from the method of warfare by which it is to be used. It follows that the legality of a weapon does not depend solely on its design or intended purpose, but also on the manner in which it is expected to be used on the battlefield. In addition, a weapon used in one manner may “pass” the Article 36 “test”, but may fail it when used in another manner. This is why Article 36 requires a State “to determine whether its employment would, *in some or all circumstances*, be prohibited” by international law (emphasis added).

As noted in the ICRC’s Commentary on the Additional Protocols, a State need only determine “whether the employment of a weapon *for its normal or expected use* would be prohibited under some or all circumstances. A State is not required to foresee or analyse all possible misuses of a weapon, for almost any weapon can be misused in a way that would be prohibited.”

## **1.2 Legal framework: Rules to be applied to new weapons, means and methods of warfare**

In determining the legality of a new weapon, the reviewing authority must apply existing international law rules which bind the State – be they treaty-based or customary. Article 36 of Additional Protocol I refers in particular to the Protocol and to “any other rule of international law applicable” to the State. The relevant rules include *general* rules of IHL applying to *all weapons, means and methods of warfare*, and *particular* rules of IHL and international law prohibiting the use of *specific weapons and means of warfare* or restricting the methods by which they can be used.

The first step is to determine whether employment of the particular weapon or means of warfare under review is prohibited or restricted by a treaty which binds the reviewing State or by customary international law (sub-section 1.2.1 below). If there is no such specific prohibition, the next step is to determine whether employment of

the *weapon or means of warfare* under review and the normal or expected *methods* by which it is to be used would comply with the general rules applicable to all weapons, means and methods of warfare found in Additional Protocol I and other treaties that bind the reviewing State or in customary international law (sub-section 1.2.2 below). In the absence of relevant treaty or customary rules, the reviewing authority should consider the proposed weapon in light of the principles of humanity and the dictates of public conscience (sub-section 1.2.2.3 below).

Of those States that have established formal mechanisms to review the legality of new weapons, some have empowered the reviewing authority to take into consideration not only the law as it stands at the time of the review, but also likely future developments of the law. This approach is meant to avoid the costly consequences of approving and procuring a weapon the use of which is likely to be restricted or prohibited in the near future.

The sections below list the relevant treaties and customary rules without specifying in which situations these apply – i.e. whether they apply in international or non-international armed conflicts, or in all situations. This is to be determined by reference to the relevant treaty or customary rule, bearing in mind that most of the rules apply to all types of armed conflict. Besides, as stated in the *Tadic* decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in relation to prohibited means and methods of warfare, “what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife”.

### **1.2.1 Prohibitions or restrictions on specific weapons**

#### **1.2.1.1 Prohibitions or restrictions on specific weapons under international treaty law**

In conducting reviews, a State must consider the international instruments to which it is a party that prohibit the use of specific weapons and means of warfare, or that impose limitations on the way in which specific weapons may be used. These instruments include (in chronological order) [N.B.: Most of these instruments are available on the CD]:

- Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St-Petersburg, 29 November/11 December 1868 (hereafter the 1868 St-Petersburg Declaration).
- Declaration (2) concerning Asphyxiating Gases. The Hague, 29 July 1899.
- Declaration (3) concerning the Prohibition of Using Bullets which Expand or Flatten Easily in the Human Body, The Hague, 29 July 1899.
- Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 23 (a), pursuant to which it is forbidden to employ poison or poisoned weapons.
- Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines. The Hague, 18 October 1907.

- Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925.
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Opened for Signature at London, Moscow and Washington, 10 April 1972.
- Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, 10 December 1976 (ENMOD Convention).
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW), Geneva, 10 October 1980, and Amendment to Article 1, 21 December 2001. The Convention has five Protocols:
  - Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980;
  - Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II). Geneva, 10 October 1980; or Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996);
  - Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980;
  - Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995;
  - Protocol on Explosive Remnants of War (Protocol V), 28 November 2003.
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993.
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997.
- Rome Statute of the International Criminal Court, 17 July 1998, Article 8(2)(b), paragraphs (xvii) to (xx), which include in the definition of war crimes for the purpose of the Statute the following acts committed in international armed conflict:
  - “(xvii) Employing poison or poisoned weapons;
  - “(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
  - “(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
  - “(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the



international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.”

#### *1.2.1.2 Prohibitions or restrictions on specific weapons under customary international law*

In conducting reviews, a State must also consider the prohibitions or restrictions on the use of specific weapons, means and methods of warfare pursuant to customary international law. According to the ICRC study on *Customary International Humanitarian Law*, these prohibitions or restrictions would include the following [See Case No. 43, ICRC, Customary International Humanitarian Law]:

- The use of poison or poisoned weapons is prohibited.
- The use of biological weapons is prohibited.
- The use of chemical weapons is prohibited.
- The use of riot-control agents as a method of warfare is prohibited.
- The use of herbicides as a method of warfare is prohibited under certain conditions.
- The use of bullets which expand or flatten easily in the human body is prohibited.
- The anti-personnel use of bullets which explode within the human body is prohibited.
- The use of weapons, the primary effect of which is to injure by fragments which are not detectable by x-ray in the human body is prohibited.
- The use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or with objects that are likely to attract civilians is prohibited.
- When landmines are used, particular care must be taken to minimize their indiscriminate effects. At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal.
- If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*.
- The use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited.

### **1.2.2 General prohibitions or restrictions on weapons, means and methods of warfare**

If no specific prohibition or restriction is found to apply, the weapon or means of warfare under review and the normal or expected methods by which it is to be used must be assessed in light of the general prohibitions or restrictions provided by treaties and by customary international law applying to all weapons, means and methods of warfare.

A number of the rules listed below are primarily context-dependent, in that their application is typically determined at field level by military commanders on a case-by-case basis taking into consideration the conflict environment in which they are operating at the time and the weapons, means and methods of warfare at their disposal. But these rules are also relevant to the assessment of the legality of a new weapon before it has been used on the battlefield, to the extent that the characteristics, expected use and foreseeable effects of the weapon allow the reviewing authority to determine whether or not the weapon will be capable of being used lawfully in certain foreseeable situations and under certain conditions. For example, if the weapon's destructive radius is very wide, it may be difficult to use it against one or several military targets located in a concentration of civilians without violating the prohibition on the use of indiscriminate means and methods of warfare and/or the rule of proportionality. In this regard, when approving such a weapon, the reviewing authority should attach conditions or comments to the approval, to be integrated into the rules of engagement or operating procedures associated with the weapon.

#### ***1.2.2.1 General prohibitions or restrictions on weapons, means and methods of warfare under international treaty law***

A number of treaty-based general prohibitions or restrictions on weapons, means and methods of warfare must be considered. In particular, States party to Additional Protocol I must consider the rules under that treaty, as required by Article 36. These include:

- Prohibition to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering (Art. 35(2)).
- Prohibition to employ methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment (Articles 35(3) and 55).
- Prohibition to employ a method or means of warfare which cannot be directed at a specific military objective and consequently, that is of a nature to strike military objectives and civilians or civilian objects without distinction (Art. 51(4)(b)).
- Prohibition to employ a method or means of warfare the effects of which cannot be limited as required by Additional Protocol I and consequently, that is of a nature to strike military objectives and civilians or civilian objects without distinction (Art. 51(4)(c)).

- Prohibition of attacks by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects (Art. 51(5)(a)).
- Prohibition of attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (proportionality rule) (Art. 51(5)(b)).

#### *1.2.2.2 General prohibitions or restrictions on weapons, means and methods of warfare under customary international law*

General prohibitions or restrictions on the use of weapons, means and methods of warfare pursuant to customary international law must also be considered. These would include:

- Prohibition to use means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering.
- Prohibition to use weapons which are by nature indiscriminate. This includes means of warfare which cannot be directed at a specific military objective, and means of warfare the effects of which cannot be limited as required by IHL.
- Prohibition of attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.
- Prohibition to use methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Destruction of the natural environment may not be used as a weapon.
- Prohibition to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (proportionality rule).

#### *1.2.2.3 Prohibitions or restrictions based on the principles of humanity and the dictates of public conscience (the “Martens clause”)*

Consideration should be given to whether the weapon accords with the principles of humanity and the dictates of public conscience, as stipulated in Article 1(2) of Additional Protocol I, in the preamble to the 1907 Hague Convention (IV), and in the preamble to the 1899 Hague Convention (II). This refers to the so-called “Martens clause”, which Article 1(2) of Additional Protocol I formulates as follows:

“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the

principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.”

The International Court of Justice in the case of the *Legality of the Threat or Use of Nuclear Weapons* affirmed the importance of the Martens clause “whose continuing existence and applicability is not to be doubted” and stated that it “had proved to be an effective means of addressing rapid evolution of military technology.” The Court also found that the Martens clause represents customary international law.

A weapon which is not covered by existing rules of international humanitarian law would be considered contrary to the Martens clause if it is determined *per se* to contravene the principles of humanity or the dictates of public conscience.

### 1.3 Empirical data to be considered by the review

In assessing the legality of a particular weapon, the reviewing authority must examine not only the weapon’s design and characteristics (the “means” of warfare) but also how it is to be used (the “method” of warfare), bearing in mind that the weapon’s effects will result from a combination of its design *and* the manner in which it is to be used.

In order to be capable of assessing whether the weapon under review is subject to specific prohibitions or restrictions (listed in sub-section 1.2.1 above) or whether it contravenes one or more of the general rules of IHL applicable to weapons, means and methods of warfare (listed in sub-section 1.2.2 above), the reviewing authority will have to take into consideration a wide range of military, technical, health and environmental factors. This is the rationale for the involvement of experts from various disciplines in the review process.

For each category of factors described below, the relevant general rule of IHL is referred to, where appropriate.

#### 1.3.1 Technical description of the weapon

An assessment will logically begin by considering the weapon’s technical description and characteristics, including:

- a full technical description of the weapon;
- the use for which the weapon is designed or intended, including the types of targets (e.g. personnel or materiel; specific target or area; etc.);
- its means of destruction, damage or injury.

#### 1.3.2 Technical performance of the weapon

The technical performance of the weapon under review is of particular relevance in determining whether its use may cause *indiscriminate effects*. The relevant factors would include:

- the accuracy and reliability of the targeting mechanism (including e.g. failure rates, sensitivity of unexploded ordnance, etc.);

- the area covered by the weapon;
- whether the weapons' foreseeable effects are capable of being limited to the target or of being controlled in time or space (including the degree to which a weapon will present a risk to the civilian population after its military purpose is served).

### **1.3.3 Health-related considerations**

Directly related to the weapon's mechanism of injury (damage mechanism) is the question of what types of injuries the new weapon will be capable of inflicting. The factors to be considered in this regard could include:

- the size of the wound expected when the weapon is used for its intended purpose (as determined by wound ballistics);
- the likely mortality rate among the victims when the weapon is used for its intended purpose;
- whether the weapon would cause anatomical injury or anatomical disability or disfigurement which are specific to the design of the weapon.

If a new weapon injures by means other than explosive or projectile force, or otherwise causes health effects that are qualitatively or quantitatively different from those of existing lawful weapons and means of warfare, additional factors to be considered could include:

- whether all relevant scientific evidence pertaining to the foreseeable effects on humans has been gathered;
- how the mechanism of injury is expected to impact on the health of victims;
- when used in the context of armed conflict, what is the expected field mortality and whether the later mortality (in hospital) is expected to be high;
- whether there is any predictable or expected long term or permanent alteration to the victims' psychology or physiology;
- whether the effects would be recognised by health professionals, be manageable under field conditions and be treatable in a reasonably equipped medical facility.

These and other health-related considerations are important to assist the reviewing authority in determining whether the weapon in question can be expected to cause *superfluous injury or unnecessary suffering*. Assessing the legality of a weapon in light of this rule involves weighing the relevant health factors together against the intended military purpose or expected military advantage of the new weapon.

### **1.3.4 Environment-related considerations**

In determining the effects of the weapon under review on the natural environment, and in particular whether they are expected to cause excessive incidental damage to

the natural environment or widespread, long-term and severe damage to the natural environment, the relevant questions to be considered would include:

- have adequate scientific studies on the effects on the natural environment been conducted and examined?
- what type and extent of damage are expected to be directly or indirectly caused to the natural environment?
- for how long is the damage expected to last; is it practically/economically possible to reverse the damage, i.e. to restore the environment to its original state; and what would be the time needed to do so?
- what is the direct or indirect impact of the environmental damage on the civilian population?
- is the weapon specifically designed to destroy or damage the natural environment, or to cause environmental modification?

## **2. Functional aspects of the review mechanism**

In setting up a weapons review mechanism, a number of decisions need to be made relating to the manner in which it is to be established, its structure and composition, the procedure for conducting a review, decision-making and record-keeping.

The following questions are indicative of the elements to be considered. Reference to State practice is limited to published procedures only.

### **2.1 How should the review mechanism be established?**

#### **2.1.1 *By legislation, regulation, administrative order, instruction or guidelines?***

Article 36 of Additional Protocol I does not specify in what manner and under what authority reviews of the legality of new weapons are to be constituted. It is the responsibility of each State to adopt legislative, administrative, regulatory and/or other appropriate measures to effectively implement this obligation. At a minimum, Article 36 requires that each State Party set up a formal procedure and, in accordance with Article 84 of Additional Protocol I, other States parties to the Protocol may ask to be informed about this procedure. The establishment of a formal procedure implies that there be a standing mechanism ready to carry out reviews of new weapons whenever these are being studied, developed, acquired or adopted.

[...]

#### **2.1.2 *Under which authority should the review mechanism be established?***

The review mechanism can be established by, and made accountable to, the government department responsible for the study, development, acquisition or adoption of new weapons, typically the Ministry of Defence or its equivalent. This has the advantage that the Ministry of Defence is also the same authority that issues

weapon handling instructions. Most States that have established review mechanisms have done so under the authority of their Ministry of Defence.

Alternatively, the review mechanism could be established by the government itself and implemented by an inter-departmental entity [...]. It is also conceivable that another relevant department be entrusted with the establishment of the review mechanism, such as for example the authority responsible for government procurement.

Whatever the establishing authority, care should be taken to ensure that the reviewing body is capable of carrying out its work in an impartial manner, based on the law and on relevant expertise.

## **2.2 Structure and composition of the review mechanism**

### **2.2.1 *Who should be responsible for carrying out the review?***

The responsibility for carrying out the legal review may be entrusted to a special body or committee made up of permanent representatives of relevant sectors and departments. [...]

The material scope of the review requires that it consider a wide range of expertise and viewpoints. The review of weapons by a committee may have the advantage of ensuring that the relevant sectors and fields of expertise are involved in the assessment.

Whether the reviewing authority is an individual or a committee, it must have the appropriate qualifications, and in particular a thorough knowledge and understanding of IHL. In this regard, it would be appropriate for the legal advisers appointed to the armed forces to take part in the review, or to head the committee responsible for the review.

### **2.2.2 *What departments or sectors should be involved in the review? What kinds of experts should participate in the review?***

Whether it is conducted by a committee or by an individual, the review should draw on the views of the relevant sectors and departments, and a wide range of expertise. As seen under section 1 of this Guide, a multidisciplinary approach, including the relevant legal, military, health, arms technology and environmental experts, is essential in order to assess fully the information relating to the new weapon and make a determination on its legality. In this regard, in addition to the relevant sectors of the Ministry of Defence and the Armed Forces, the review may need to draw on experts from the departments of foreign affairs (in particular international law experts), health, and the environment, and possibly on expert advice from outside of the administration.

[...]

## 2.3 Review process

### 2.3.1 *At what stage should the review of the new weapon take place?*

The temporal application of Article 36 is very broad. It requires an assessment of the legality of new weapons at the stages of their “*study, development, acquisition or adoption*”. This covers all stages of the weapons procurement process, in particular the initial stages of the research phase (i.e. conception, study), the development phase (i.e. development and testing of prototypes) and the acquisition phase (including “off-the-shelf” procurement).

In practical terms this means that:

- For a State producing weapons itself, be it for its own use or for export, reviews should take place at the stage of the conception/design of the weapon, and thereafter at the stages of its technological development (development of prototypes and testing), and in any case before entering into the production contract.
- For a State purchasing weapons, either from another State or from the commercial market including through “off-the-shelf” procurement, the review should take place at the stage of the study of the weapon proposed for purchase, and in any case before entering into the purchasing agreement. It should be emphasized that the purchasing State is under an obligation to conduct its own review of the weapon it is considering to acquire, and cannot simply rely on the vendor or manufacturer’s position as to the legality of the weapon, nor on another State’s evaluation. For this purpose, all relevant information and data about the weapon should be obtained from the vendor prior to purchasing the weapon.
- For a State adopting a technical modification or a field modification to an existing weapon, a review of the proposed modification should also take place at the earliest stage.

At each stage of the review, the reviewing authority should take into consideration how the weapon is proposed or expected to be used, i.e. the methods of warfare associated with the weapon.

In addition to being required by Article 36, the rationale for conducting legal reviews at the earliest possible stage is to avoid costly advances in the procurement process (which can take several years) for a weapon which may end up being unusable because illegal. The same rationale underlies the need for conducting reviews at different stages of the procurement process, bearing in mind that the technical characteristics of the weapon and its expected uses can change in the course of the weapon’s development. In this connection, a new review should be carried out when new evidence comes to light on the operational performance or effects of the weapon both during and after the procurement process.



### **2.3.2 *How and by whom is the legal review mechanism triggered?***

Each of the authorities responsible for the study, development, acquisition, modification or adoption of a weapon should be required to submit the matter to the reviewing authority for a legal review at the stages identified above. This can be done through for example a notification or a request for an advisory opinion or for a legal review.

In addition, the reviewing authority could itself be empowered to undertake assessments of its own initiative.

### **2.3.3 *How does the review mechanism obtain information on the weapon in question, and from what sources?***

At each stage of any given case, the authorities responsible for studying, developing, acquiring or adopting the new weapon should make available to the reviewing authority all relevant information on the weapon, in particular the information described in section 1.3 above.

The reviewing authority should be empowered to request and obtain any additional information and to order any tests or experiments needed to carry out and complete the review, from the relevant government departments or external actors as appropriate.

## **2.4 Decision-making**

### **2.4.1 *How does the review mechanism reach decisions?***

This question is relevant to cases where the reviewing authority is a committee. Ideally, decisions should be reached by consensus, but another decision-making procedure should be provided in cases where consensus is not possible, either through a voting system, majority and minority reports, or by vesting in the chair of the committee final decision-making authority.

### **2.4.2 *Should the reviewing authority's decision be binding or should it be treated only as a recommendation?***

As the reviewing authority is making a determination on the conformity of the new weapon with the State's international legal obligations, it is difficult to justify the proposition that acquisition of a new weapon can proceed without a favourable determination by the reviewing authority. For example, if the reviewing authority finds that the new weapon is prohibited by IHL applicable to the concerned State, the development or acquisition of the weapon should be halted on this basis as a matter of law.

### **2.4.3 *May the reviewing authority attach conditions to its approval of a new weapon?***

The reviewing authority is required by the terms of Article 36 to determine whether the employment of the weapon under consideration would "in some or all circumstances"

be legal. Therefore it may find that the use of the new weapon is prohibited in certain situations. In such a case the authority could either approve the weapon on condition that restrictions be placed on its operational use, in which case such restrictions should be incorporated into the rules of engagement or standard operating procedures relevant to the weapon, or it could request modifications to the weapon which must be met before approval can be granted.

#### **2.4.4 *Should the reviewing authority's decision be final or should it be subject to appeal or review?***

Of the States that have made known their review mechanisms, two expressly provide for the possibility of appeal or review of its decisions. If an appeal mechanism is provided, care should be taken to ensure that the appellate or reviewing body is also qualified in IHL and conducts its review on the basis of legal considerations, taking into account the relevant multidisciplinary elements.

### **2.5 Record-keeping**

#### **2.5.1 *Should records be kept of the decisions of the review mechanism?***

The reviewing authority's work will be more effective over time if it maintains an archive of all its opinions and decisions on the weapons it has reviewed. By enabling the reviewing authority to refer to its previous decisions, the archive also facilitates consistency in decision-making. It is also particularly useful where the weapon under review is a modified version of a weapon previously reviewed.

[...]

#### **2.5.2 *To whom and under what conditions should these records be accessible?***

It is up to each State to decide whether to allow access to the review records, in whole or in part, and to whom. The State's decision will be influenced by whether in a given case the weapon itself is considered confidential.

Amongst others, the following factors could be taken into account when deciding on whether to disclose reviews, and to whom:

- the value of transparency among different government departments, and towards external experts and the public;
- the value of sharing experience with other States;
- the obligation for all States to ensure respect for IHL in all circumstances, in particular in cases where it is determined that the use of the weapon under review would contravene IHL.

[...]

While there is no obligation on the reviewing State to make the substantive findings of its review public nor to share them with other States, it would be required to share

its review procedures with other States Parties to Additional Protocol I, in accordance with Article 84 of the Protocol. In this regard, both the 27th and the 28th International Conference of the Red Cross and the Red Crescent, which includes all of the States Parties to the Geneva Conventions, have encouraged States to exchange information on their review mechanisms and procedures, and have called upon the ICRC to facilitate such exchanges.

[...]

## Document No. 48, ICRC, Biotechnology, Weapons and Humanity

## A. Biological Weapons Convention

[Source: Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Opened for Signature at London, Moscow and Washington. 10 April 1972. Available at [www.icrc.org](http://www.icrc.org)]

### **Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction**

*The States Parties to this Convention,*

*Determined* to act with a view to achieving effective progress towards general and complete disarmament, including the prohibition and elimination of all types of weapons of mass destruction, and convinced that the prohibition of the development, production and stockpiling of chemical and bacteriological (biological) weapons and their elimination, through effective measures, will facilitate the achievement of general and complete disarmament under strict and effective international control.

*Recognising* the important significance of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925 [See Document No. 9, The Geneva Chemical Weapons Protocol], and conscious also of the contribution which the said Protocol has already made, and continues to make, to mitigating the horrors of war,

*Reaffirming* their adherence to the principles and objectives of that Protocol and calling upon all States to comply strictly with them,

*Recalling* that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Geneva Protocol of 17 June 1925, [...]

*Convinced* of the importance and urgency of eliminating from the arsenals of States, through effective measures, such dangerous weapons of mass destruction as those using chemical or bacteriological (biological) agents,

*Recognising* that an agreement on the prohibition of bacteriological (biological) and toxin weapons represents a first possible step towards the achievement of agreement on effective measures also for the prohibition of the development, production and stockpiling of chemical weapons, and determined to continue negotiations to that end,

*Determined*, for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons,

*Convinced* that such use would be repugnant to the conscience of mankind and that no effort should be spared to minimise this risk,

*Have agreed* as follows:

**ARTICLE I**

Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

1. Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
2. Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

**ARTICLE II**

Each State Party to this Convention undertakes to destroy, or to divert to peaceful purposes, as soon as possible but not later than nine months after the entry into force of the Convention, all agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, which are in its possession or under its jurisdiction or control. In implementing the provisions of this Article all necessary safety precautions shall be observed to protect populations and the environment.

**ARTICLE III**

Each State Party to this Convention undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organisations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in Article I of the Convention.

**ARTICLE IV**

Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.

[...]

**ARTICLE VIII**

Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925.

[...]

**ARTICLE XII**

Five years after the entry into force of this Convention, or earlier if it is requested by a majority of Parties to the Convention by submitting a proposal to this effect to the Depositary Governments, a conference of States Parties to the Convention shall be held at Geneva, Switzerland, to review the operation of the Convention, with a view

to assuring that the purposes of the preamble and the provisions of the Convention, including the provisions concerning negotiations on chemical weapons, are being realised. Such review shall take into account any new scientific and technological developments relevant to the Convention.

[...]

## B. Appeal by the International Committee of the Red Cross

[Source: Official Statement, Appeal on Biotechnology, Weapons and Humanity; ICRC's appeal to the political and military authorities and to the scientific and medical communities, industry and civil society on the potentially dangerous developments in biotechnology, 25 September 2002; available at [www.icrc.org](http://www.icrc.org)]

### APPEAL OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON BIOTECHNOLOGY, WEAPONS AND HUMANITY

[...]

#### Background

The “age of biotechnology”, like the industrial revolution and the “information age”, promises great benefits to humanity. Yet if biotechnology is put to hostile uses, including to spread terror, the human species faces great dangers.

The International Committee of the Red Cross (ICRC), in keeping with its mandate to protect and assist victims of armed conflict, is particularly alarmed by the potential hostile uses of biological agents.

Potential benefits of advances in biological sciences and technologies are impressive. These include cures for diseases, new vaccines and increases in food production, including in impoverished regions of the world.

Yet the warnings of what can go wrong are profoundly disturbing. The ICRC believes these merit reflection at every level of society. Testimony from governments, UN agencies, scientific circles, medical associations and industry provides a long list of existing and emerging capacities for misuse. These include:

- Deliberate spread of existing diseases such as typhoid, anthrax and smallpox to cause death, disease and fear in a population.
- Alteration of existing disease agents rendering them more virulent, as already occurred unintentionally in research on the “mousepox” virus.
- Creation of viruses from synthetic materials, as occurred this year using a recipe from the Internet and gene sequences from a mail order supplier.
- Possible future development of ethnically or racially specific biological agents.

- Creation of novel biological warfare agents for use in conjunction with corresponding vaccines for one's own troops or population. This could increase the attractiveness of biological weapons.
- New methods to covertly spread naturally occurring biological agents to alter physiological or psychological processes of target populations such as consciousness, behavior and fertility, in some cases over a period of years.
- Production of biological agents that could attack agricultural or industrial infrastructure. Even unintended release of such agents could have uncontrollable and unknown effects on the natural environment.
- Creation of biological agents that could affect the makeup of human genes, pursuing people through generations and adversely affecting human evolution itself.

The life processes at the core of human existence must never be manipulated for hostile ends. In the past, scientific advances have all too often been misused. It is essential that humanity acts together now to prevent the abuse of biotechnology.

The ICRC calls on all concerned to assume their responsibilities in this field, before it is too late. We must reaffirm the ancient taboo against the use in war of "plague and poison", passed down for generations in diverse cultures. From the ancient Greeks and Romans, to the Manu Law of War in India, to rules on the conduct of war drawn from the Koran by the Saracens, the use of poison and poison weapons has been forbidden. This ban was codified in the 1863 Lieber Code during the US Civil War and, internationally, in the 1899 Hague Declaration and the Regulations annexed to the 1907 Hague Convention IV. [See Document No. 1, The Hague Regulations]

In February 1918, the ICRC launched an impassioned appeal, describing warfare by poison as "a barbaric invention which science is bringing to perfection..." and protesting "with all the force at [its] command against such warfare, which can only be called criminal." This appeal is still valid today.

Responding in part to the ICRC's appeal, States adopted the 1925 Geneva Protocol, [See Document No. 9, The Geneva Chemical Weapons Protocol] reaffirming the general ban on the use of poison gas and extending it to cover bacteriological weapons. This norm is now part of customary international law – binding on all parties to all armed conflicts.

The 1972 Biological Weapons Convention significantly reinforced this prohibition by outlawing the development, production, stockpiling, acquisition, retention and transfer of biological weapons. As regards new advances in biotechnology and possible terrorist threats, this Convention covers all biological agents which "have no justification for prophylactic, protective or other peaceful purposes" and includes the means to deliver such agents. (Article 1, 1972 Biological Weapons Convention). The ICRC deeply regrets that lengthy negotiations to strengthen this Convention through a compliance-monitoring regime did not come to fruition as expected in November 2001. This underlines the urgent need for a renewed commitment by all States to ensure effective control of biological agents.

The responsibility to prevent hostile uses of biotechnology lies with each State. But it extends beyond governments to all persons, especially to military, scientific and medical professionals and those in the biotechnology and pharmaceutical industries. [...]

**The ICRC appeals in particular:****TO ALL POLITICAL AND MILITARY AUTHORITIES**

- To become parties to the 1925 Geneva Protocol and the 1972 Biological Weapons Convention, if they have not already done so, to encourage States which are not parties to become parties, and to lift reservations on use to the 1925 Geneva Protocol,
- To resume with determination efforts to ensure faithful implementation of these treaties and develop appropriate mechanisms to maintain their relevance in the face of scientific developments,
- To adopt stringent national legislation, where it does not yet exist, for implementation of the 1925 Geneva Protocol and the 1972 Biological Weapons Convention, and to enact effective controls on biological agents with potential for abuse,
- To ensure that any person who commits acts prohibited by the above instruments is prosecuted,
- To undertake actions to ensure that the legal norms prohibiting biological warfare are known and respected by members of armed forces,
- To encourage the development of effective codes of conduct by scientific and medical associations and by industry to govern activities and biological agents with potential for abuse, and
- To enhance international cooperation, including through the development of greater international capacity to monitor and respond to outbreaks of infectious disease.

**TO THE SCIENTIFIC AND MEDICAL COMMUNITIES AND TO THE BIOTECHNOLOGY AND PHARMACEUTICAL INDUSTRIES**

- To scrutinize all research with potentially dangerous consequences and to ensure it is submitted to rigorous and independent peer review,
- To adopt professional and industrial codes of conduct aimed at preventing the abuse of biological agents,
- To ensure effective regulation of research programs, facilities and biological agents which may lend themselves to misuse, and supervision of individuals with access to sensitive technologies, and



- To support enhanced national and international programs to prevent and respond to the spread of infectious disease.

The ICRC calls on all those addressed here to assume their responsibilities as members of a species whose future may be gravely threatened by abuse of biological knowledge. The ICRC appeals to you to make your contribution to the age-old effort to protect humanity from disease. We urge you to consider the threshold at which we all stand and to remember our common humanity.

The ICRC urges States to adopt at a high political level an international Declaration on “Biotechnology, Weapons and Humanity” containing a renewed commitment to existing norms and specific commitments to future preventive action.

*Geneva, September 2002*

## **C. Sixth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction**

[Source: Sixth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Doc. BWC/CONF.VI/6, Geneva, 2006; available at [www.un.org](http://www.un.org)]

### **SIXTH REVIEW CONFERENCE OF THE STATES PARTIES TO THE CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION AND STOCKPILING OF BACTERIOLOGICAL (BIOLOGICAL) AND TOXIN WEAPONS AND ON THEIR DESTRUCTION**

(Geneva, 20 November – 8 December 2006)

#### **FINAL DOCUMENT**

[...]

#### **Part II. Final Declaration**

THE STATES PARTIES TO THE CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION AND STOCKPILING OF BACTERIOLOGICAL (BIOLOGICAL) AND TOXIN WEAPONS AND ON THEIR DESTRUCTION, WHICH MET IN GENEVA FROM 20 NOVEMBER TO 8 DECEMBER 2006 TO REVIEW THE OPERATION OF THE CONVENTION, SOLEMNLY DECLARE:

- (i) Their conviction that the Convention is essential for international peace and security;
- (ii) Their determination also to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control including the prohibition and elimination of all weapons of mass destruction

and their conviction that the prohibition of the development, production and stockpiling of bacteriological (biological) weapons and their elimination, will facilitate the achievement of this goal;

[...]

- (v) Their continued determination, for the sake of humankind, to exclude completely the possibility of the use of bacteriological (biological) weapons, and their conviction that such use would be repugnant to the conscience of humankind;
- (vi) Their reaffirmation that under any circumstances the use, development, production and stockpiling of bacteriological (biological) and toxin weapons is effectively prohibited under Article I of the Convention;
- (vii) Their conviction that terrorism in all its forms and manifestations and whatever its motivation, is abhorrent and unacceptable to the international community, and that terrorists must be prevented from developing, producing, stockpiling, or otherwise acquiring or retaining, and using under any circumstances, biological agents and toxins, equipment, or means of delivery of agents or toxins, for non-peaceful purposes, and their recognition of the contribution of full and effective implementation of United Nations Security Council Resolution 1540 by all states to assist in achieving the objectives of this Convention;
- (viii) Their conviction that the full implementation of all the provisions of the Convention should facilitate economic and technological development and international cooperation in the field of peaceful biological activities;
- (ix) Their reiteration that the effective contribution of the Convention to international peace and security will be enhanced through universal adherence to the Convention, and their call on signatories to ratify and other states not party to accede to the Convention without delay;
- (x) Their recognition that achieving the objectives of the Convention will be more effectively realized through greater public awareness of its contribution, and through collaboration with relevant regional and international organizations, in keeping within their respective mandates, and their commitment to promote this;

[...]

### **Article I**

1. The Conference reaffirms the importance of Article I, as it defines the scope of the Convention. The Conference declares that the Convention is comprehensive in its scope and that all naturally or artificially created or altered microbial and other biological agents and toxins, as well as their components, regardless of their origin and method of production and whether they affect humans, animals or plants, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes, are unequivocally covered by Article I.

2. The Conference reaffirms that Article I applies to all scientific and technological developments in the life sciences and in other fields of science relevant to the Convention.
3. The Conference reaffirms that the use by the States Parties, in any way and under any circumstances, of microbial or other biological agents or toxins, that is not consistent with prophylactic, protective or other peaceful purposes, is effectively a violation of Article I. The Conference reaffirms the undertaking in Article I never in any circumstances to develop, produce, stockpile or otherwise acquire or retain weapons, equipment, or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict in order to exclude completely and forever the possibility of their use. The Conference affirms the determination of States Parties to condemn any use of biological agents or toxins for other than peaceful purposes, by anyone at any time.
4. The Conference notes that experimentation involving open-air release of pathogens or toxins harmful to humans, animals and plants that have no justification for prophylactic, protective or other peaceful purposes is inconsistent with the undertakings contained in Article I.

[...]

### **Article III**

8. The Conference reaffirms that Article III is sufficiently comprehensive to cover any recipient whatsoever at the international, national or sub-national levels. The Conference calls for appropriate measures, including effective national export controls, by all States Parties to implement this Article, in order to ensure that direct and indirect transfers relevant to the Convention, to any recipient whatsoever, are authorized only when the intended use is for purposes not prohibited under the Convention.
9. The Conference calls for appropriate measures by all States Parties to ensure that biological agents and toxins relevant to the Convention are protected and safeguarded, including through measures to control access to and handling of such agents and toxins;

[...]

### **Article IV**

11. The Conference reaffirms the commitment of States Parties to take the necessary national measures under this Article. The Conference also reaffirms that the enactment and implementation of necessary national measures under this Article would strengthen the effectiveness of the Convention. In this context, the Conference calls upon States Parties to adopt, in accordance with their constitutional processes, legislative, administrative, judicial and other measures, including penal legislation, designed to:

- (i) enhance domestic implementation of the Convention and ensure the prohibition and prevention of the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipments and means of delivery as specified in Article I of the Convention;
  - (ii) apply within their territory, under their jurisdiction or under their control anywhere and apply, if constitutionally possible and in conformity with international law, to actions taken anywhere by natural or legal persons possessing their nationality;
  - (iii) ensure the safety and security of microbial or other biological agents or toxins in laboratories, facilities, and during transportation, to prevent unauthorized access to and removal of such agents or toxins.
12. The Conference welcomes those measures taken by States Parties in this regard, and reiterates its call to any State Party that has not yet taken any necessary measures to do so without delay. [...]
13. The Conference reaffirms the commitment of States Parties to take the necessary national measures to strengthen methods and capacities for surveillance and detection of outbreaks of disease at the national, regional and international levels.
14. The Conference urges the inclusion in medical, scientific and military educational materials and programmes of information on the Convention and the 1925 Geneva Protocol. The Conference urges States Parties to promote the development of training and education programmes for those granted access to biological agents and toxins relevant to the Convention and for those with the knowledge or capacity to modify such agents and toxins, in order to raise awareness of the risks, as well as of the obligations of States Parties under the Convention.
15. The Conference encourages States Parties to take necessary measures to promote awareness amongst relevant professionals of the need to report activities conducted within their territory or under their jurisdiction or under their control that could constitute a violation of the Convention or related national criminal law. In this context, the Conference recognises the importance of codes of conduct and self-regulatory mechanisms in raising awareness, and calls upon States Parties to support and encourage their development, promulgation and adoption.
16. The Conference urges States Parties with relevant experience in legal and administrative measures for the implementation of the provisions of the Convention, to provide assistance on request to other States Parties. The Conference also encourages such initiatives on a regional basis.
- [...]

## Article VIII

39. The Conference appeals to all States Parties to the 1925 Geneva Protocol to fulfill their obligations assumed under that Protocol and urges all states not yet party to the Protocol to ratify or accede to it without delay.

40. The Conference acknowledges that the 1925 Geneva Protocol, which prohibits the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, and the Convention complement each other. The Conference reaffirms that nothing contained in the Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any state under the 1925 Geneva Protocol.
41. The Conference stresses the importance of the withdrawal of all reservations to the 1925 Geneva Protocol related to the Convention.

[...]

### **Article IX**

[...]

45. The Conference welcomes the fact that the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction entered into force on 29 April 1997 and that 181 instruments of ratification or accession have now been deposited with the United Nations. The Conference calls upon all states that have not yet done so to accede to that Convention without delay.

[...]

### **Article XIV**

63. The Conference notes with satisfaction that eleven states have acceded to or ratified the Convention since the Fifth Review Conference.
64. The Conference calls upon signatories to ratify the Convention, and upon those states which have not signed the Convention to accede to it without delay, thus contributing to the achievement of universal adherence to the Convention.
65. The Conference encourages States Parties to take action to persuade non-parties to accede to the Convention without delay, and particularly welcomes regional initiatives that would lead to wider accession to the Convention.

[...]

## **Part III. Decisions and Recommendations**

[...]

### Intersessional Programme 2007-2010

7. The Conference decides:
  - (a) To hold four annual meetings of the States Parties of one week duration each year commencing in 2007, prior to the Seventh Review Conference, to be held not later than the end of 2011, to discuss, and promote common understanding and effective action on:

- (i) Ways and means to enhance national implementation, including enforcement of national legislation, strengthening of national institutions and coordination among national law enforcement institutions.
- (ii) Regional and sub-regional cooperation on implementation of the Convention.
- (iii) National, regional and international measures to improve biosafety and biosecurity, including laboratory safety and security of pathogens and toxins.
- (iv) Oversight, education, awareness raising, and adoption and/or development of codes of conduct with the aim of preventing misuse in the context of advances in bio-science and bio-technology research with the potential of use for purposes prohibited by the Convention.
- (v) With a view to enhancing international cooperation, assistance and exchange in biological sciences and technology for peaceful purposes, promoting capacity building in the fields of disease surveillance, detection, diagnosis, and containment of infectious diseases: (1) for States Parties in need of assistance, identifying requirements and requests for capacity enhancement; and (2) from States Parties in a position to do so, and international organizations, opportunities for providing assistance related to these fields.
- (vi) Provision of assistance and coordination with relevant organizations upon request by any State Party in the case of alleged use of biological or toxin weapons, including improving national capabilities for disease surveillance, detection and diagnosis and public health systems.

[...]

**Case No. 49, ICRC, IHL and the Challenges of Contemporary Armed Conflicts****A. 28<sup>th</sup> International Conference of the Red Cross and Red Crescent, 2-6 December 2003**

[Source: *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report prepared by the International Committee of the Red Cross for the 28<sup>th</sup> International Conference of the Red Cross and Red Crescent, 2-6 December 2003; footnotes are partially reproduced; available on <http://www.icrc.org>]

**INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES  
OF CONTEMPORARY ARMED CONFLICTS [...]****INTRODUCTION [...]**

The purpose of the present ICRC Report is to provide an overview of some of the challenges posed by contemporary armed conflicts for international humanitarian law, stimulate further reflection, and outline prospective ICRC action. [...]

First, the ICRC believes, [...] that the four Geneva Conventions and their Additional Protocols, as well as the range of other international IHL treaties and the norms of customary law provide a bedrock of principles and rules that must continue to guide the conduct of hostilities and the treatment of persons who have fallen into the hands of a party to an armed conflict. Second, [...] some dilemmas that the international community grappled with decades ago were, in general, satisfactorily resolved by means of IHL development. [...] Thirdly, international opinion – both governmental and expert, as well as public opinion – remains largely divided on how to deal with new forms of violence, primarily acts of transnational terrorism, in legal terms. While no one can predict what the future might bring, this Report purports to be a snapshot, as seen by the ICRC, of challenges to IHL as they currently stand. Its aim is to reaffirm the proven tenets of the law and to suggest a nuanced approach to its possible clarification and development.

Lastly, and this cannot be emphasized enough by way of introduction, the present Report deals with only a limited number of challenges identified by the ICRC and should by no means be taken as a comprehensive review of all IHL-related issues that will be scrutinized at the present time or in the future. [...]

**II. INTERNATIONAL ARMED CONFLICTS AND IHL**

International armed conflict is by far the most regulated type of conflict under IHL. [...] Despite certain ambiguities that have led to differing interpretations which is a characteristic of any body of law – the ICRC believes that this legal framework is on the whole adequate to deal with present day inter-state armed conflicts. The framework has, for the most part, withstood the test of time because it was drafted as a careful balance between the imperative of reducing suffering in war and military requirements.

The four Geneva Conventions of 1949 have been ratified by almost the entire community of nations (191 state parties to date) and their provisions on the protection

of persons who have fallen into enemy hands reflect customary international law. The same may be said in particular of the Fourth Geneva Convention's section on occupation, which provides basic norms on the administration of occupied territory and the protection of populations under foreign occupation. Even though Additional Protocol I still lacks universal ratification (161 state parties to date), it is not disputed that most of its norms on the conduct of hostilities also reflect customary international law.

It has not been easy to determine which legal issues, among many related to international armed conflict, deserve to be examined [...]. The initial choices were made based on the differing interpretations that the relevant norms give rise to in practice and, more importantly, on the consequences that such interpretations have for the protection of civilians. Among them are the notion of direct participation in hostilities under IHL, related conduct of hostilities issues, and the concept of occupation.

### **Direct Participation in Hostilities**

Under humanitarian law applicable in international armed conflicts, civilians enjoy immunity from attack "unless and for such time as they take a direct part in hostilities". It is undisputed that apart from loss of immunity from attack during the time of direct participation, civilians, as opposed to combatants, may also be criminally prosecuted under domestic law for the mere fact of having taken part in hostilities. In other words, they do not enjoy the combatant's or belligerent's "privilege" of not being liable to prosecution for taking up arms and are thus sometimes referred to as "unlawful" or "unprivileged" combatants or belligerents. One issue that has, especially in recent months, given rise to considerable controversy is the status and treatment of civilians who have taken a direct part in hostilities. Related to it is the meaning of what constitutes "direct" participation in hostilities, [...].

There is currently a range of governmental and academic positions on the issue of the status and treatment of civilians who have directly participated in hostilities and have fallen into enemy hands. At one end are those – a minority – who claim that such persons are outside any international humanitarian law protection. The middle ground is represented by those who believe that "unprivileged" combatants are covered only by article 3 common to the Geneva Conventions and article 75 of Additional Protocol I (either as treaty or customary law). According to the interpretation espoused by the ICRC and others, civilians who have taken a direct part in hostilities and who fulfill the nationality criteria provided for in the Fourth Geneva Convention remain protected persons under that Convention. Those who do not fulfill the nationality criteria are at a minimum protected by the provisions of article 3 common to the Geneva Conventions and of article 75 of Additional Protocol I (either as treaty or customary law).

The ICRC does not, therefore, believe that there is a category of persons affected by or involved in international armed conflict who are outside any IHL protection or that there is a "gap" in IHL coverage between the Third and Fourth Geneva Conventions, i.e. an intermediate status into which civilians ("unprivileged belligerents") fulfilling the nationality criteria would fall. International humanitarian law provides that



combatants cannot suffer penal consequences for direct participation in hostilities and that they enjoy prisoner-of-war status upon capture. IHL does not prohibit civilians from fighting for their country, but lack of prisoner-of-war status implies that such persons are, among other things, not protected from prosecution under the applicable domestic laws upon capture. Direct participation in hostilities by civilians, it should be noted, is not a war crime.

Apart from having no immunity from domestic penal sanctions, civilians who take a direct part in hostilities lose immunity from attack during the period of direct participation. [...]

While the ICRC therefore does not believe that there is an “intermediate” category between combatants and civilians in international armed conflict, the questions of what constitutes “direct” participation in hostilities and how the temporal aspect of participation should be defined (“for such time as they take a direct part in hostilities”) are still open. In the ICRC’s view – given the consequences of direct participation mentioned above and the importance of having an applicable definition that would uphold the principle of distinction – the notion of direct participation is a legal issue that merits further reflection and study, as well as an effort to arrive at proposals for clarification of the concept. This is all the more important as civilian participation in hostilities occurs in international and non-international armed conflicts. [...]

### **Related Conduct of Hostilities Issues**

The package of IHL rules on the conduct of hostilities was one of the crowning achievements of the diplomatic process that ended with the adoption of the 1977 first Additional Protocol to the Geneva Conventions. While most of these rules have garnered broad acceptance and become customary law in the intervening years, it is acknowledged that certain ambiguities in formulation have given rise to differences in interpretation, and, therefore, in their practical application. The changing face of warfare due to, among other things, constant developments in military technology has also contributed to disparate readings of the relevant provisions. Among them are the definition of military objectives, the principle of proportionality and the rules on precautionary measures.

### ***Military Objectives***

In the conduct of military operations, only military objectives may be directly attacked. The definition of military objectives provided for in Additional Protocol I is generally considered to reflect customary international law. Under article 52 (2) of the Protocol, “military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.

The [...] drafters wanted to exclude indirect contributions and possible advantages. Without these restrictions, the limitation of lawful attacks to “military” objectives could be too easily undermined and the principle of distinction rendered void.

The definition of military objectives, read together with the principle of distinction, the prohibition of indiscriminate attacks, the obligation to minimize civilian casualties, as well as the principle of proportionality, clearly rejects interpretations advanced formerly in doctrines of “total warfare”, [...].

If the political, economic, social or psychological importance of objects becomes the determining factor – as suggested in certain military writings – the assessment of whether an object is a military objective becomes highly speculative and invites boundless interpretations. By the same token, interpretations that accept attacks on the morale of the civilian population as a means of influencing the enemy’s determination to fight would lead to unlimited warfare, and could not be supported by the ICRC.

A particular problem arises with regard to so-called dual-use objects, i.e. objects that serve both civilian and military purposes, such as airports or bridges. It should be stressed that “dual-use” is not a legal term. In the ICRC’s view, the nature of any object must be assessed under the definition of military objectives provided for in Additional Protocol I. Thus, it may be held that even a secondary military use may turn such an object into a military objective. However, an attack on such an object may nevertheless be unlawful if the effects on the civilian use of the object in question violate the principle of proportionality, [...].

### ***Principle of Proportionality in the Conduct of Hostilities***

In order to spare civilians and civilian property as much as possible from the effects of war, international humanitarian law prohibits disproportionate attacks. A disproportionate attack is defined as “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” (Additional Protocol I, article 51 (5)(b)). This definition is generally regarded as reflecting customary international law. [...]

As far as the interpretation of the principle of proportionality is concerned the meaning of the term “concrete and direct military advantage” is crucial. It cannot be stressed enough that the advantage anticipated must be a military advantage, which generally consists in gaining ground or in destroying or weakening the enemy’s armed forces. The expression “concrete and direct” was intended to show that the advantage concerned should be substantial and relatively immediate, and that an advantage which is hardly perceptible or which would only appear in the long term should be disregarded. [...]

If the concept of military advantage were to be enlarged, it seems only logical to also consider such “knock-on effects”, i.e. those effects not directly and immediately caused by the attack, but which are nevertheless the product thereof. In the ICRC’s view, the same scale has to be applied with regard to both the military advantage and the corresponding civilian casualties. This means that the foreseeable military advantage of a particular military operation must be weighed against the foreseeable incidental civilian casualties or damages of such an operation, which include knock-on effects. [...]

### ***Precautionary Measures***

In order to implement the restrictions and prohibitions on targeting and to minimize civilian casualties and damage, specific rules on precautions in attack must be observed. These rules are codified in article 57 of Additional Protocol I and apply to the planning of an attack, as well as to the attack itself. They largely reflect customary international law and aim at ensuring that in the conduct of military operations constant care is taken to spare civilians and civilian objects.

Several of the obligations provided for are not absolute, but depend on what is “feasible” at the time. Thus again, a certain discretion is given to those who plan or decide upon an attack. According to various interpretations given at the time of signature or ratification of Additional Protocol I and the definitions subsequently adopted in the Mines Protocol (in its original and amended version [See Document No. 16, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention)], [...], feasible precautions are those “which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”

In this context it is debatable what weight can be given to the understandable aim of ensuring the safety of the attacking side’s armed forces (“military consideration”), when an attack is launched. It seems hardly defensible that it may serve as a justification for not taking precautionary measures at all and thereby exposing the civilian population or civilian objects to a greater risk. While under national regulations military commanders are generally obliged to protect their troops, under international humanitarian law combatants [...] may [...] be lawfully attacked by the adversary. Civilians, as long as they do not participate directly in hostilities, as well as civilian objects, must not be made the object of an attack. Thus, the provisions of international humanitarian law clearly emphasize the protection of civilians and civilian objects.

In the conduct of hostilities it is not only the attacking side that has obligations with a view to ensuring protection of the civilian population and civilians, but also the defending side. Generally speaking, the latter must take necessary precautions to protect the civilian population, individual civilians and civilian objects under its control against the dangers resulting from military operations, [...]. Under no circumstances may civilians be used to shield military objectives from attack or to shield military operations.

Given that the defending side can exercise control over its civilian population, it is sometimes suggested in scholarly writings that the defender should bear more responsibility for taking precautions. [...]

The ICRC could not support attempts to reduce the obligations on the attacking side. However, states must be encouraged to take measures necessary to reduce or eliminate the danger to the civilian population already in peacetime. In particular, the obligation to avoid locating military objectives within or near densely populated areas can often not be complied with in the heat of an armed conflict and should be fulfilled in peacetime.

In the ICRC's assessment, there is at present not much likelihood that the rules on military objectives, on the principle of proportionality or on precautions in attack, as well as other rules on the conduct of hostilities provided for in Additional Protocol I could be developed with a view to enhancing the protection of civilians or civilian objects. [...]

### **The Concept of Occupation**

There is no doubt that the rules on occupation set forth in the Fourth Geneva Convention remain fully applicable in all cases of partial or total occupation of foreign territory by a High Contracting Party, whether or not the occupation meets with armed resistance. It is acknowledged that those rules encapsulate a concept of occupation based on the experience of the Second World War and on the Hague law preceding it. The rules provide for a notion of occupation based on effective control of territory and on the assumption that the occupying power can or will substitute its own authority for that of the previous government. They also imply that the occupying power intends to hold on to the territory involved, at least temporarily, and to administer it.

While cases corresponding to the traditional notion of occupation persist and new situations of the same kind have recently arisen, practice has also shown that there are situations where a more functional approach to occupation might be necessary in order to ensure the comprehensive protection of persons. An example would be when the armed forces of a state, even though not "occupying" foreign territory in the sense described above, nevertheless exercise complete and exclusive control over persons and/or facilities on that territory over a certain period of time and with a limited purpose, without supplanting any domestic authority (because such authority does not exist or is not able to exercise its powers).

Another issue deserving examination would be the protection of persons who find themselves in the hands of a party to the conflict due to military operations preceding the establishment of effective territorial control or in situations of military operations that do not result in occupation in the traditional sense. [...]

An entirely separate issue is the rules applicable to multinational forces present in a territory pursuant to a United Nations mandate. While the Fourth Geneva Convention will not, generally, be applicable to peacekeeping forces, practice has shown that multinational forces do apply some of the relevant rules of the law of occupation by analogy. [...]

### **III. NON-INTERNATIONAL ARMED CONFLICTS AND IHL**

The scope and number of IHL treaty rules governing non-international armed conflicts are far less extensive than those applicable to international armed conflicts. Internal armed conflicts are covered by article 3 common to the Geneva Conventions, by Additional Protocol II to the Conventions adopted in 1977 (156 state parties to date), by a certain number of other treaties. [footnote 13: e.g. the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects and its Protocols; the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. [See **Document No. 10**, Conventions on the Protection of Cultural Property [A.]] as well as by customary international law. [...]]

In the more than twenty-five years since the Protocol's adoption it has become clear that, as the result of state and international practice, many rules applicable in international armed conflicts have also become applicable in internal armed conflicts as customary international law. The forthcoming ICRC Study on Customary International Humanitarian Law Applicable in Armed Conflicts confirms this development. [See Case No. 43, ICRC, Customary International Humanitarian Law] [...]

#### IV. IHL AND THE FIGHT AGAINST TERRORISM

The immediate aftermath of the September 11<sup>th</sup>, 2001 attacks against the United States saw the launching of what has colloquially been called the global "war against terrorism". Given that terrorism is primarily a criminal phenomenon – like drug-trafficking, against which "wars" have also been declared by states – the question is whether the "war against terrorism" is a "war" in the legal sense. To date, there is no uniform answer. [Footnote 15: By way of reminder, terrorism is not defined under international law. Work on drafting a Comprehensive Convention on Terrorism has been stalled at the United Nations for several years now.]

Proponents of the view that a "war" in the legal sense is involved essentially believe that September 11<sup>th</sup>, 2001 and ensuing events confirmed the emergence of a new phenomenon, of transnational networks capable of inflicting deadly violence on targets in geographically distant states. The transnational, rather than international, nature of such networks is evidenced by the fact that their activities, which are also geographically dispersed, are not, as a rule, imputable to a specific state under the international rules on state responsibility.

According to this point of view, the law enforcement paradigm, previously applicable to the fight against terrorist acts both internationally and domestically, is no longer adequate because the already proven and potential magnitude of terrorist attacks qualifies them as acts of war. It is said that standards of evidence required in criminal proceedings would not allow the detention or trial of a majority of persons suspected of terrorist acts and that domestic judicial systems, with their detailed rules and laborious procedures, would be overwhelmed by the number of potential cases involved. [...]

The conclusion of proponents of the arguments outlined above is that the world is faced with a new kind of violence to which the laws of armed conflict should be applicable. According to this view, transnational violence does not fit the definition of international armed conflict because it is not waged among states, and does not correspond to the traditional understanding of non-international armed conflict, because it takes places across a wide geographic area. Thus, the law of armed conflict needs to be adapted to become the main legal tool in dealing with acts of transnational terrorism. It is claimed that, for the moment, such adaptation is taking place in practice, i.e. by means of the development of customary international humanitarian law (no treaties or other legal instruments are being proposed). Some proponents of this view argue that persons suspected of being involved in acts of terrorism constitute "enemy combatants" who may be subject to direct attack, and, once captured, may be detained until the end of active hostilities in the "war against terrorism".

The counterarguments may be, also briefly, summarized as follows: terrorism is not a new phenomenon. On the contrary, terrorist acts have been carried out both at the

domestic and international levels for centuries, resulting in a series of international conventions criminalizing specific acts of terrorism and obliging states to cooperate in their prevention and punishment. The non-state, i.e. private character of this form of violence, usually pursued for ideological or political reasons rather than for private gain, has also been a regular feature of terrorism. The fact that persons or groups can now aim their violence across international borders or create transnational networks does not, in itself, justify qualifying this essentially criminal phenomenon as armed conflict.

Unfortunate confusion – pursuant to this viewpoint – has been created by the use of the term “war” to qualify the totality of activities that would be better described as a “fight against terrorism”. It is evident that most of the activities being undertaken to prevent or suppress terrorist acts do not amount to, or involve, armed conflict. [...]

[...] Most importantly, expediency in dealing with persons suspected of acts of terrorism cannot be an excuse for extra-judicial killings, for denying individuals basic rights when they are detained, or for denying them access to independent and regularly constituted courts when they are subject to criminal process. [...]

As already publicly stated by the ICRC on various occasions, the ICRC believes that international humanitarian law is applicable when the “fight against terrorism” amounts to, or involves, armed conflict. Such was the case in Afghanistan, a situation that was clearly governed by the rules of international humanitarian law applicable in international armed conflicts. It is doubtful, absent further factual evidence, whether the totality of the violence taking place between states and transnational networks can be deemed to be armed conflict in the legal sense. Armed conflict of any type requires a certain intensity of violence and, among other things, the existence of opposing parties. A party to an armed conflict is usually understood to mean armed forces or armed groups with a certain level of organization, command structure and, therefore, the ability to implement international humanitarian law.

The very logic underlying IHL requires identifiable parties in the above sense because this body of law – while not affecting the parties’ legal status establishes equality of rights and obligations among them under IHL (not domestic law) when they are at war. [...] The primary beneficiary of the rules are civilians, as well as other persons who do not, or no longer take part in hostilities and whom IHL strives principally to protect.

In the case at hand, it is difficult to see how a loosely connected, clandestine network of cells – a characterization that is undisputed for the moment – could qualify as a “party” to the conflict. [...]

The principle of equality of the belligerents underlies the law of armed conflict; in other words, as a matter of law, there can be no wars in which one side has all the rights and the other has none. Applying the logic of armed conflict to the totality of the violence taking place between states and transnational networks would mean that such networks or groups must be granted equality of rights and obligations under IHL with the states fighting them, a proposition that states do not seem ready to consider.

It is submitted that [...] acts of transnational terrorism and the responses thereto must be qualified on a case-by-case basis. In some instances the violence involved will amount

to a situation covered by IHL (armed conflict in the legal sense), while in others, it will not. Just as importantly, whether armed conflict in the legal sense is involved or not, IHL does not constitute the only applicable legal framework. IHL does not – and should not be used – to exclude the operation of other relevant bodies of law, such as international human rights law, international criminal law and domestic law. [...]

### **V. IMPROVING COMPLIANCE WITH IHL**

Insufficient respect for the rules of international humanitarian law has been a constant – and unfortunate – result of the lack of political will and practical ability of states and armed groups engaged in armed conflict to abide by their legal obligations. [...]

Over the years, states, supported by other actors, have devoted considerable effort to devising and implementing in peacetime preventive measures aimed at ensuring better respect for IHL. Dissemination of IHL [...] has been reinforced, and IHL has been increasingly incorporated into military manuals and doctrine. Domestic legislation and regulations have been progressively adopted or adapted, and the necessary structures put in place to give effect to the rules contained in the relevant IHL treaties. [...]

While efforts to improve both the prevention and repression of IHL violations are fundamental and must continue, there also remains the question of how better compliance with international humanitarian law can be ensured during armed conflicts. Under article 1 common to the four Geneva Conventions, states undertook to “respect and ensure respect” for these conventions in all circumstances. This provision is now generally interpreted as enunciating a specific responsibility of third states not involved in armed conflict to ensure respect for international humanitarian law by the parties to an armed conflict. In addition, article 89 of Additional Protocol I provides for the possibility of actions of the contracting parties in cooperation with the United Nations in situations of serious violations of the Geneva Conventions and of Additional Protocol I. While these provisions have been invoked from time to time, this has not been done consistently. It is evident, however, that the role and influence of third states, as well as of international organizations – be they universal or regional – are crucial for improving compliance with international humanitarian law.

In 2003, the ICRC, in cooperation with other institutions and organizations, organized a series of regional expert seminars to examine that issue. [...]

### **Scope and Obligation to “Ensure Respect” for IHL**

[...] [I]t was emphasized that the common article 1 obligation provided for in the four Geneva Conventions means that states must neither encourage a party to an armed conflict to violate IHL, nor take action that would assist in such violations. Participants illustrated this negative obligation by referring to the prohibited action of, for example, transferring arms or selling weapons to a state that is known to use such arms or weapons to commit violations of IHL. [...]

Seminar participants also acknowledged a positive obligation on states not involved in an armed conflict to take action against states that are violating IHL, in particular



to use their influence to stop the violations. [...] It was not considered an obligation to reach a specific result, but rather an “obligation of means” on states to take all appropriate measures possible, in an attempt to end IHL violations. [...]

The state obligation to “respect and ensure respect” for the Geneva Conventions, contained in common Article 1, was confirmed as applicable to both international and non-international armed conflicts.

### **Existing IHL Mechanisms and Bodies [...]**

Regarding [...] existing IHL mechanisms, most seminar participants agreed that, in principle, they were not defective. While some fine-tuning might be possible and necessary, the major problem is the lack of political will by states to seize them, and in particular, the fact that the triggering of most existing IHL mechanisms depends on the consent of the parties to a conflict. [...]

Although many participants submitted ideas for new mechanisms, others forcefully voiced a preference for focusing efforts on the reform or re-invigoration of existing mechanisms, declaring that only through use of the mechanisms will they be able to prove their effectiveness. [...]

### **New IHL Supervision Mechanisms: *Pro et Contra***

In general, participants who supported the idea of establishing new IHL supervision mechanisms agreed that [...] any new supervision mechanism potentially adopted by states should be neutral and impartial, should be constituted in a way that would enable it to operate effectively, should be able to act without the consent of the parties in question (i.e. have mandatory powers), and should take costs and administrative burdens on states into account. Among participants there was, however, some recognition that the general international atmosphere at present is not conducive to the establishment of new mechanisms. Thus, many participants advocated for a gradual process, beginning with the creation and use of ad hoc or regional mechanisms, that might earn trust and garner support over time, potentially leading to the creation of a new permanent universal mechanism.

Some of the new mechanisms suggested were a system of either ad hoc or periodic reporting and the institution of an individual complaints mechanism, either independently or as part of an IHL Commission (see proposal below). [...]

The idea was also put forward of creating a “Diplomatic Forum”, that would be composed of a committee of states or a committee of IHL experts, similar to the UN Commission on Human Rights and its Sub-commission on the Promotion and Protection of Human Rights. According to participants, many of the above-mentioned mechanisms could be placed within an IHL Commission or an Office of a High Commissioner for IHL that would be created as “treaty body” to the Geneva Conventions and the Additional Protocols. Its functions could include examination of reports, the examination of individual complaints, issuance of general observations, etc. [...]



Participants who endorsed resort to existing mechanisms, rather than the creation of new ones, held strongly to the opinion that more mechanisms would not necessarily lead to more effectiveness. [...]

### **Improving Compliance in Non-International Armed Conflicts**

Discussions at the regional expert seminars confirmed that improving compliance with IHL in non-international armed conflicts remains a challenging task. Among the general obstacles mentioned were that states often deny the applicability of IHL out of a reluctance to acknowledge that a situation of violence amounts to an internal armed conflict. It was emphasized that foreign interference in many internal armed conflicts also creates confusion with respect to the legal qualification and therefore to the body of rules applicable to the conflict. In addition, armed groups lack sufficient incentive to abide by IHL given that implementation of their legal obligations under this body of law is usually of little help to them in avoiding punishment under domestic law. [...]

The fact that armed groups usually enjoy no immunity from domestic criminal prosecution for mere participation in hostilities (even if they respect IHL), remains an important disincentive in practice for better IHL compliance by such groups. [...]

### **Closing Remarks**

The present Report attempted to highlight several challenges to international humanitarian law posed by contemporary armed conflicts, [...]. In the ICRC's view, the overall picture that emerges is one of a well-established and mature body of law whose basic tenets, if applied in good faith and with the requisite political will, continue to serve their initial purpose – which is to regulate the conduct of war and thereby alleviate the suffering caused by war. [...]

## **B. 30<sup>th</sup> International Conference of the Red Cross and Red Crescent, 26-30 November 2007**

[Source: International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Document prepared by the International Committee of the Red Cross for the 30<sup>th</sup> International Conference of the Red Cross and Red Crescent, 26-30 November 2007; available at [www.icrc.org](http://www.icrc.org). Footnotes omitted.]

### **INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS**

**Document prepared by the International Committee of the Red Cross**

Geneva, October 2007

[...]

## **I. INTRODUCTION**

This is the second report on “International Humanitarian Law (IHL) and the Challenges of Contemporary Armed Conflicts” that has been prepared by the International

Committee of the Red Cross (ICRC) for an International Conference of the Red Cross and Red Crescent. In the years that have elapsed since the first report was presented to the 28<sup>th</sup> International Conference in Geneva, in December 2003, the daily reality of armed conflict has, unsurprisingly, not changed. While a factual description of the various conflicts that are being waged around the world today is beyond the scope of this report, suffice it to say that war has continued, inexorably, to bring death, destruction, suffering and loss in their wake.

[...]

While the suffering inflicted in war has not changed, the past four years have been characterized by growing public awareness of IHL and its basic rules – and therefore of acts that constitute violations of those rules. IHL principles and standards have been the focus not only of the usual expert debates but also, increasingly, of intense and wide-ranging governmental, academic and media scrutiny. Heightened interest in and awareness of IHL must be welcomed and encouraged, bearing in mind the fact that knowledge of any body of rules is a prerequisite to better implementation. Moreover, the 1949 Geneva Conventions have now become universal, making the treaties legally binding on all countries in the world. It is hoped that the ICRC's Study on Customary International Humanitarian Law, published in 2005, will also contribute to improved awareness of the rules governing behaviour in all types of armed conflicts.

The fact that IHL may be said to have stepped out of expert circles and to have fully entered the public domain has meant, however, that the risk of politicized interpretations and implementation of its rules has also increased. The past four years have provided evidence of this general trend. States have, on occasion, denied the applicability of IHL to certain situations even though the facts on the ground clearly indicated that an armed conflict was taking place. In other instances, States have attempted to broaden the scope of application of IHL to include situations that could not, based on the facts, be classified as armed conflicts. Apart from controversies over the issue of how to qualify a situation of violence in legal terms, there have also been what can only be called opportunistic misinterpretations of certain time-tested, specific legal rules. The tendency by some actors to point to alleged violations by others, without showing any willingness to acknowledge ongoing violations of their own, has also been detrimental to the proper application of the law.

The politicization of IHL, it must be emphasized, defeats the very purpose of this body of rules. IHL's primary beneficiaries are civilians and persons *hors de combat*. The very edifice of IHL is based on the idea that certain categories of individuals must be spared the effects of violence as far as possible regardless of the side to which they happen to belong and regardless of the justification given for armed conflict in the first place. The non-application or selective application of IHL, or the misinterpretation of its rules for domestic or other political purposes, can – and inevitably does – have a direct effect on the lives and livelihoods of those who are not or are no longer waging war. A fragmentary approach to IHL contradicts the essential IHL principle of humanity, which must apply equally to all victims of armed conflict if it is to retain its inherent meaning at all. Parties to armed conflicts must not lose sight of the fact that, in accordance with the very logic of IHL, politicized and otherwise skewed interpretations of the

law can rarely, if ever, have an impact on the opposing side alone. It is often just a question of time before one's own civilians and captured combatants are exposed to the pernicious effects of reciprocal politicization or deliberate misinterpretation by the adversary.

The purpose of this report, like the previous one, is to provide an overview of some of the challenges posed by contemporary armed conflicts for IHL, to generate broader reflection on those challenges and to outline ongoing or prospective ICRC action. The report is based on the premises outlined below.

First of all, the treaties of humanitarian law, notably the Geneva Conventions and their two Additional Protocols of 1977, supplemented by rules of customary humanitarian law, remain the relevant frame of reference for regulating behaviour in armed conflict. In the ICRC's view, the basic principles and rules governing the conduct of hostilities and the treatment of persons in enemy hands (the two core areas of IHL), continue to reflect a reasonable and pragmatic balance between the demands of military necessity and those of humanity. As discussed further on in this report, acts of violence with transnational elements, which have presented the most recent overall challenge for IHL, do not necessarily amount to armed conflict in the legal sense. Moreover, IHL is certainly not the only legal regime that can be used to deal with various forms of such violence.

Secondly, in the ICRC's view, the main cause of suffering during armed conflicts and of violations of IHL remains the failure to implement existing norms – whether owing to an absence of political will or to another reason – rather than a lack of rules or their inadequacy.

Thirdly, the law is just one among many tools used to regulate human behaviour and no branch of law, whether international or domestic, can – on its own – be expected to completely regulate a phenomenon as complex as violence. While IHL aims to circumscribe certain behaviour in armed conflict, there will always be States, non-State armed groups and individuals who will not be deterred from violating the rules, regardless of the penalty involved. The increase in suicide attacks targeting civilians in and outside of armed conflict is just a current case in point. In other words, the law, if relied on as the sole tool for eliminating or reducing violence, must be understood to have limits. Political, economic, societal, cultural and other factors that influence human conduct just as decisively must also be taken into account when contemplating comprehensive solutions to any form of violence.

Lastly, this report examines a number of issues that may be considered to pose challenges for IHL. The selection is non-exhaustive and does not purport to include the full range of IHL-related subjects that the ICRC is currently considering or working on, or to which it may in future turn its attention.

## II. IHL AND TERRORISM

[See also **Part I, Chapter 2**, International Humanitarian Law as a Branch of Public International Law, d) Acts of terrorism?]

If, as has been asserted above, IHL principles and rules have entered the public domain over the past few years, it is in large part owing to debate over the relationship between armed conflict and acts of terrorism. The question that is most frequently asked is whether IHL has a role to play in addressing terrorism and what that role is.

### *IHL and terrorist acts*

An examination of the adequacy of international law, including IHL, in dealing with terrorism obviously begs the question, “What is terrorism?” Definitions abound, both in domestic legislation and at the international level but, as is well known, there is currently no comprehensive international legal definition of the term. The United Nations draft Comprehensive Convention on International Terrorism has been stalled for several years because of the issue, among others, whether and how acts committed in armed conflict should be excluded from its scope.

However, regardless of the lack of a comprehensive definition at the international level, terrorist acts are crimes under domestic law and under the existing international and regional conventions on terrorism and they may, provided the requisite criteria are met, qualify as war crimes or as crimes against humanity. Thus, as opposed to some other areas of international law, “terrorism” – although not universally defined as such – is abundantly regulated. The ICRC believes, however, that the very term remains highly susceptible to subjective political interpretations and that giving it a legal definition is unlikely to reduce its emotive impact or use.

**[...] While IHL does not provide a definition of terrorism, it explicitly prohibits most acts committed against civilians and civilian objects in armed conflict that would commonly be considered “terrorist” if committed in peacetime.**

It is a basic principle of IHL that persons engaged in armed conflict must at all times distinguish between civilians and combatants and between civilian objects and military objectives. The principle of distinction is a cornerstone of IHL. Derived from it are specific rules aimed at protecting civilians, such as the prohibition of deliberate or direct attacks against civilians and civilian objects, the prohibition of indiscriminate attacks and of the use of “human shields,” and other rules governing the conduct of hostilities that are aimed at sparing civilians and civilian objects from the effects of hostilities. IHL also prohibits hostage-taking, whether of civilians or of persons no longer taking part in hostilities.

Once the threshold of armed conflict has been reached, it may be argued that **there is little added value in designating most acts of violence against civilians or civilian objects as “terrorist” because such acts already constitute war crimes under IHL.** Individuals suspected of having committed war crimes may be criminally prosecuted by States under existing bases of jurisdiction in international law; and, in the case of grave breaches as defined by the Geneva Conventions and Additional Protocol I, they must be criminally prosecuted, including under the principle of universal jurisdiction.

IHL also specifically prohibits “measures of terrorism” and “acts of terrorism” against persons in the power of a party to the conflict. Thus, the Fourth Geneva Convention (Article 33) provides that “collective penalties and likewise all measures of intimidation or of terrorism are prohibited,” while Additional Protocol II (Article 4(2)(d)) prohibits “acts of terrorism” against persons not or no longer taking part in hostilities. The context in which referral is made to these prohibitions suggests that the main aim is to underline a general principle of law, namely, that criminal responsibility is individual and that neither individuals nor the civilian population as a whole may be subjected to collective punishment, which is, obviously, a measure likely to induce terror.

In sections dealing with the conduct of hostilities, both Protocols additional to the Geneva Conventions also prohibit acts aimed at spreading terror among the civilian population. Additional Protocol I (Article 51(2)) and Additional Protocol II (Article 13(2)) stipulate that:

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

The main purpose of these provisions is to reiterate the prohibition of acts committed in international or non-international armed conflict that do not provide a definite military advantage. While even a lawful attack against a military objective is likely to spread fear among civilians, these rules prohibit attacks specifically designed to terrorize civilians – such as campaigns of shelling or sniping at civilians in urban areas – that cannot be justified by the anticipated military advantage.

The explicit prohibition of acts of terrorism against persons in the power of the adversary, as well as the prohibition of such acts committed in the course of hostilities – along with the other basic provisions mentioned above – demonstrate that IHL protects civilians and civilian objects against these types of assault when committed in armed conflict. **Thus, in current armed conflicts, the problem is not a lack of rules, but a lack of respect for them.**

A recent challenge for IHL has been the tendency of States to label as “terrorist” all acts of warfare committed by organized armed groups in the course of armed conflict, in particular non-international armed conflict. Although it is generally agreed that parties to an international armed conflict may, under IHL, lawfully attack each other’s military objectives, States have been much more reluctant to recognize that the same principle applies in non-international armed conflicts. Thus, States engaged in non-international armed conflicts have, with increasing frequency, labelled any act committed by domestic insurgents an act of “terrorism” even though, under IHL, such an act might not have been unlawful (e.g. attacks against military personnel or installations). What is being overlooked here is that a crucial difference between IHL and the legal regime governing terrorism is the fact that IHL is based on the premise that certain acts of violence – against military objectives – are not prohibited. Any act of “terrorism” is, however, by definition, prohibited and criminal.

The need to differentiate between lawful acts of war and acts of terrorism must be borne in mind so as not to conflate these two legal regimes. This is particularly important in

non-international armed conflicts, in which all acts of violence by organized armed groups against military objectives remain in any event subject to domestic criminal prosecution. The tendency to designate them additionally as “terrorist” may diminish armed groups’ incentive to respect IHL, and may also be a hindrance in a possible subsequent political process of conflict resolution.

### *Legal qualification*

The legal qualification of what is often called the “global war on terror” has been another subject of considerable controversy. While the term has become part of daily parlance in certain countries, one needs to examine, in the light of IHL, whether it is merely a rhetorical device or whether it refers to a global armed conflict in the legal sense. On the basis of an analysis of the available facts, the ICRC does not share the view that a global war is being waged and it takes a case-by-case approach to the legal qualification of situations of violence that are colloquially referred to as part of the “war on terror.” Simply put, where violence reaches the threshold of armed conflict, whether international or non-international, IHL is applicable. Where it does not, other bodies of law come into play.

Under the 1949 Geneva Conventions, international armed conflicts are those fought between States. Thus, the 2001 war between the US-led coalition and the Taliban regime in Afghanistan (waged as part of the “war on terror”) is an example of an international armed conflict.

IHL does not envisage an international armed conflict between States and non-State armed groups for the simple reason that States have never been willing to accord armed groups the privileges enjoyed by members of regular armies. To say that a global international war is being waged against groups such as Al-Qaeda would mean that, under the law of war, their followers should be considered to have the same rights and obligations as members of regular armed forces. It was already clear in 1949 that no nation would contemplate exempting members of non-State armed groups from criminal prosecution under domestic law for acts of war that were not prohibited under international law – which is the crux of combatant and prisoner-of-war status. The drafters of the Geneva Conventions, which grant prisoner-of-war status under strictly defined conditions, were fully aware of the political and practical realities of international armed conflict and crafted the treaty provisions accordingly.

The so-called “war on terror” can also take the form of a non-international armed conflict, such as the one currently being waged in Afghanistan between the Afghan government, supported by a coalition of States and different armed groups, namely, remnants of the Taliban and Al-Qaeda. This conflict is non-international, albeit with an international component in the form of a foreign military presence on one of the sides, because it is being waged with the consent and support of the respective domestic authorities and does not involve two opposed States. The ongoing hostilities in Afghanistan are thus governed by the rules applicable to non-international armed conflicts found in both treaty-based and customary IHL. The same body of rules would apply in similar circumstances where the level of violence has reached that of an armed

conflict and where a non-State armed actor is party to an armed conflict (e.g. the situation in Somalia).

The question that remains is whether, taken together, all the acts of terrorism carried out in various parts of the world (outside situations of armed conflict such as those in Afghanistan, Iraq or Somalia) are part of one and the same armed conflict in the legal sense. In other words, can it be said that the bombings in Glasgow, London, Madrid, Bali or Casablanca can be attributed to one and the same party to an armed conflict as understood under IHL? Can it furthermore be claimed that the level of violence involved in each of those places has reached that of an armed conflict? On both counts, it would appear not.

Moreover, it is evident that the authorities of the States concerned did not apply conduct of hostilities rules in dealing with persons suspected of planning or having carried out acts of terrorism, which they would have been allowed to do if they had applied an armed conflict paradigm. IHL rules would have permitted them to directly target the suspects and even to cause what is known as “collateral damage” to civilians and civilian objects in the vicinity as long as the incidental civilian damage was not excessive in relation to the military advantage anticipated. Instead, they applied the rules of law enforcement. They attempted to capture the suspects for later trial and took care in so doing to evacuate civilian structures in order to avoid all injury to persons, buildings and objects nearby.

To sum up, **each situation of organized armed violence must be examined in the specific context in which it takes place and must be legally qualified as armed conflict, or not, based on the factual circumstances. The law of war was tailored for situations of armed conflict, both from a practical and a legal standpoint.** One should always remember that IHL rules on what constitutes the lawful taking of life or on detention in international armed conflicts, for example, allow for more flexibility than the rules applicable in non-armed conflicts governed by other bodies of law, such as human rights law. **In other words, it is both dangerous and unnecessary, in practical terms, to apply IHL to situations that do not amount to war. This is not always fully appreciated.**

### *Status of persons*

The ICRC also adopts a case-by-case approach, based on the available facts, in determining the legal regime that governs the status and rights of persons detained in connection with what is called the “global war on terror”. If a person is detained in relation to an international armed conflict, the relevant treaties of IHL fully apply. If a person is detained in connection with a non-international armed conflict, the deprivation of liberty is governed by Article 3 common to the four Geneva Conventions, other applicable treaties, customary international law, and other bodies of law such as human rights law and domestic law. If a person is detained outside an armed conflict, it is only those other bodies of law that apply.

In this context, it bears repeating that *only in international armed conflicts* does IHL provide combatant (and prisoner-of-war) status to members of the armed forces. The



main feature of this status is that it gives combatants the right to directly participate in hostilities and grants them immunity from criminal prosecution for acts carried out in accordance with IHL, such as lawful attacks against military objectives. In case of capture, combatants become prisoners of war and, as such, cannot be tried or convicted for having participated in hostilities. The corollary is that captured combatants can be interned, without any form of process, until the end of active hostilities. Captured combatants may, however, be criminally prosecuted for war crimes or other criminal acts committed before or during internment. In the event of criminal prosecution, the Third Geneva Convention provides that prisoners of war may be validly sentenced only if this is done by the same courts and according to the same procedure as for members of the armed forces of the detaining power. It is often not understood that prisoners of war who have been acquitted in criminal proceedings may be held by the Detaining Power until the end of active hostilities. In case of doubt about the status of a captured belligerent, such status must be determined by a competent tribunal.

IHL treaties contain no explicit reference to “unlawful combatants.” This designation is shorthand for persons – civilians – who have directly participated in hostilities *in an international armed conflict* without being members of the armed forces as defined by IHL and who have fallen into enemy hands. Under the rules of IHL applicable to international armed conflicts, civilians enjoy immunity from attack “unless and for such time as they take a direct part in hostilities.” It is undisputed that, in addition to the loss of immunity from attack during the time in which they participate directly in hostilities, civilians – as opposed to combatants – may also be criminally prosecuted under domestic law for the mere fact of having taken part in hostilities. In other words, they do not enjoy the combatant’s “privilege” of not being liable to prosecution for taking up arms, and they are thus sometimes referred to as “unprivileged belligerents” or “unlawful combatants.”

Regarding the status and rights of civilians who have directly participated in hostilities *in an international armed conflict* and have fallen into enemy hands, there are essentially two schools of thought. According to the first, “unprivileged belligerents” are covered only by the rules contained in Article 3 common to the four Geneva Conventions and (possibly) in Article 75 of Additional Protocol I, applicable either as treaty law or as customary law. According to the other view, shared by the ICRC, civilians who have taken a direct part in hostilities, and who fulfil the nationality criteria set out in the Fourth Geneva Convention (Article 4), remain protected persons within the meaning of that Convention. Those who do not fulfil the nationality criteria are at a minimum protected by the provisions of Article 3 common to the Geneva Conventions and Article 75 of Additional Protocol I, applicable either as treaty law or as customary law.

Thus, there is no category of persons affected by or involved in international armed conflict who fall outside the scope of any IHL protection. Likewise, there is no “gap” between the Third and Fourth Geneva Conventions, i.e. there is no intermediate status into which “unprivileged belligerents” fulfilling the nationality criteria could fall.

[...]



Persons who have directly participated in hostilities can be interned by the adversary if this is absolutely necessary to the security of the detaining power. Under the Fourth Geneva Convention, a protected person who has been interned is entitled to have the decision on internment reconsidered without delay and to have it automatically reviewed every six months. While interned, a person can be considered as having forfeited certain rights and privileges provided for in the Fourth Geneva Convention, the exercise of which would be prejudicial to the security of the State, as laid down in Article 5 of that Convention and subject to the safeguards of treaty law and customary international law.

Under the Fourth Geneva Convention, persons who have been interned must be released as soon as possible after the close of the hostilities in the international armed conflict during which they were captured, if not sooner, unless they are subject to criminal proceedings or have been convicted of a criminal offence. This means that, after the end of an international armed conflict, the Fourth Geneva Convention can no longer be considered a valid legal framework for the detention of persons who are not subject to criminal proceedings.

In sum, it is difficult to see what other measures, apart from: (a) loss of immunity from attack, (b) internment if warranted by security reasons, (c) possible forfeiture of certain rights and privileges during internment and (d) criminal charges, could be applied to persons who have directly participated in hostilities without exposing them to the risk of serious violations of their right to life, physical integrity and personal dignity under IHL, such as attempts to relax the absolute prohibition of torture, and cruel and inhuman treatment. The ICRC would oppose any such attempts.

*Combatant status*, which entails the right to participate directly in hostilities, and *prisoner-of-war status*, do not exist in *non-international armed conflicts*. Civilians who take a direct part in hostilities in such conflicts are subject, for as long as they continue to do so, to the same rules regarding loss of protection from direct attack that apply during international armed conflict. [...] Upon capture, civilians detained in non-international armed conflicts do not, as a matter of law, enjoy prisoner-of-war status and may be prosecuted by the detaining State under domestic law for any acts of violence committed during the conflict, including, of course, war crimes. Their rights and treatment during detention are governed by humanitarian law, human rights law and domestic law.

It must be emphasized that no one, regardless of his or her legal status, can be subjected to acts prohibited by IHL, such as murder, violence to life and person, torture, cruel or inhuman treatment or outrages upon personal dignity or be denied the right to a fair trial. "Unlawful combatants" are in this sense also fully protected by IHL and it is incorrect to suggest that they have minimal or no rights. One of the purposes of the law of war is to protect the life, health and dignity of all persons involved in or affected by armed conflict. It is inconceivable that calling someone an "unlawful combatant" (or anything else) should suffice to deprive him or her of rights guaranteed to every individual under the law.

The preceding observations on the relationship between IHL and terrorism should not be taken to mean that there is no scope or need for further reflection on the interplay between the two legal regimes – IHL and the one governing terrorism – or for clarification or development of the law. Indeed, [...] the ICRC has been working on ways of dealing with specific legal challenges that are also posed by acts of terrorism. What is submitted is that **the fight against terrorism requires the application of a range of measures – investigative, diplomatic, financial, economic, legal, educational and so forth – spanning the entire spectrum from peacetime to armed conflict and that IHL cannot be the sole legal tool relied on in such a complex endeavour.**

Throughout its history, IHL has proven adaptable to new types of armed conflict. The ICRC stands ready to help States and others concerned to clarify or develop the rules governing armed conflict if it is those rules that are deemed insufficient – and not the political will to apply the existing ones. **The overriding challenge for the ICRC, and others, will then be to ensure that any clarifications or developments are such as to preserve current standards of protection provided for by international law, including IHL.** The ICRC is well aware of the significant challenge that States face in their duty to protect their citizens against acts of violence that are indiscriminate and intended to spread terror among the civilian population. However, the ICRC is convinced that any steps taken – including efforts to clarify or develop the law – must remain within an appropriate legal framework, especially one that preserves respect for human dignity and the fundamental guarantees to which each individual is entitled.

[...]

#### IV. THE CONDUCT OF HOSTILITIES

[...]

##### *Asymmetric warfare*

[See also **Part I, Chapter 13**, Implementation of International Humanitarian Law, XII. Factors Contributing to Violations of International Humanitarian Law]

Asymmetric warfare is characterized by significant disparities between the military capacities of the belligerent parties. Its fundamental aim is to find a way round the adversary's military strength. Asymmetry often causes today's armed confrontations to take a more brutal turn, in which there is seemingly little place for the rule of law. While asymmetric warfare may have many facets, it specifically affects compliance with the most fundamental rules on the conduct of hostilities, namely the principle of distinction and the prohibition of perfidy. The following section focuses solely on challenges related to this facet, contains various illustrations and does not purport to be exhaustive.

When under attack, a belligerent party that is weaker in military strength and technological capacity may be tempted to hide from modern sophisticated means and methods of warfare. As a consequence, it may be led to engage in practices prohibited by IHL, such as feigning protected status, mingling combatants and military objectives with the civilian population and civilian objects, or using civilians as human

shields. Such practices clearly increase the risk of incidental civilian casualties and damage. Provoking incidental civilian casualties and damage may sometimes even be deliberately sought by the party that is the object of the attack. The ultimate aim may be to benefit from the significant negative impression conveyed by media coverage of such incidents. The idea is to “generate” pictures of civilian deaths and injuries and thereby to undermine support for the continuation of the adversary’s military action.

Technologically disadvantaged States or armed groups may tend to exploit the protected status of certain objects (such as religious or cultural sites, or medical units) in launching attacks. Methods of combat like feigning civilian, non-combatant status and carrying out military operations from amidst a crowd of civilians will often amount to perfidy. In addition, the weaker party often tends to direct strikes at “soft targets” because, in particular in modern societies, such attacks create the greatest damage or else because the party is unable to strike the military personnel or installations of the enemy. Consequently, violence is directed at civilians and civilian objects, sometimes in the form of suicide attacks. Resort to hostage-taking is also a more frequent phenomenon.

The dangers of asymmetry also relate to the means of warfare likely to be used by the disadvantaged forces. It appears more and more likely that States or armed groups that are powerless in the face of sophisticated weaponry will seek to acquire – or construct – chemical, biological and even possibly nuclear weapons (in particular, the “dirty bomb scenario”), against which traditional means of defending the civilian population and civilian objects are inadequate.

A militarily superior belligerent may tend to relax the standards of protection of civilian persons and civilian objects in response to constant violations of IHL by the adversary. For example, confronted with enemy combatants and military objectives that are persistently hidden among the civilian population and civilian objects, an attacker – who is legally bound by the prohibition of disproportionate attacks – may, in response to the adversary’s strategy, progressively revise his assessment of the principle of proportionality and accept more incidental civilian casualties and damage. Another likely consequence could be a broader interpretation of what constitutes “direct participation in hostilities” [...] [See Document No. 51, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]. The militarily stronger party may also be tempted to adopt a broader interpretation of the notion of military objective. Such developments would make the civilian population as a whole more vulnerable to the effects of hostilities.

In sum, military imbalances carry incentives for the weaker party to level out its inferiority by disregarding existing rules on the conduct of hostilities. Faced with an enemy that systematically refuses to respect IHL, a belligerent may have the impression that legal prohibitions operate exclusively for the adversary’s benefit. The real danger in such a situation is that the application of IHL will be perceived as detrimental by all the parties to a conflict (“spiral-down effect”) and this will ultimately lead to all-around disregard for IHL and thus undermine its basic tenets.

### *Urban warfare*

Similar challenges concerning the definition of a military objective and the interpretation of the principle of proportionality and of precautionary measures also arise from the spread of urban warfare. Military ground operations in urban settings are particularly complex: those resisting attack benefit from innumerable firing positions and may strike anywhere at anytime. The fear of surprise attacks is likely to reduce the attacker's armed forces ability to properly identify enemy forces and military objectives and to assess the incidental civilian casualties and damages that may ensue from its operations. Likewise, artillery and aerial bombardments of military objectives located in cities are complicated by the proximity of those objectives to the civilian population and civilian objects.

**The ICRC believes that the challenges posed to IHL by asymmetric and urban warfare cannot a priori be solved by developments in treaty law. It must be stressed that in such circumstances, it is generally not the rules that are at fault, but the will or sometimes the ability of the parties to an armed conflict – and of the international community – to enforce them, in particular through criminal law.**

The ICRC recognizes that today's armed conflicts, especially asymmetric ones, pose serious threats to the rules derived from the principle of distinction. It is crucial to resist these threats and to make every effort to maintain and reinforce rules that are essential to protecting civilians, who so often bear the brunt of armed conflicts. The rules themselves are as pertinent to "new" types of conflicts and warfare as they were to the conflicts or forms of warfare that existed at the time when they were adopted. The fundamental values underlying these rules, which need to be safeguarded, are timeless. While it is conceivable that developments in IHL might occur in specific areas, such as in relation to restrictions and limitations on certain weapons, a major rewriting of existing treaties does not seem necessary for the time being.

Nevertheless, there is an ongoing need to assess the effectiveness of existing rules for the protection of civilians and civilian objects, to improve the implementation of those rules or to clarify the interpretation of specific concepts on which the rules are based. However, this must be done without disturbing the framework and underlying tenets of existing IHL, the aim of which is precisely to ensure the protection of civilians. Despite certain shortcomings in some of the rules governing the conduct of hostilities, mostly linked to imprecise wording, these rules continue to play an important role in limiting the use of weapons. Any further erosion of IHL may propel mankind backwards to a time when the use of armed force was almost boundless.

[...]

## **V. NON-INTERNATIONAL ARMED CONFLICTS**

[...]

### *Substantive challenges*

Article 3 common to the four Geneva Conventions laid down the first rules to be observed by parties to non-international armed conflicts. [...]

Over time, the protections set out in common Article 3 came to be regarded as so fundamental to preserving a measure of humanity in war that they are now referred to as “elementary considerations of humanity” that must be observed in all types of armed conflict as a matter of customary international law. **Common Article 3 has thus become a baseline from which no departure, under any circumstances, is allowed. It applies to the treatment of all persons in enemy hands, regardless of how they may be legally or politically classified or in whose custody they may be held.**

[...]

[T]he ICRC plans to examine current and new types of armed violence and assess the current status of the law of non-international armed conflict, in the light of treaty law and customary international law. On the basis of the results, it will evaluate whether there is a need for further clarification or development of the law with a view to strengthening the protection of persons and objects affected by non-international armed conflicts.

#### *Respect for IHL in non-international armed conflicts*

[...]

When seeking to engage with the parties to non-international armed conflicts and to improve their compliance with IHL, the ICRC has faced the following challenges:

##### *Diversity of conflicts and parties*

Non-international armed conflicts differ enormously. They range from those that resemble conventional warfare, similar to international armed conflicts, to those that are essentially unstructured. The parties – whether States or organized armed groups – vary widely in character. Depth of knowledge of the law, motives for taking part in an armed conflict, interest in or need for international recognition or political legitimacy all have a direct impact on a party’s compliance with the law. Organized armed groups, in particular, are extremely diverse. They range from those that are highly centralized (with a strong hierarchy, effective chain of command, communication capabilities, etc.) to those that are decentralized (with semi-autonomous or splinter factions operating under an ill-defined leadership structure). Groups may also differ in relation to the extent of their territorial control, their capacity to train members, and the disciplinary or punitive measures that are taken against members who violate IHL.

##### *Denial of applicability of IHL*

Not infrequently, a party to a non-international armed conflict – either a State or an armed group – will deny the applicability of humanitarian law. Governmental authorities, for example, might disagree that a particular situation qualifies as an armed conflict. They might claim instead that it is a situation of “tension” or one that involves banditry or terrorist activities that do not amount to a non-international armed conflict, as recognition that such an armed conflict is taking place would, in their view, implicitly grant “legitimacy” to the armed group. Non-State armed groups might also deny the applicability of IHL on the grounds that

it is a body of law created by States and that they cannot be bound by obligations ratified by the government against whom they are fighting. In such cases, the law will seldom be a relevant frame of reference, especially for groups whose actions are shaped by strong ideology.

*Lack of political will to implement humanitarian law*

A party may have no – or not enough – political will to comply with the provisions of humanitarian law. Where the objective of a party to a non-international armed conflict is itself contrary to the principles, rules and spirit of humanitarian law, there will be no political will to implement the law.

*Ignorance of the law*

In many non-international armed conflicts, bearers of arms with little or no training in IHL are directly involved in the fighting. This ignorance of the law significantly impedes efforts to increase respect for IHL and to regulate the behaviour of the parties to conflicts.

Based on its long experience in situations of non-international armed conflict, the ICRC has drawn a number of lessons which could be helpful to more effectively address parties to non-international armed conflicts with a view to an improved respect for IHL.

[...]

*Understand and adapt to the unique characteristics of the conflict and the parties*

Given the great diversity of armed conflicts and parties, there is no uniform approach to the problem of lack of respect for humanitarian law. Any effort to increase respect for the law will be more effective if it takes into account the unique characteristics of a specific situation. This is especially true with regard to the parties themselves. It is particularly helpful to know and to understand a party's motivations and interests in order to explain why it is in the party's interest to comply with the law.

*Work in the context of a long-term process of engagement*

Attempts to influence the behaviour of parties to a non-international armed conflict will be most effective if they are part of a process of engaging and building up a relationship with each of those parties. Carried out over the long term, such a process will also provide opportunities for acquiring insight into the characteristics of the parties and thus form a basis for discussing the law "strategically." It will also lead to opportunities for addressing issues such as the party's political will and capacity to comply with the law.

In addition to dissemination and training activities, which are crucial to making the rules of IHL known and to building a foundation for discussions concerning respect for the law, a number of legal tools have been used by the ICRC and other humanitarian actors in their efforts to improve compliance with humanitarian law by parties to non-international armed conflicts. Such tools do not themselves guarantee increased respect, but they nevertheless provide a basis on which legal representations can be made and on which accountability can be required. These tools, which are inter-related and reinforce each other, include the following:

- Special agreements between the parties to non-international armed conflicts whereby they explicitly commit themselves to comply with humanitarian law (see Article 3 common to the four Geneva Conventions)
- Unilateral declarations (or “declarations of intention”) by armed groups party to non-international armed conflicts whereby they commit themselves to comply with IHL
- Inclusion of humanitarian law in codes of conduct for armed groups
- References to humanitarian law in ceasefire or peace agreements
- Grants of amnesty for mere participation in hostilities

[...]

## VI. REGULATING PRIVATE MILITARY AND PRIVATE SECURITY COMPANIES

[See **Case No. 20**, The Issue of Mercenaries, Part. D, Report submitted by the Working Group on the Use of Mercenaries. See also **Document No. 30**, Montreux Document on Private Military and Security Companies]

[...]

### *Obligations of States*

[...]

**States that hire PMCs / PSCs** have the closest relationship with them. At the outset, it is important to stress that those States themselves remain responsible for respecting and fulfilling their obligations under IHL. For instance, Article 12 of the Third Geneva Convention clearly stipulates that whoever is individually responsible, the detaining power remains responsible for the treatment of prisoners of war. This close relationship also means that States can be directly responsible for the acts of PMCs / PSCs when these are attributable to them under the law of State responsibility, particularly if the PMCs / PSCs are empowered to exercise elements of governmental authority or if they act on the instructions or under the direction or control of State authorities.

In addition, States contracting a PMC / PSC have an obligation to ensure respect for IHL by the company. This is a rather broad legal obligation, but best practice gives an indication of how it can be fulfilled by States. For instance, States could include certain requirements in the company's contract, such as adequate training in IHL, the exclusion of specific activities such as participation in military operations or the vetting of employees to ensure they have not committed violations in the past.

Lastly, States that hire PMCs / PSCs, like all other States, must repress war crimes and suppress other violations of IHL committed by PMC / PSC staff.

**States on whose territory PMCs / PSCs operate** also have an obligation to ensure that IHL is respected within their jurisdictions. In practice, this can be done by enacting regulations providing a legal framework for the activities of PMCs / PSCs. For instance, States could establish a registration system imposing certain criteria for PMCs / PSCs;

or they can have a licensing system, either for individual companies, or for specific pre-defined services, or on a case-by-case basis for each service.

**States in whose jurisdictions PMCs / PSCs are incorporated** or have their headquarters likewise have an obligation to ensure respect for IHL. They are particularly well-placed to take practical, effective measures because, like States on whose territory PMCs / PSCs operate, they have the possibility to regulate and license PMCs / PSCs. They could enact regulations requiring that PMCs / PSCs meet a number of conditions to operate lawfully, for instance that their employees receive appropriate training and be put through an adequate vetting process.

Lastly, **States whose nationals are PMC / PSC employees** should be mentioned. While these States may have virtually no link to the company as such or to the operation, they have a strong jurisdictional link to the employees and may thus be well-placed to exercise criminal jurisdiction over them should they commit violations of IHL, even abroad.

**In short, different States have obligations under IHL. Taken together, these obligations form quite an extensive international legal framework surrounding the operations of PMCs / PSCs. Some of the obligations are relatively broad, and there is a need for guidance so that States can put them into practice. There are a variety of ways in which this can be done effectively and in which remaining gaps in accountability can be filled.**

[...]

## DISCUSSION

### I. General Questions

1. In view of all the challenges mentioned in the texts, do you think that IHL is still relevant to regulate organized violence in the contemporary world? Are some of these forms of violence new? Does, or should, IHL apply to them?
2. How could interpretations of IHL be harmonized? Is there a need to clarify further the rules of IHL?

### II. Direct Participation in Hostilities [*Parts A and B.*]

[See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]

3. a. May anyone be outside the scope of IHL? Wouldn't that be contrary to the object and purpose of IHL? What are the legal arguments, if any, in favour of this interpretation? What are the legal arguments in favour of the second interpretation (according to which only common Art. 3 and Art. 75 of Protocol I apply to civilians directly participating in hostilities)? In your opinion, which rules of IHL apply to civilians who directly participate in hostilities: while they are actually doing so? Once they are in the power of the enemy? (GC IV, Arts 3 and 4; P I, Art. 51(3); P II, Art. 13(3); CIHL, Rule 6)
- b. Does IHL contain any explicit reference to "unlawful combatants"? What is the purpose of some governments in creating such a category of person? [See **Case No. 136**, Israel, The Targeted Killings Case, and **Case No. 138**, Israel, Detention of Unlawful Combatants] To whom does it refer? What would be the dangers of creating such a category? What are the ICRC's views on that subject?



4. Is it easy to draw a line between taking direct part and not taking part in hostilities? When does direct participation in hostilities start? When does it end? Can the preparation of an attack be considered as direct participation in hostilities? When does a civilian lose immunity from attack? What are the dangers of a blurred definition of direct participation?
5. [*Parts A. and B.*] If civilians directly participating in hostilities fall into enemy hands, according to which status must they be protected? Does the fact that they were participating in hostilities when captured have any consequences for their treatment during detention? Do you agree that “unprivileged belligerents” have minimal or no rights? In international armed conflict, what kind of protection are they entitled to? In non-international armed conflict? (GC IV, Arts 3, 4 and 5)

### III. Related Conduct of Hostilities Issues [*Part A.*]

#### Military Objectives

[See **Case No. 163**, Eritrea/Ethiopia, Awards on Military Objectives, and **Case No. 178**, United States/United Kingdom, Report on the Conduct of the Persian Gulf War]

6. In your opinion, what does the criterion of “effective contribution to military action” cover? Does it cover all war-sustaining capabilities? Why did the drafters add the second criterion to the definition (“whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”)? What would have been the dangers of defining military objectives solely on the basis of the first criterion? (P I, Art. 52(2) and (3); CIHL, Rule 8)
7.
  - a. Is there a fixed borderline between civilian objects and military objectives? Why/Why not? Are there any lists of military objectives? Why/Why not? Should/could such lists be drafted? (P I, Art. 52(2) and (3); CIHL, Rule 8)
  - b. When may a civilian object be attacked? May a civilian object be automatically attacked when it is concurrently used for civilian and military purposes? Are effects upon the civilian purposes of a “dual-use object” incidental effects subject to the proportionality principle? Is incidental damage to so-called “dual-use objects” more easily accepted? [See **Case No. 226**, Federal Republic of Yugoslavia, NATO Intervention] (P I, Arts 51(5)(b), 52(2) and (3); CIHL, Rules 8, 9 and 14)

#### Proportionality

8.
  - a. Does the principle of proportionality give “permission” to cause incidental loss of life among civilians? How do you calculate proportionality? Is it easy to determine at which point an incidental loss of civilian life becomes excessive compared to the concrete and direct military advantage? (P I, Arts 51(5)(b) and 57(2)(a)(iii), CIHL, Rule 14) [See **Case No. 124**, Israel/Gaza, Operation Cast Lead]
  - b. May the concrete and direct military advantage refer to a campaign of attacks as a whole, or only to individual attacks? (P I, Art. 51(5)(b); CIHL, Rule 13)
9.
  - a. Does the proportionality principle cover the long-term effects of an attack on the civilian population? The long-term military advantages? Could envisaging long-term military advantages justify larger incidental losses of civilian lives? Could long-term effects include knock-on effects on the natural environment? (P I, Arts 35(3) and 55, CIHL, Rules 44 and 45)
  - b. If the “knock-on effects” are taken into account, does it mean that an attack on a military objective that would cause no civilian loss of life, injury or damage in the short-term may still be unlawful if it is expected to cause damage in the long-term? How long should those effects be taken into account?

### Precautionary Measures

[See **Case No. 203**, Case Study, Armed Conflicts in the former Yugoslavia]

10. According to the ICRC, in striking a balance between the protection of armed forces and the protection of civilians, which protection counts more? Should the safety of the armed forces be taken into account at all? In the proportionality evaluation of whether an attack has excessive incidental effects on civilians? In evaluating the feasibility of precautionary measures? Is it realistic to say that it should not? (P I, Arts 51(5)(b) and 57; CIHL, Rules 14-21)
11. Is the obligation to take precautionary measures greater for the attacker than for the defender? If the defender fails to take the required precautions and, for instance, locates military objectives within civilian areas, does this relieve the attacker of the obligation to take precautionary measures? (P I, Arts 51(7) and (8), and 58; CIHL, Rules 14-24)
12. What are the attacker's legal responsibilities if the defender uses civilians or civilian objects to shield military objectives? When is the attack prohibited? Which additional measures must be taken? (GC IV, Art. 28; P I, Arts 51(7) and (8) and 58; CIHL, Rules 14-21 and 97) [See **Case No. 149**, Israel/Lebanon/Hezbollah, Conflict in 2006]

### Asymmetric and Urban Warfare [Part B.]

13. What do the concepts of "asymmetric warfare" and "urban warfare" refer to? Is IHL still relevant to regulate such situations? Are such situations "new"? Do these "new" situations not reveal the limits of IHL?
14. Is respect for IHL subject to reciprocity? Do the repeated violations of IHL by one party lessen the other party's obligation to respect IHL? How should a party react to repeated violations of IHL by its enemies?

### IV. The Concept of Occupation [Part A.]

[See **Case No. 125**, Israel, Applicability of the Fourth Convention to Occupied Territories, and **Case No. 161**, Eritrea/Ethiopia, Awards on Occupation]

15. What are the traditional conditions for a territory to be considered occupied? (HR, Art. 42; GC IV, Art. 2) Are the conditions of applicability different for occupation law norms contained in the Hague Regulations and the Fourth Geneva Convention?
16.
  - a. What is the exact meaning of "effective control" for the purposes of occupation? At which point may a party to a conflict be considered to have effective control over the other party's territory? Is effective control required for the provisions contained in the Hague Regulations to apply? For the provisions of Convention IV to apply? (HR, Art. 42ff.; GC IV, Art. 2)
  - b. To what extent does the "functional approach" to occupation reinterpret the criterion of effective control of the territory? What is the ultimate purpose of this approach? What are the consequences for the protection of civilians?
  - c. According to the functional approach, when would a territory be occupied? Is it occupied as soon as the enemy forces enter the territory? Or is it necessary that they "exercise complete and exclusive control over persons and/or facilities in that territory over a certain period of time"? Can some provisions of Convention IV relating to occupation be implemented as soon as the enemy forces enter the territory? If yes, which ones?
  - d. If Part III, Section III, of Convention IV on occupied territories is not applicable during an invasion phase, are enemy civilians arrested by invading forces nevertheless protected civilians?

Are they covered by Section II? Can there be protected civilians covered neither by Section II nor by Section III, but only by Section I? By no substantive rules of Part III?

17. a. Is the law of occupation appropriate to UN operations? Do they fulfil the same goals? Is that relevant for the applicability of the law of occupation? [See **Case No. 188**, Iraq, Occupation and Peacebuilding]
- b. Would it be necessary to reinforce, clarify or develop the rules of occupation, or even to create a new set of rules exclusively for “occupation” by UN multinational forces? Why/why not?

#### V. Non-International Armed Conflict and IHL [Parts A. and B.]

18. [Part B.] Is common Art. 3 now considered as part of *jus cogens*? If it is, what are the consequences? (GC I-IV, common Art. 3)
19. Is the ICRC’s customary law study sufficient to improve the law applicable to non-international armed conflict? What could the next step be to improve the law applicable to such conflicts? [See **Case No. 43**, ICRC, Customary International Humanitarian Law]

#### VI. IHL and the Fight Against Terrorism [Parts A. and B.]

[See **Case No. 288**, United States, The September 11, 2001 Attacks, and **Case No. 185**, United States, The Schlesinger Report]

20. What is the difference between lawful acts of war and acts of terrorism? May States label as “terrorist” all acts of warfare committed by organized armed groups not belonging to a State? (GC IV, Art. 33; P I, Arts 37, 48, 51, 52, 57, 58, 85; P II, Arts 4(2)(d) and 13(2); CIHL, Rules 1-21, 57, 106)
21. Why, as a rule, are terrorist activities not imputable to a State under international rules on State responsibility? In which cases can a terrorist act be imputable to a specific State? [See **Case No. 53**, International Law Commission, Articles on State Responsibility]
22. [Part A.]
  - a. Do you agree with the argument that the law enforcement paradigm is not adequate to combat terrorist acts? Does it mean that all acts of terrorism should come within the scope of IHL? Would that be legally possible?
  - b. Do you agree with the view that transnational violence fits neither the definition of international armed conflict nor that of non-international armed conflict? Cannot a conflict between a State and an armed group operating from outside that State be considered as a non-international armed conflict? Do you think a new category should be created under IHL?
23. [Part B.] Does the notion of “global war on terror” consider the world as a global battlefield? That acts of violence perpetrated around the world can be attributed to one global non-state party? What is the geographical field of application of the IHL of international armed conflicts? Of the IHL of non-international armed conflicts? Would it be appropriate to apply IHL to any act performed during the global armed conflict? At least if committed by a member of the global non-state party? What are the dangers of such a concept for the protection of human rights? What approach does the ICRC take to qualifying acts of transnational terrorism and the responses thereto? [See **Case No. 211**, ICTY, The Prosecutor v. Tadic, A. Appeals Chamber, Jurisdiction, para. 68] (GC I-IV, common Arts 2 and 3; P I, Art. 1; P II, Art. 1)
24. What does the notion of “enemy combatant” refer to? Does this “status” apply independently of the qualification of the situation of violence? What kind of protection does it grant? Can IHL be applied “à la carte” for “enemy combatants”? (GC III, Arts 1 and 4; GC IV, Art. 4)

## VII. Improving Compliance with IHL [Part A.]

25. What kind of action does Art. 89 of Protocol I provide for? Does it include reprisals? Why has Art. 89 not been resorted to consistently? How could it be better utilized?

### Scope of the obligation to ensure respect for IHL

[See **Case No. 139**, UN, Resolutions and Conference on Respect for the Fourth Convention]

26. Since it is acknowledged that common Art. 1 lays down a responsibility for third States to ensure respect for IHL by parties to a conflict, what kinds of action does this entail? What are the lower and upper limits to action under Art. 1? Does it allow interference in the internal affairs of another State? May force be used to fulfil the obligation? (GC I-IV, Arts 47/48/127/144 respectively; P I, Arts 6(1), 80, 82, 83 and 87(2))

### Existing IHL mechanisms and bodies

27. Considering the lack of effectiveness of existing mechanisms to date, what could be done to make the existing mechanisms established under IHL more acceptable to parties to an armed conflict? (GC I-IV, Arts 8/8/8/9, 10/10/10/11 and 52/53/132/149 respectively; P I, Arts 5 and 90)

### New IHL supervision mechanisms: *pro et contra*

28. What would be the political and legal feasibility of an individual complaints mechanism for violations of IHL? What would be the advantages and disadvantages of such a mechanism compared with a periodic reporting system? What would be the political and legal feasibility of an International Court of IHL? Of an International Commission of IHL? Would the politicization of mechanisms such as a “Diplomatic Forum” help improve compliance with IHL? How could such politicization be reduced?

### Improving compliance in non-international armed conflict [Parts A. and B.]

[See **Case No. 202**, Geneva Call, Puntland State of Somalia adhering to a total ban on anti-personal mines]

29. Can IHL be adapted to provide better incentives for armed groups to comply with the rules? Do all existing rules of the IHL of non-international armed conflict set realistic standards of conduct for armed groups? Are the legal tools designed to improve compliance with IHL effective? In your opinion, are States willing to accept such measures?
30. How can existing IHL mechanisms and bodies be used in non-international armed conflicts? Is there a need for specific supervision, enquiry or fact-finding possibilities?

### PMCs / PSCs [Part B.]

[See **Document No. 30**, Montreux Document on Private Military and Security Companies]

31. Are PMCs defined under IHL? What is the status of PMCs? Are PMCs’ employees operating in an armed conflict bound by IHL? On which basis? Who is responsible for ensuring that they are aware of IHL rules and that they respect them? How? What is the legal basis for such an obligation?
32. When is a contracting State responsible for violations of IHL committed by a PMC/PSC? When is their home State responsible? When is the territorial State (i.e. where the violations were committed) responsible? Does the responsibility of such States include an obligation to prevent violations? How can they ensure better compliance with IHL by those companies?

**Document No. 50, Sixtieth Anniversary of the Geneva Conventions**

[Source: ICRC, Sixty years of the Geneva Conventions: learning from the past to better face the future, Ceremony to celebrate the 60<sup>th</sup> anniversary of the Geneva Conventions, Address by Jakob Kellenberger, President of the ICRC, Geneva, 12 August 2009; available at [www.icrc.org](http://www.icrc.org)]

**Sixty years of the Geneva Conventions:  
learning from the past to better face the future**

Ceremony to celebrate the 60<sup>th</sup> anniversary of the Geneva Conventions

Address by Jakob Kellenberger, President of the ICRC

Geneva, 12 August 2009.

Excellencies,  
Ladies and gentlemen,

We gather here to mark a significant coming of age. Sixty years ago today, the Geneva Conventions were adopted. This defining event played a central role in expanding the protection provided to victims of armed conflicts. It also expanded the ICRC's humanitarian mandate, and facilitated our access as well as our dialogue with States.

[...]

Without a doubt, the journey so far has not always been plain sailing. The extent to which armed conflict has evolved over the past 60 years cannot be underestimated. It almost goes without saying that contemporary warfare rarely consists of two well-structured armies facing each other on a geographically defined battlefield. As lines have become increasingly blurred between various armed groups and between combatants and civilians, it is civilian men, women and children who have increasingly become the main victims. International humanitarian law, IHL, has necessarily adapted to this changing reality. The adoption of the first two Additional Protocols to the Geneva Conventions in 1977, with the rules they established on the conduct of hostilities and on the protection of persons affected by non-international armed conflict, is just one example. Specific rules prohibiting or regulating weapons such as anti-personnel mines and, more recently, cluster munitions are another example of the adaptability of IHL to the realities on the ground.

The traumatic events of 9/11 and its aftermath set a new test for IHL. The polarisation of international relations and the humanitarian consequences of what has been referred to as the "global war on terror" have posed a huge challenge. The proliferation and fragmentation of non-state armed groups, and the fact that some of them reject the premises of IHL, have posed another. These challenges effectively exposed IHL to some rigorous cross-examination by a wide range of actors, including the ICRC, to see if it really does still stand as an adequate legal framework for the protection of victims of armed conflict.

In short, the result of this sometimes arduous process was a resounding reaffirmation of the relevance and adequacy of IHL in preserving human life and dignity in armed

conflict. However, [...] this is no time to rest on our laurels. **The nature of armed conflict, and of the causes and consequences of such conflict, is continuing to evolve. IHL must evolve too.**

The priority for the ICRC now is to anticipate and prepare for the main challenges to IHL in the years ahead. While these challenges have a legal and often a political dimension, I must stress that our ultimate concern is purely humanitarian; our only motivation is to contribute to achieving better protection for the victims of armed conflict.

I shall refer to some of these challenges and consider some ways in which they might be addressed, including what and how the ICRC, for its part, stands ready to contribute in terms of guidance and advice. It almost goes without saying however that the effort required to address these challenges is the responsibility – be it legal or moral – not just of the ICRC, but of a wide range of actors including States and non-state actors, military forces and legislators.

I shall focus firstly on certain challenges related to armed conflict in general and secondly on those related specifically to non-international armed conflicts.

So what are some of the ongoing challenges to IHL? The first relates to the conduct of hostilities. I referred earlier to the changing nature of armed conflict and the increasingly blurred lines between combatants and civilians. Civilians have progressively become more involved in activities closely related to actual combat. At the same time, combatants do not always clearly distinguish themselves from civilians, neither wearing uniforms nor openly carrying arms. They mingle with the civilian population. Civilians are also used as human shields. To add to the confusion, in some conflicts, traditional military functions have been outsourced to private contractors or other civilians working for State armed forces or for organised armed groups. These trends are, if anything, likely to increase in the years ahead.

The result of this, in a nutshell, is that civilians are more likely to be targeted – either mistakenly or arbitrarily. Military personnel are also at increased risk: since they cannot properly identify their adversary, they are vulnerable to attack by individuals who to all appearances are civilians.

IHL stipulates that those involved in fighting must make a basic distinction between combatants on the one hand, who may lawfully be attacked, and civilians on the other hand, who are protected against attack unless and for such time as they directly participate in hostilities. The problem is that neither the Geneva Conventions nor their Additional Protocols spell out what precisely constitutes “direct participation in hostilities”.

To put it bluntly, this lack of clarity has been costing lives. This is simply unjustifiable. In an effort to help remedy this situation, the ICRC worked for six years with a group of more than 50 international legal experts from military, academic, governmental and non-governmental backgrounds. The end result of this long and intense process, published just two months ago, was a substantial guidance document. This document serves to shed light firstly on who is considered a civilian for the purpose of conducting hostilities, what conduct amounts to direct participation in hostilities, and which

particular rules and principles govern the loss of civilian protection against direct attack. [See Document No. 51, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]

Without changing existing law, the ICRC's Interpretative Guidance document provides our recommendations on how IHL relating to the notion of direct participation in hostilities should be interpreted in contemporary armed conflict. It constitutes much more than an academic exercise. The aim is that these recommendations will enjoy practical application where it matters, in the midst of armed conflict, and better protect the victims of those conflicts.

[...]

Another key issue here is the increasingly asymmetric nature of modern armed conflicts. Differences between belligerents, especially in terms of technological and military capacities have become ever more pronounced. Compliance with the rules of IHL may be perceived as beneficial to one side of the conflict only, while detrimental to the other. At worst, a militarily weak party – faced with a much more powerful opponent – will contravene fundamental rules of IHL in an attempt to even out the imbalance. If one side repeatedly breaks the rules, there is a risk that the situation quickly deteriorates into a free-for-all. Such a downward spiral would defy the fundamental purpose of IHL – to alleviate suffering in times of war. We must explore every avenue to prevent this from happening.

I would also like to briefly address the humanitarian and legal challenges related to the protection of internally displaced people. In terms of numbers, this is perhaps one of the most daunting humanitarian challenges arising in armed conflicts around the world today, from Colombia to Sri Lanka and from Pakistan to Sudan. This problem not only affects the many millions of IDPs, but also countless host families and resident communities.

Violations of IHL are the most common causes of internal displacement in armed conflict. Preventing violations is therefore, logically, the best means of preventing displacement from occurring in the first place.

On the other hand, people are sometimes forcibly prevented from fleeing when they wish to do so. During displacement, IDPs are often exposed to further abuses and have wide-ranging subsistence needs. Even when IDPs want to return to their place of origin, or settle elsewhere, they are often faced with obstacles. Their property may have been destroyed or taken by others, the land might be occupied or unusable after the hostilities, or returnees may fear reprisals if they return.

As part of the civilian population, IDPs are protected as civilians in armed conflicts.

If parties to conflicts respected the basic rules of IHL, much of the displacement and suffering caused to IDPs could be prevented. Nevertheless, there are some aspects of IHL concerning displacement that could be clarified or improved. These include in particular questions of freedom of movement, the need to preserve family unity, the prohibition of forced return or forced resettlement, and the right to voluntary return.

These various humanitarian and legal challenges exist in all types of armed conflict, whether international or non-international. However, I would now like to highlight some specific challenges concerning the law regulating non-international armed conflicts.



Non-international armed conflicts are by far the most prevalent type of armed conflict today, causing the greatest suffering. Yet there is no clear, universally-accepted legal definition of what such a conflict actually is. Both Article 3 common to the four Geneva Conventions and the second Additional Protocol give rise to certain questions on this. How can a non-international armed conflict be more precisely distinguished from other forms of violence, in particular organized crime and terrorist activities? And what if a non-international armed conflict spills over a State border, for example?

The lack of clear answers to such questions may effectively allow parties to circumvent their legal obligations. The existence of an armed conflict may be refuted so as to evade the application of IHL altogether. Conversely, other situations may inaccurately or prematurely be described as an armed conflict, precisely to trigger the applicability of IHL and its more permissive standards regarding the use of force, for example.

Even where the applicability of IHL in a non-international armed conflict is not in dispute, the fact that treaty-based law applying to these situations is at best limited has led to further uncertainties.

Let us remember however that non-international armed conflicts are not only governed by treaty law. The substantial number of rules identified in the ICRC's 2005 Study on Customary International Humanitarian Law provides additional legally binding norms in these situations.

But while customary IHL can fill some gaps, there are still humanitarian problems arising in these types of conflicts that are not fully addressed under the current applicable legal regime.

IHL applicable in non-international armed conflict contains general principles but remains insufficiently elaborate as regards material conditions of detention and detainees' right of contact with the outside world, for example. Lack of precise rules on various aspects of treatment and conditions of detention and the lack of clarity surrounding detention centres may have immediate and grave humanitarian consequences on the health and well-being of detainees. Therefore, even if the primary humanitarian challenge lies in the lack of resources by detaining authorities and in the lack of implementation of existing general principles, more precise regulation of conditions of detention in non-international armed conflict could usefully complement some of IHL's fundamental requirements.

Other areas that suffer from a lack of legal clarity include procedural safeguards for people interned for security reasons. In an effort to clarify minimum procedural rights, in 2005 the ICRC issued a set of procedural principles and safeguards applicable to any situation of internment, based on law and policy. The ICRC has been relying on this position in its operational dialogue with detaining authorities in a number of contexts around the world. Adequate protection could nevertheless be better ensured if procedural safeguards were put on a more solid legal footing by States.

Humanitarian issues arise in other areas as well, in part because of a lack of rules, or because the rules are too broad or vague, leaving much to subjective interpretation. These areas include access to populations in need of humanitarian assistance, the



fate of missing persons and protection of the natural environment. And this list is not exhaustive.

To address these humanitarian and legal challenges, the ICRC has been intensively engaged for the past two years in a comprehensive internal research study. The study aims firstly to explain in simple terms the scope of application of the law to the whole range of aforementioned humanitarian concerns arising in non-international armed conflicts, including the challenge of improving compliance with the law by all parties to such conflicts. On the basis of this, its second aim is to evaluate the legal responses provided in existing law to these humanitarian concerns. Based on a comprehensive assessment of the conclusions of this research, which is still underway, a case will be made for the clarification or further development of specific aspects of the law. The research will be followed by proposals on how to move forward, both substantively and procedurally.

Within the scope of this study, the ICRC is also looking at aspects of Article 3 common to the Geneva Conventions that need to be further clarified. Article 3 is widely regarded as a mini Convention in itself, binding States and non-state armed groups; a baseline from which no departure, under any circumstances, is allowed. It applies minimum legal standards to the treatment of all persons in enemy hands, regardless of how they may be legally or politically classified or in whose custody they may be. We are preparing a consolidated reading of the protective legal and policy framework applicable in non-international armed conflicts that meet the threshold of common Article 3.

The ICRC has a responsibility in ensuring that the Conventions will continue to stand the test of time. Of course it is the political and legal responsibility primarily of States, which have universally ratified the Conventions, to ensure that they are implemented and enforced.

Ideally of course, all parties to an armed conflict, whatever they call themselves or each other, would appreciate that it is in their own best interest to apply the legal restraints provided by IHL. After all, combatants on both sides have obligations as well as rights. On the other hand, failure to prevent abuse against others ultimately removes the safeguard against similar abuse in return. The result, simply put, is spiralling human suffering.

However, **the lack of respect for existing rules remains, as ever, the main challenge.** I hardly need to remind you of the catalogue of flagrant violations of IHL frequently witnessed in armed conflicts around the world today. This situation – sadly – is compounded by a prevailing culture of impunity. True, there have been significant positive developments towards strengthening accountability for war crimes through various international tribunals and the International Criminal Court. National legislators and courts are also finally starting to live up to their respective responsibilities of ensuring that domestic legislation recognises the criminal responsibility of those who violate IHL, and of actually enforcing such legislation.

Public pressure and international scrutiny of conduct in an armed conflict are also significant factors in improving compliance with IHL. This presupposes adequate knowledge and training in IHL not just by lawyers and military commanders, but by

wider sectors of the public at large. After all it was public pressure – and the collective shame of governments in failing to stop the atrocities in the former Yugoslavia and Rwanda – that led to the establishment of the *ad-hoc* tribunals for those countries in the mid-1990s.

Ignorance of the law is no excuse. At least the guidance, clarification and proposals coming out of the various ICRC initiatives I mentioned will make recourse to this excuse by parties to a conflict even less credible.

The ICRC can only contribute one part of what must be a concerted international effort to improve compliance with IHL. On the 60<sup>th</sup> anniversary of the Geneva Conventions, I make a heartfelt plea to States and non-state armed groups who are also bound by their provisions, to show the requisite political will to turn legal provisions into a meaningful reality. I urge them to show good faith in protecting the victims of armed conflicts – conflicts that in view of the challenges I have mentioned today are likely to become ever-more pernicious in the years to come.

Sixty years ago, the Geneva Conventions were born out of the horrors experienced by millions of people during the Second World War and its aftermath. **The essential spirit of the Geneva Conventions – to uphold human life and dignity even in the midst of armed conflict – is as important now as it was 60 years ago.** Thank you for doing all you can to keep that spirit alive.

**Document No. 51, ICRC, Interpretive Guidance  
on the Notion of Direct Participation in Hostilities**

[Source: ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Geneva, May 2009; available at [www.icrc.org](http://www.icrc.org). Footnotes omitted.]

**FOREWORD**

The protection of civilians is one of the main goals of international humanitarian law. Pursuant to its rules on the conduct of hostilities, the civilian population and individual civilians enjoy general protection against the effects of hostilities. Accordingly, the law obliges the parties to an armed conflict to distinguish, at all times, between the civilian population and combatants and to direct operations only against military targets. It also provides that civilians may not be the object of deliberate attack. In the same vein, humanitarian law mandates that civilians must be humanely treated if and when they find themselves in the hands of the enemy. This overarching norm finds expression in many provisions of humanitarian law, including those prohibiting any form of violence to life, as well as torture or cruel, inhuman or degrading treatment.

Unusual as it may seem today, the comprehensive protection of civilians was not always a main focus of international humanitarian law. Its origins, at least in terms of treaty rules, lie at a time when civilian populations were largely spared from the direct effects of hostilities and actual fighting was carried out only by combatants. In 1864, when the First Geneva Convention was adopted, armies faced off on battlefields with clearly drawn frontlines. It was the suffering of soldiers, often tens of thousands of them who lay wounded or dying after a military engagement that needed to be alleviated. Only later, when technological innovations in weaponry started causing massive civilian suffering and casualties in war, did the protection of civilians also need to be addressed.

Over time, and particularly after the Second World War, the law also had to regulate the consequences of more and more frequent direct participation by civilians in hostilities. Two situations were emblematic: first, wars of national liberation in which government forces faced off against “irregular” armed formations fighting for the freedom of colonized populations. In 1977 Additional Protocol I recognized that such wars could under certain circumstances be deemed international in character. A second situation has become prevalent and remains of great concern today: armed conflicts not of an international character waged between government forces and organized non-State armed groups, or between such groups, for political, economic, or other reasons. It hardly needs to be said that these types of conflicts, in which parts of the civilian population are effectively transformed into fighting forces, and in which civilians are also the main victims, continue to cause untold loss of life, injury and destruction.

International humanitarian law has addressed the trend towards increased civilian participation in hostilities by providing a basic rule, found in both Additional Protocols to the Geneva Conventions, pursuant to which civilians benefit from protection against direct attack “unless and for such time as they take a direct part in hostilities”. It is the

meaning of this notion – direct participation in hostilities – that the present Interpretive Guidance seeks to explain. In examining the notion of direct participation in hostilities the ICRC not only had to face longstanding dilemmas that had surrounded its practical application (e.g., can a person be a protected farmer by day and a targetable fighter at night?), but also had to grapple with more recent trends that further underlined the need for clarity. One such trend has been a marked shift in the conduct of hostilities into civilian population centres, including cases of urban warfare, characterized by an unprecedented intermingling of civilians and armed actors. Another has been the increased outsourcing of previously traditional military functions to a range of civilian personnel such as private contractors or civilian government employees that has made distinguishing between those who enjoy protection from direct attack and those who do not ever more difficult. A third, particularly worrying trend has been the failure of persons directly participating in hostilities, whether civilians or members of armed forces or groups, to adequately distinguish themselves from the civilian population.

The Interpretive Guidance provides a legal reading of the notion of “direct participation in hostilities” with a view to strengthening the implementation of the principle of distinction. In order for the prohibition of directing attacks against civilians to be fully observed, it is necessary that the armed forces of parties to an armed conflict – whether international and non-international – be distinguished from civilians, and that civilians who never take a direct part in hostilities be distinguished from those who do so on an individual, sporadic or unorganized basis only. The present text seeks to facilitate these distinctions by providing guidance on the interpretation of international humanitarian law relating to the notion of direct participation in hostilities. In so doing, it examines three questions: who is considered a civilian for the purposes of the principle of distinction, what conduct amounts to direct participation in hostilities and what modalities govern the loss of protection against direct attack.

The responses provided and the resulting interpretations included in the Interpretive Guidance tackle one of the most difficult, but as yet unresolved issues of international humanitarian law. The ICRC initiated reflection on the notion of direct participation in hostilities based both on the need to enhance the protection of civilians in practice for humanitarian reasons and on the international mandate it has been given to work for the better understanding and faithful application of international humanitarian law. In this context, it is appropriate that three observations be made: First, the Interpretive Guidance is an expression of solely the ICRC’s views. While international humanitarian law relating to the notion of direct participation in hostilities was examined over several years with a group of eminent legal experts, to whom the ICRC owes a huge debt of gratitude, the positions enunciated are the ICRC’s alone. Second, while reflecting the ICRC’s views, the Interpretive Guidance is not and cannot be a text of a legally binding nature. Only State agreements (treaties) or State practice followed out of a sense of legal obligation on a certain issue (custom) can produce binding law. Third, the Guidance does not purport to change the law, but provides an interpretation of the notion of direct participation in hostilities within existing legal parameters.

The present text interprets the notion of direct participation in hostilities for the purposes of the conduct of hostilities only. Thus, apart from providing guidance on

when and for how long a person is considered to have lost protection from direct attack, it does not address the consequences of direct participation in hostilities once he or she finds him or herself in the adversary's hands. Other rules of international humanitarian law then govern, foremost among them being the already mentioned principle of humane treatment.

Unfortunately, there seems to be little reason to believe that the current trend towards increased civilian participation in hostilities will weaken over time. Today, more than ever, it is of the utmost importance that all feasible measures be taken to prevent the exposure of the civilian population to erroneous or arbitrary targeting based, among other things, on reliable guidance as to how to the principle of distinction should be implemented in the challenging and complex circumstances of contemporary warfare. By presenting this Interpretive Guidance, the ICRC hopes to make a contribution to ensuring that those who do not take a direct part in hostilities receive the humanitarian protection that they are entitled to under international humanitarian law.

*Dr. Jakob Kellenberger*

*President of the International Committee of the Red Cross*

[...]

## INTRODUCTION

### 1. Purpose and nature of the Interpretive Guidance

The purpose of the Interpretive Guidance is to provide recommendations concerning the interpretation of international humanitarian law (IHL) as far as it relates to the notion of direct participation in hostilities. Accordingly, **the 10 recommendations made by the Interpretive Guidance, as well as the accompanying commentary, do not endeavour to change binding rules of customary or treaty IHL, but reflect the ICRC's institutional position as to how existing IHL should be interpreted** in light of the circumstances prevailing in contemporary armed conflicts.

The Interpretive Guidance draws on a variety of sources including, first and foremost, the rules and principles of customary and treaty IHL and, where necessary, the *travaux préparatoires* of treaties, international jurisprudence, military manuals, and standard works of legal doctrine. Additionally, it draws on the wealth of materials produced in the course of an expert process, jointly initiated by the ICRC and the TMC Asser Institute with the aim of clarifying the notion of direct participation in hostilities under IHL. Five informal expert meetings were conducted from 2003 to 2008 in The Hague and Geneva, each bringing together 40 to 50 legal experts from academic, military, governmental, and nongovernmental circles, all of whom participated in their private capacity.

The Interpretive Guidance is widely informed by the discussions held during these expert meetings but does not necessarily reflect a unanimous view or majority opinion of the experts. It endeavours to propose a balanced and practical solution that takes into account the wide variety of concerns involved and, at the same time, ensures a clear and coherent interpretation of the law consistent with the purposes

and principles of IHL. **Ultimately, the responsibility for the Interpretive Guidance is assumed by the ICRC as a neutral and independent humanitarian organization mandated by the international community of States to promote and work for a better understanding of IHL.** Although a legally binding interpretation of IHL can only be formulated by a competent judicial organ or, collectively, by the States themselves, the ICRC hopes that the comprehensive legal analysis and the careful balance of humanitarian and military interests underlying the Interpretive Guidance will render the resulting recommendations persuasive for States, non-State actors, practitioners, and academics alike.

The Interpretive Guidance consists of 10 recommendations, each of which summarizes the ICRC's position on the interpretation of IHL on a particular legal question, and a commentary explaining the bases of each recommendation. Throughout the text, particularly where major divergences of opinion persisted among the experts, footnotes refer to the passages of the expert meeting reports and background documents where the relevant discussions were recorded. **The sections and recommendations of the Interpretive Guidance are closely interrelated and can only be properly understood if read as a whole.** Likewise, the examples offered throughout the Interpretive Guidance are not absolute statements on the legal qualification of a particular situation or conduct, but must be read in good faith, within the precise context in which they are mentioned and in accordance with generally recognized rules and principles of IHL. They can only illustrate the principles based on which the relevant distinctions ought to be made, but cannot replace a careful assessment of the concrete circumstances prevailing at the relevant time and place.

Lastly, it should be emphasized that the Interpretive Guidance **examines the concept of direct participation in hostilities only for the purposes of the conduct of hostilities.** Its conclusions are not intended to serve as a basis for interpreting IHL regulating the status, rights and protections of persons outside the conduct of hostilities, such as those deprived of their liberty. Moreover, although the Interpretive Guidance is concerned with IHL only, **its conclusions remain without prejudice to an analysis of questions related to direct participation in hostilities under other applicable branches of international law, such as human rights law or the law governing the use of interstate force (*jus ad bellum*).**

## **2. The issue of civilian participation in hostilities**

The primary aim of IHL is to protect the victims of armed conflict and to regulate the conduct of hostilities based on a balance between military necessity and humanity. At the heart of IHL lies the principle of distinction between the armed forces, who conduct the hostilities on behalf of the parties to an armed conflict, and civilians, who are presumed not to directly participate in hostilities and must be protected against the dangers arising from military operations. Throughout history, the civilian population has always contributed to the general war effort of parties to armed conflicts, for example through the production and supply of weapons, equipment, food, and shelter, or through economic, administrative, and political support. However, such

activities typically remained distant from the battlefield and, traditionally, only a small minority of civilians became involved in the conduct of military operations.

Recent decades have seen this pattern change significantly. A continuous shift of the conduct of hostilities into civilian population centres has led to an increased intermingling of civilians with armed actors and has facilitated their involvement in activities more closely related to military operations. Even more recently, the increased outsourcing of traditionally military functions has inserted numerous private contractors, civilian intelligence personnel, and other civilian government employees into the reality of modern armed conflict. Moreover, military operations have often attained an unprecedented level of complexity, involving the coordination of a great variety of interdependent human and technical resources in different locations.

All of these aspects of contemporary warfare have given rise to confusion and uncertainty as to the distinction between legitimate military targets and persons protected against direct attacks. These difficulties are aggravated where armed actors do not distinguish themselves from the civilian population, for example during undercover military operations or when acting as farmers by day and fighters by night. As a result, civilians are more likely to fall victim to erroneous or arbitrary targeting, while armed forces – unable to properly identify their adversary – run an increased risk of being attacked by persons they cannot distinguish from the civilian population.

### 3. Key legal questions

This trend underlines the importance of distinguishing not only between civilians and the armed forces, but also between civilians who do and, respectively, do not take a direct part in hostilities. Under IHL, the concept of direct participation in hostilities refers to conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations. Most notably, for the duration of their direct participation in hostilities, civilians may be directly attacked as if they were combatants. Derived from Article 3 common to the Geneva Conventions, the notion of taking a direct or active part in hostilities is found in many provisions of IHL. However, despite the serious legal consequences involved, neither the Conventions nor their Additional Protocols provide a definition of direct participation in hostilities. This situation calls for the clarification of three questions under IHL applicable in both international and non-international armed conflict:

- *Who is considered a civilian for the purposes of the principle of distinction?* The answer to this question determines the circle of persons who are protected against direct attack unless and for such time as they directly participate in hostilities.

[Footnote: The status, rights, and protections of persons outside the conduct of hostilities does not depend on their qualification as civilians but on the precise personal scope of application of the provisions conferring the relevant status, rights, and protections (e.g., Arts 4 GC III, 4 GC IV, 3 GC I-IV, 75 AP I, 4 to 6 AP II).]

- *What conduct amounts to direct participation in hostilities?* The answer to this question determines the individual conduct that leads to the suspension of a civilian's protection against direct attack.

• *What modalities govern the loss of protection against direct attack?* The answer to this question will elucidate issues such as the duration of the loss of protection against direct attack, the precautions and presumptions in situations of doubt, the rules and principles governing the use of force against legitimate military targets, and the consequences of regaining protection against direct attack.

## **Part 1: RECOMMENDATIONS OF THE ICRC concerning the interpretation of international humanitarian law relating to the notion of direct participation in hostilities**

### **I. The concept of civilian in international armed conflict**

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.

### **II. The concept of civilian in non-international armed conflict**

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function").

### **III. Private contractors and civilian employees**

Private contractors and employees of a party to an armed conflict who are civilians (see above I and II) are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Their activities or location may, however, expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities.

### **IV. Direct participation in hostilities as a specific act**

The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.

### **V. Constitutive elements of direct participation in hostilities**

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or



destruction on persons or objects protected against direct attack (threshold of harm), and

2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

#### **VI. Beginning and end of direct participation in hostilities**

Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.

#### **VII. Temporal scope of the loss of protection**

Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians (see above II), and lose protection against direct attack, for as long as they assume their continuous combat function.

#### **VIII. Precautions and presumptions in situations of doubt**

All feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person must be presumed to be protected against direct attack.

#### **IX. Restraints on the use of force in direct attack**

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

#### **X. Consequences of regaining civilian protection**

International humanitarian law neither prohibits nor privileges civilian direct participation in hostilities. When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-State party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack, but are not exempted from prosecution for violations of domestic and international law they may have committed.

## Part 2: RECOMMENDATIONS AND COMMENTARY

### A. THE CONCEPT OF CIVILIAN

For the purposes of the principle of distinction, the definition of civilian refers to those persons who enjoy immunity from direct attack unless and for such time as they take a direct part in hostilities. Where IHL provides persons other than civilians with immunity from direct attack, the loss and restoration of protection is governed by criteria similar to, but not necessarily identical with, direct participation in hostilities. Before interpreting the notion of direct participation in hostilities itself, it will therefore be necessary to clarify the concept of civilian under IHL applicable in international and non-international armed conflict.

#### I. The concept of civilian in international armed conflict

**For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.**

##### 1. Mutual exclusiveness of the concepts of civilian, armed forces and *levée en masse*

According to Additional Protocol I (AP I), in situations of international armed conflict, civilians are defined negatively as all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*.

While treaty IHL predating Additional Protocol I does not expressly define civilians, the terminology used in the Hague Regulations (H IV R) and the four Geneva Conventions (GC I-IV) nevertheless suggests that the concepts of civilian, of armed forces, and of *levée en masse* are mutually exclusive, and that every person involved in, or affected by, the conduct of hostilities falls into one of these three categories. In other words, under all instruments governing international armed conflict, the concept of civilian is negatively delimited by the definitions of armed forces and of *levée en masse*, both of which shall in the following be more closely examined.

#### 2. Armed forces

##### a) Basic concept

According to Additional Protocol I, the armed forces of a party to the conflict comprise all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates. At first glance, this broad and functional concept of armed forces seems wider than that underlying the Hague Regulations and the Geneva Conventions. Although these treaties do not expressly define armed forces, they require that members of militias and volunteer corps other than the regular armed forces recognized as such in domestic law fulfil four requirements: (a) responsible command; (b) fixed distinctive sign recognizable at a

distance; (c) carrying arms openly; and (d) operating in accordance with the laws and customs of war. Strictly speaking, however, these requirements constitute conditions for the post-capture entitlement of irregular armed forces to combatant privilege and prisoner-of-war status and are not constitutive elements of the armed forces of a party to a conflict.

Thus, while members of irregular armed forces failing to fulfil the four requirements may not be entitled to combatant privilege and prisoner-of-war status after capture,

[Footnote: In the ICRC's view, in international armed conflict, any person failing to qualify for prisoner-of-war status under Art. 4 GC III must be afforded the fundamental guarantees set out in Art. 75 AP I, which have attained customary nature and, subject to the nationality requirements of Art. 4 GC IV, also remains a "protected person" within the meaning of GC IV]

it does not follow that any such person must necessarily be excluded from the category of armed forces and regarded as a civilian for the purposes of the conduct of hostilities. On the contrary, it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war. Therefore, even under the terms of the Hague Regulations and the Geneva Conventions, all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party.

[Footnote: While the prevailing opinion during the 2006 expert meeting was supportive of this interpretation, some concerns were expressed that this approach could be misunderstood as creating a category of persons protected neither by GC III nor by GC IV (Report DPH 2006, pp. 15 f.). For the ICRC's position in this respect see, e.g., above N 15.]

## **b) Meaning and significance of "belonging to" a party to the conflict**

In order for organized armed groups to qualify as armed forces under IHL, they must belong to a party to the conflict. While this requirement is made textually explicit only for irregular militias and volunteer corps, including organized resistance movements, it is implied wherever the treaties refer to the armed forces "of" a party to the conflict. The concept of "belonging to" requires at least a *de facto* relationship between an organized armed group and a party to the conflict. This relationship may be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting. Without any doubt, an organized armed group can be said to belong to a State if its conduct is attributable to that State under the international law of State responsibility. The degree of control required to make a State responsible for the conduct of an organized armed group is not settled in international law. In practice, in order for an organized armed group to belong to a party to the conflict, it appears essential that it conduct hostilities on behalf and with the agreement of that party.

Groups engaging in organized armed violence against a party to an international armed conflict without belonging to another party to the same conflict cannot be regarded as members of the armed forces of a party to that conflict, whether under Additional Protocol I, the Hague Regulations, or the Geneva Conventions. They are thus civilians

under those three instruments. Any other view would discard the dichotomy in all armed conflicts between *the armed forces of the parties to the conflict* and the *civilian population*; it would also contradict the definition of international armed conflicts as confrontations between States and not between States and non-State actors. Organized armed groups operating within the broader context of an international armed conflict without belonging to a party to that conflict could still be regarded as parties to a separate non-international armed conflict provided that the violence reaches the required threshold. Whether the individuals are civilians or members of the armed forces of a party to the conflict would then have to be determined under IHL governing non-international armed conflicts.

Lastly, it should be pointed out that organized armed violence failing to qualify as an international or non-international armed conflict remains an issue of law enforcement, whether the perpetrators are viewed as rioters, terrorists, pirates, gangsters, hostage-takers or other organized criminals.

### **c) Determination of membership**

For the regular armed forces of States, individual membership is generally regulated by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia, and equipment. The same applies where armed units of police, border guard, or similar uniformed forces are incorporated into State armed forces. Members of regularly constituted forces are not civilians, regardless of their individual conduct or the function they assume within the armed forces. For the purposes of the principle of distinction, membership in regular State armed forces ceases, and civilian protection is restored, when a member disengages from active duty and re-integrates into civilian life, whether due to a full discharge from duty or as a deactivated reservist.

Membership in irregular armed forces, such as militias, volunteer corps, or resistance movements belonging to a party to the conflict, generally is not regulated by domestic law and can only be reliably determined on the basis of functional criteria, such as those applying to organized armed groups in non-international armed conflict.

### **3. *Levée en masse***

As far as the *levée en masse* is concerned, all relevant instruments are based on the same definition, which refers to the inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war. Participants in a *levée en masse* are the only armed actors who are excluded from the civilian population although, by definition, they operate spontaneously and lack sufficient organization and command to qualify as members of the armed forces. All other persons who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis must be regarded as civilians.

#### 4. Conclusion

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Membership in irregularly constituted militia and volunteer corps, including organized resistance movements, belonging to a party to the conflict must be determined based on the same functional criteria that apply to organized armed groups in non-international armed conflict.

### II. The concept of civilian in non-international armed conflict

**For the purposes of the principle of distinction in *non-international* armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).**

#### 1. Mutual exclusiveness of the concepts of civilian, armed forces and organized armed groups

##### a) Lack of express definitions in treaty law

Treaty IHL governing non-international armed conflict uses the terms civilian, armed forces and organized armed group without expressly defining them. These concepts must therefore be interpreted in good faith in accordance with the ordinary meaning to be given to them in their context and in the light of the object and purpose of IHL.

While it is generally recognized that members of State armed forces in non-international armed conflict do not qualify as civilians, treaty law, State practice, and international jurisprudence have not unequivocally settled whether the same applies to members of organized armed groups (i.e. the armed forces of non-State parties to an armed conflict). Because organized armed groups generally cannot qualify as regular armed forces under national law, it might be tempting to conclude that membership in such groups is simply a continuous form of civilian direct participation in hostilities. Accordingly, members of organized armed groups would be regarded as civilians who, owing to their continuous direct participation in hostilities, lose protection against direct attack for the entire duration of their membership. However, this approach would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population. As the wording and logic of Article 3 GC I-IV and Additional Protocol II (AP II) reveals, civilians, armed forces, and organized armed groups of the

parties to the conflict are mutually exclusive categories also in non-international armed conflict.

#### **b) Article 3 common to the Geneva Conventions**

Although Article 3 GC I-IV generally is not considered to govern the conduct of hostilities, its wording allows certain conclusions to be drawn with regard to the generic distinction between the armed forces and the civilian population in non-international armed conflict. Most notably, Article 3 GC I-IV provides that “each Party to the conflict” must afford protection to “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*”. Thus, both State and non-State parties to the conflict have armed forces distinct from the civilian population. This passage also makes clear that members of such armed forces, in contrast to other persons, are considered as “taking no active part in the hostilities” only once they have disengaged from their fighting function (“have laid down their arms”) or are placed *hors de combat*; mere suspension of combat is insufficient. Article 3 GC I-IV thus implies a concept of civilian comprising those individuals “who do not bear arms” on behalf of a party to the conflict.

#### **c) Additional Protocol II**

While Additional Protocol II has a significantly narrower scope of application and uses terms different from those in Article 3 GC I-IV, the generic categorization of persons is the same in both instruments. During the Diplomatic Conference of 1974-77, Draft Article 25 [1] AP II defined the concept of civilian as including “anyone who is not a member of the armed forces or of an organized armed group”. Although this article was discarded along with most other provisions on the conduct of hostilities in a last minute effort to “simplify” the Protocol, the final text continues to reflect the originally proposed concept of civilian. According to the Protocol, “armed forces”, “dissident armed forces”, and “other organized armed groups” have the function and ability “to carry out sustained and concerted military operations”; whereas the “civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations” carried out by these forces “unless and for such time as they take a direct part in hostilities”.

#### **d) Reconciliation of terminology**

In Additional Protocol II, the term “armed forces” is restricted to State armed forces, whereas the armed forces of non-State parties are referred to as “dissident armed forces” or “other organized armed groups”. The notion of “armed forces” in Article 3 GC I-IV, on the other hand, includes all three categories juxtaposed in Article 1 [1] AP II, namely State armed forces, dissident armed forces, and other organized armed groups. Thus, similar to situations of international armed conflict, the concept of civilian in non-international armed conflict is negatively delimited by the definition of “armed forces” (Article 3 GC I-IV) or, expressed in the terminology of Additional Protocol II, of State “armed forces”, “dissident armed forces” and “other organized armed groups”. For the purposes of this Interpretive Guidance, the armed forces of States party to

a non-international armed conflict are referred to as “State armed forces”, whereas the armed forces of non-State parties are described as “organized armed groups”. Where not stated otherwise, the concept of “organized armed group” includes both “dissident armed forces” and “other organized armed groups” (Article 1 [1] AP II).

## **2. State armed forces**

### **a) Basic concept**

There is no reason to assume that States party to both Additional Protocols desired distinct definitions of State armed forces in situations of international and non-international armed conflict. According to the *travaux préparatoires* for Additional Protocol II, the concept of armed forces of a High Contracting Party in Article 1 [1] AP II was intended to be broad enough to include armed actors who do not necessarily qualify as armed forces under domestic law, such as members of the national guard, customs, or police forces, provided that they do, in fact, assume the function of armed forces. Thus, comparable to the concept of armed forces in Additional Protocol I, State armed forces under Additional Protocol II include both the regular armed forces and other armed groups or units organized under a command responsible to the State.

### **b) Determination of membership**

At least as far as regular armed forces are concerned, membership in State armed forces is generally defined by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia and equipment. The same applies where armed units of police, border guard, or similar uniformed forces are incorporated into the armed forces. Members of regularly constituted forces are not civilians, regardless of their individual conduct or of the function they assume within the armed forces. For the purposes of the principle of distinction, membership in regular State armed forces ceases, and civilian protection is restored, when a member disengages from active duty and re-integrates into civilian life, whether due to a full discharge from duty or as a deactivated reservist. Just as in international armed conflict, membership in irregular State armed forces, such as militia, volunteer or paramilitary groups, generally is not regulated by domestic law and can only be reliably determined on the basis of the same functional criteria that apply to organized armed groups of non-State parties to the conflict.

## **3. Organized armed groups**

### **a) Basic concept**

Organized armed groups belonging to a non-State party to an armed conflict include both dissident armed forces and other organized armed groups. Dissident armed forces essentially constitute part of a State’s armed forces that have turned against the government. Other organized armed groups recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as State armed forces.

In both cases, it is crucial for the protection of the civilian population to distinguish a non-State party to a conflict (e.g., an insurgency, a rebellion, or a secessionist movement) from its armed forces (i.e., an organized armed group). As with State parties to armed conflicts, non-State parties comprise both fighting forces and supportive segments of the civilian population, such as political and humanitarian wings. The term organized armed group, however, refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense. This distinction has important consequences for the determination of membership in an organized armed group as opposed to other forms of affiliation with, or support for, a non-State party to the conflict.

#### **b) Determination of membership**

***Dissident armed forces:*** Although members of dissident armed forces are no longer members of State armed forces, they do not become civilians merely because they have turned against their government. At least to the extent, and for as long as, they remain organized under the structures of the State armed forces to which they formerly belonged, these structures should continue to determine individual membership in dissident armed forces as well.

***Other organized armed groups:*** More difficult is the concept of membership in organized armed groups other than dissident armed forces. Membership in these irregularly constituted groups has no basis in domestic law. It is rarely formalized through an act of integration other than taking up a certain function for the group; and it is not consistently expressed through uniforms, fixed distinctive signs, or identification cards. In view of the wide variety of cultural, political, and military contexts in which organized armed groups operate, there may be various degrees of affiliation with such groups that do not necessarily amount to “membership” within the meaning of IHL. In one case, affiliation may turn on individual choice, in another on involuntary recruitment, and in yet another on more traditional notions of clan or family. In practice, the informal and clandestine structures of most organized armed groups and the elastic nature of membership render it particularly difficult to distinguish between a non-State party to the conflict and its armed forces.

As has been shown above, in IHL governing non-international armed conflict, the concept of organized armed group refers to non-State armed forces in a strictly functional sense. For the practical purposes of the principle of distinction, therefore, membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict. Consequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: “continuous combat function”). Continuous combat function does not imply *de jure* entitlement to combatant privilege. Rather, it distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely



spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.

Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act. This case must be distinguished from persons comparable to reservists who, after a period of basic training or active membership, leave the armed group and reintegrate into civilian life. Such “reservists” are civilians until and for such time as they are called back to active duty.

Individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL. Instead, they remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces. Thus, recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities. The same applies to individuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature. Although such persons may accompany organized armed groups and provide substantial support to a party to the conflict, they do not assume continuous combat function and, for the purposes of the principle of distinction, cannot be regarded as members of an organized armed group. As civilians, they benefit from protection against direct attack unless and for such time as they directly participate in hostilities, even though their activities or location may increase their exposure to incidental death or injury.

In practice, the principle of distinction must be applied based on information which is practically available and can reasonably be regarded as reliable in the prevailing circumstances. A continuous combat function may be openly expressed through the carrying of uniforms, distinctive signs, or certain weapons. Yet it may also be identified on the basis of conclusive behaviour, for example where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation. Whatever criteria are applied in implementing the principle of distinction in a particular context, they must allow to reliably distinguish members of the armed forces of a non-State party to the conflict from civilians who do not directly participate in hostilities, or who do so on a merely spontaneous, sporadic or unorganized basis. As will be shown, that determination remains subject to all feasible precautions and to the presumption of protection in case of doubt.

#### 4. Conclusion

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function").

### III. Private contractors and civilian employees

**Private contractors and employees of a party to an armed conflict who are civilians (see above I and II) are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Their activities or location may, however, expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities.**

#### 1. Particular difficulties related to private contractors and civilian employees

In recent decades, parties to armed conflicts have increasingly employed private contractors and civilian employees in a variety of functions traditionally performed by military personnel. Generally speaking, whether private contractors and employees of a party to an armed conflict are civilians within the meaning of IHL and whether they directly participate in hostilities depends on the same criteria as would apply to any other civilian. The special role of such personnel requires that these determinations be made with particular care and with due consideration for the geographic and organizational closeness of many private contractors and civilian employees to the armed forces and the hostilities.

It should also be noted that the purpose of the distinction between civilians and members of the armed forces may not be identical under domestic and international law. Depending on national legislation, membership in the armed forces may have administrative, jurisdictional, and other consequences irrelevant to the principle of distinction in the conduct of hostilities. Under IHL, the primary consequences of membership in the armed forces are the exclusion from the category of civilian and, in international armed conflict, the right to directly participate in hostilities on behalf of a party to the conflict (combatant privilege). Where the concepts of civilian and armed forces are defined for the purpose of the conduct of hostilities, the relevant standards must be derived from IHL.

The great majority of private contractors and civilian employees currently active in armed conflicts have not been incorporated into State armed forces and assume functions that clearly do not involve their direct participation in hostilities on behalf of a party to the conflict (i.e. no continuous combat function). Therefore, under IHL, they generally come within the definition of civilians. Although they are thus entitled to protection against direct attack, their proximity to the armed forces and other military objectives may expose them more than other civilians to the dangers arising from military operations, including the risk of incidental death or injury.

In some cases, however, it may be extremely difficult to determine the civilian or military nature of contractor activity. For example, the line between the defence of military personnel and other military objectives against enemy attacks (direct participation in hostilities) and the protection of those same persons and objects against crime or violence unrelated to the hostilities (law enforcement / defence of self or others) may be thin. It is therefore particularly important in this context to observe the general rules of IHL on precautions and presumptions in situations of doubt.

## **2. International armed conflict**

Civilians, including those formally authorized to accompany the armed forces and entitled to prisoner-of-war status upon capture, were never meant to directly participate in hostilities on behalf of a party to the conflict. As long as they are not incorporated into the armed forces, private contractors and civilian employees do not cease to be civilians simply because they accompany the armed forces and or assume functions other than the conduct of hostilities that would traditionally have been performed by military personnel. Where such personnel directly participate in hostilities without the express or tacit authorization of the State party to the conflict, they remain civilians and lose their protection against direct attack for such time as their direct participation lasts.

A different conclusion must be reached for contractors and employees who, to all intents and purposes, have been incorporated into the armed forces of a party to the conflict, whether through a formal procedure under national law or *de facto* by being given a continuous combat function. Under IHL, such personnel would become members of an organized armed force, group, or unit under a command responsible to a party to the conflict and, for the purposes of the principle of distinction, would no longer qualify as civilians.

## **3. Non-international armed conflict**

The above observations also apply, *mutatis mutandis*, in non-international armed conflicts. Thus, for such time as private contractors assume a continuous combat function for an organized armed group belonging to a non-State party, they become members of that group. Theoretically, private military companies could even become independent non-State parties to a non-international armed conflict. Private contractors and civilian employees who are neither members of State armed forces nor members of organized armed groups, however, must be regarded as civilians and, therefore, are protected against direct attack unless and for such time as they directly participate in hostilities.

## **4. Conclusion**

Whether private contractors and employees of a party to the conflict qualify as civilians within the meaning of IHL and whether they directly participate in hostilities depends on the same criteria as are applicable to any other civilian. The geographic and organizational closeness of such personnel to the armed forces and the hostilities require that this determination be made with particular care. Those who qualify as civilians are entitled to protection against direct attack unless and for such time as

they directly participate in hostilities, even though their activities and location may expose them to an increased risk of incidental injury and death. This does not rule out the possibility that, for purposes other than the conduct of hostilities, domestic law might regulate the status of private contractors and employees differently from IHL.

## **B. THE CONCEPT OF DIRECT PARTICIPATION IN HOSTILITIES**

Treaty IHL does not define direct participation in hostilities, nor does a clear interpretation of the concept emerge from State practice or international jurisprudence. The notion of direct participation in hostilities must therefore be interpreted in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the object and purpose of IHL.

Where treaty law refers to hostilities, that notion is intrinsically linked to situations of international or non-international armed conflict. Therefore, the concept of direct participation in hostilities cannot refer to conduct occurring outside situations of armed conflict, such as during internal disturbances and tensions, including riots, isolated and sporadic acts of violence and other acts of a similar nature. Moreover, even during armed conflict, not all conduct constitutes part of the hostilities. It is the purpose of the present chapter to identify the criteria that determine whether and, if so, for how long a particular conduct amounts to direct participation in hostilities.

In practice, civilian participation in hostilities occurs in various forms and degrees of intensity and in a wide variety of geographical, cultural, political, and military contexts. Therefore, in determining whether a particular conduct amounts to direct participation in hostilities, due consideration must be given to the circumstances prevailing at the relevant time and place. Nevertheless, the importance of the circumstances surrounding each case should not divert attention from the fact that direct participation in hostilities remains a legal concept of limited elasticity that must be interpreted in a theoretically sound and coherent manner reflecting the fundamental principles of IHL.

## **IV. Direct participation in hostilities as a specific act**

**The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.**

### **1. Basic components of the notion of direct participation in hostilities**

The notion of direct participation in hostilities essentially comprises two elements, namely that of “hostilities” and that of “direct participation” therein. While the concept of “hostilities” refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy, “participation” in hostilities refers to the (individual) involvement of a person in these hostilities. Depending on the quality and degree of such involvement, individual participation in hostilities may be described as “direct” or “indirect”. The notion of direct participation in hostilities has evolved from the phrase “taking no active part in the hostilities” used in Article 3 GC I-IV. Although the English

texts of the Geneva Conventions and Additional Protocols use the words “active” and “direct”, respectively, the consistent use of the phrase “*participant directement*” in the equally authentic French texts demonstrate that the terms “direct” and “active” refer to the same quality and degree of individual participation in hostilities. Furthermore, as the notion of taking a direct part in hostilities is used synonymously in the Additional Protocols I and II, it should be interpreted in the same manner in international and non-international armed conflict.

## 2. Restriction to specific acts

In treaty IHL, individual conduct that constitutes part of the hostilities is described as direct participation in hostilities, regardless of whether the individual is a civilian or a member of the armed forces. Whether individuals directly participate in hostilities on a spontaneous, sporadic, or unorganized basis or as part of a continuous function assumed for an organized armed force or group belonging to a party to the conflict may be decisive for their status as civilians, but has no influence on the scope of conduct that constitutes direct participation in hostilities. This illustrates that the notion of direct participation in hostilities does not refer to a person’s status, function, or affiliation, but to his or her engagement in specific hostile acts. In essence, the concept of hostilities could be described as the sum total of all hostile acts carried out by individuals directly participating in hostilities.

Where civilians engage in hostile acts on a persistently recurrent basis, it may be tempting to regard not only each hostile act as direct participation in hostilities, but even their continued intent to carry out unspecified hostile acts in the future. However, any extension of the concept of direct participation in hostilities beyond specific acts would blur the distinction made in IHL between *temporary, activity-based loss of protection* (due to direct participation in hostilities), and *continuous, status- or function-based loss of protection* (due to combatant status or continuous combat function). In practice, confusing the distinct regimes by which IHL governs the loss of protection for civilians and for members of State armed forces or organized armed groups would provoke insurmountable evidentiary problems. Those conducting hostilities already face the difficult task of distinguishing between civilians who are and civilians who are not engaged in a specific hostile act (direct participation in hostilities), and distinguishing both of these from members of organized armed groups (continuous combat function) and State armed forces. In operational reality, it would be impossible to determine with a sufficient degree of reliability whether civilians not currently preparing or executing a hostile act have previously done so on a persistently recurrent basis and whether they have the continued intent to do so again. Basing continuous loss of protection on such speculative criteria would inevitably result in erroneous or arbitrary attacks against civilians, thus undermining their protection which is at the heart of IHL. Consequently, in accordance with the object and purpose of IHL, the concept of direct participation in hostilities must be interpreted as restricted to specific hostile acts.

### 3. Conclusion

The notion of direct participation in hostilities refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. It must be interpreted synonymously in situations of international and non-international armed conflict. The treaty terms of “direct” and “active” indicate the same quality and degree of individual participation in hostilities.

### V. Constitutive elements of direct participation in hostilities

**In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:**

- 1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (*threshold of harm*), and**
- 2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (*direct causation*), and**
- 3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).**

Acts amounting to direct participation in hostilities must meet three cumulative requirements: (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict. Although these elements are very closely interrelated, and although there may be areas of overlap between them, each of them will be discussed separately here.

#### 1. Threshold of harm

**In order to reach the required threshold of harm, a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack.**

For a specific act to qualify as direct participation in hostilities, the harm likely to result from it must attain a certain threshold. This threshold can be reached either by causing harm of a specifically military nature or by inflicting death, injury, or destruction on persons or objects protected against direct attack. The qualification of an act as direct participation does not require the *materialization* of harm reaching the threshold but merely the objective *likelihood* that the act will result in such harm. Therefore, the relevant threshold determination must be based on “likely” harm, that is to say, harm which may reasonably be expected to result from an act in the prevailing circumstances.

**a) Adversely affecting the military operations or military capacity of a party to the conflict**

When an act may reasonably be expected to cause harm of a specifically *military nature*, the threshold requirement will generally be satisfied regardless of quantitative gravity. In this context, military harm should be interpreted as encompassing not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict.

For example, beyond the killing and wounding of military personnel and the causation of physical or functional damage to military objects, the military operations or military capacity of a party to the conflict can be adversely affected by sabotage and other armed or unarmed activities restricting or disturbing deployments, logistics and communication. Adverse effects may also arise from capturing or otherwise establishing or exercising control over military personnel, objects and territory to the detriment of the adversary. For instance, denying the adversary the military use of certain objects, equipment and territory, guarding captured military personnel of the adversary to prevent them being forcibly liberated (as opposed to exercising authority over them), and clearing mines placed by the adversary would reach the required threshold of harm. Electronic interference with military computer networks could also suffice, whether through computer network attacks (CNA) or computer network exploitation (CNE), as well as wiretapping the adversary's high command<sup>103</sup> or transmitting tactical targeting information for an attack.

At the same time, the conduct of a civilian cannot be interpreted as *adversely* affecting the military operations or military capacity of a party to the conflict simply because it fails to *positively* affect them. Thus, the refusal of a civilian to collaborate with a party to the conflict as an informant, scout or lookout would not reach the required threshold of harm regardless of the motivations underlying the refusal.

**b) Inflicting death, injury or destruction on persons or objects protected against direct attack**

Specific acts may constitute part of the hostilities even if they are not likely to adversely affect the military operations or military capacity of a party to the conflict. In the absence of such military harm, however, a specific act must be likely to cause at least death, injury, or destruction. The most uncontroversial examples of acts that can qualify as direct participation in hostilities even in the absence of military harm are attacks directed against civilians and civilian objects. In IHL, attacks are defined as "acts of violence against the adversary, whether in offence or in defence". The phrase "against the adversary" does not specify the target, but the belligerent nexus of an attack, so that even acts of violence directed specifically against civilians or civilian objects may amount to direct participation in hostilities. For example, sniper attacks against civilians and the bombardment or shelling of civilian villages or urban residential areas are likely to inflict death, injury, or destruction on persons and objects protected against direct attack and thus qualify as direct participation in hostilities regardless of any military harm to the opposing party to the conflict.



Acts that neither cause harm of a military nature nor inflict death, injury, or destruction on protected persons or objects cannot be equated with the use of means or methods of “warfare” or, respectively, of “injuring the enemy”, as would be required for a qualification as hostilities. For example, the building of fences or road blocks, the interruption of electricity, water, or food supplies, the appropriation of cars and fuel, the manipulation of computer networks, and the arrest or deportation of persons may have a serious impact on public security, health, and commerce, and may even be prohibited under IHL. However, they would not, in the absence of adverse military effects, cause the kind and degree of harm required to qualify as direct participation in hostilities.

### c) Summary

For a specific act to reach the threshold of harm required to qualify as direct participation in hostilities, it must be likely to adversely affect the military operations or military capacity of a party to an armed conflict. In the absence of military harm, the threshold can also be reached where an act is likely to inflict death, injury, or destruction on persons or objects protected against direct attack. In both cases, acts reaching the required threshold of harm can only amount to direct participation in hostilities if they additionally satisfy the requirements of direct causation and belligerent nexus.

## 2. Direct causation

**In order for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.**

### a) Conduct of hostilities, general war effort, and war sustaining activities

The treaty terminology of taking a “direct” part in hostilities, which describes civilian conduct entailing loss of protection against direct attack, implies that there can also be “indirect” participation in hostilities, which does not lead to such loss of protection. Indeed, the distinction between a person’s direct and indirect participation in hostilities corresponds, at the collective level of the opposing parties to an armed conflict, to that between the conduct of hostilities and other activities that are part of the general war effort or may be characterized as war-sustaining activities.

Generally speaking, beyond the actual conduct of hostilities, the general war effort could be said to include all activities objectively contributing to the military defeat of the adversary (e.g. design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations), while war sustaining activities would additionally include political, economic or media activities supporting the general war effort (e.g. political propaganda, financial transactions, production of agricultural or non-military industrial goods).

Admittedly, both the general war effort and war-sustaining activities may ultimately result in harm reaching the threshold required for a qualification as direct participation



in hostilities. Some of these activities may even be indispensable to harming the adversary, such as providing finances, food and shelter to the armed forces and producing weapons and ammunition. However, unlike the conduct of hostilities, which is designed to cause – i.e. bring about the materialization of – the required harm, the general war effort and war sustaining activities also include activities that merely maintain or build up the capacity to cause such harm.

#### **b) Direct and indirect causation**

For a specific act to qualify as “direct” rather than “indirect” participation in hostilities there must be a sufficiently close causal relation between the act and the resulting harm. Standards such as “indirect causation of harm” or “materially facilitating harm” are clearly too wide, as they would bring the entire war effort within the concept of direct participation in hostilities and, thus, would deprive large parts of the civilian population of their protection against direct attack. Instead, the distinction between direct and indirect participation in hostilities must be interpreted as corresponding to that between direct and indirect causation of harm.

In the present context, direct causation should be understood as meaning that the harm in question must be brought about in one causal step. Therefore, individual conduct that merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, is excluded from the concept of direct participation in hostilities. For example, imposing a regime of economic sanctions on a party to an armed conflict, depriving it of financial assets, or providing its adversary with supplies and services (such as electricity, fuel, construction material, finances and financial services) would have a potentially important, but still indirect, impact on the military capacity or operations of that party. Other examples of indirect participation include scientific research and design, as well as production and transport of weapons and equipment unless carried out as an integral part of a specific military operation designed to directly cause the required threshold of harm. Likewise, although the recruitment and training of personnel is crucial to the military capacity of a party to the conflict, the causal link with the harm inflicted on the adversary will generally remain indirect. Only where persons are specifically recruited and trained for the execution of a predetermined hostile act can such activities be regarded as an integral part of that act and, therefore, as direct participation in hostilities.

Moreover, for the requirement of direct causation to be met, it is neither necessary nor sufficient that the act be indispensable to the causation of harm. For example, the financing or production of weapons and the provision of food to the armed forces may be indispensable, but not directly causal, to the subsequent infliction of harm. On the other hand, a person serving as one of several lookouts during an ambush would certainly be taking a direct part in hostilities although his contribution may not be indispensable to the causation of harm. Finally, it is not sufficient that the act and its consequences be connected through an uninterrupted causal chain of events. For example, the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with

the resulting harm through an uninterrupted causal chain of events, but, unlike the planting and detonation of that device, do not cause that harm directly.

#### c) Direct causation in collective operations

The required standard of direct causation of harm must take into account the collective nature and complexity of contemporary military operations. For example, attacks carried out by unmanned aerial vehicles may simultaneously involve a number of persons, such as computer specialists operating the vehicle through remote control, individuals illuminating the target, aircraft crews collecting data, specialists controlling the firing of missiles, radio operators transmitting orders, and an overall commander. While all of these persons are integral to that operation and directly participate in hostilities, only few of them carry out activities that, in isolation, could be said to directly cause the required threshold of harm. The standard of direct causation must therefore be interpreted to include conduct that causes harm only in conjunction with other acts. More precisely, where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm. Examples of such acts would include, *inter alia*, the identification and marking of targets, the analysis and transmission of tactical intelligence to attacking forces, and the instruction and assistance given to troops for the execution of a specific military operation.

#### d) Causal, temporal, and geographic proximity

The requirement of direct causation refers to a degree of *causal* proximity, which should not be confused with the merely indicative elements of *temporal* or *geographic* proximity. For example, it has become quite common for parties to armed conflicts to conduct hostilities through delayed (i.e. temporally remote) weapons-systems, such as mines, booby-traps and timer-controlled devices, as well as through remote-controlled (i.e. geographically remote) missiles, unmanned aircraft and computer network attacks. The causal relationship between the employment of such means and the ensuing harm remains direct regardless of temporal or geographical proximity. Conversely, although the delivery or preparation of food for combatant forces may occur in the same place and at the same time as the fighting, the causal link between such support activities and the causation of the required threshold of harm to the opposing party to a conflict remains indirect. Thus, while temporal or geographic proximity to the resulting harm may indicate that a specific act amounts to direct participation in hostilities, these factors would not be sufficient in the absence of direct causation. As previously noted, where the required harm has not yet materialized, the element of direct causation must be determined by reference to the harm that can reasonably be expected to directly result from a concrete act or operation ("likely" harm).

#### e) Selected examples

**Driving an ammunition truck:** The delivery by a civilian truck driver of ammunition to an active firing position at the front line would almost certainly have to be regarded as

an integral part of ongoing combat operations and, therefore, as direct participation in hostilities. Transporting ammunition from a factory to a port for further shipping to a storehouse in a conflict zone, on the other hand, is too remote from the use of that ammunition in specific military operations to cause the ensuing harm directly. Although the ammunition truck remains a legitimate military objective, the driving of the truck would not amount to direct participation in hostilities and would not deprive a civilian driver of protection against direct attack. Therefore, any direct attack against the truck would have to take the probable death of the civilian driver into account in the proportionality assessment.

**Voluntary human shields:** The same logic applies to civilians attempting to shield a military objective by their presence as persons entitled to protection against direct attack (voluntary human shields). Where civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cause the threshold of harm required for a qualification as direct participation in hostilities. This scenario may become particularly relevant in ground operations, such as in urban environments, where civilians may attempt to give physical cover to fighting personnel supported by them or to inhibit the movement of opposing infantry troops.

Conversely, in operations involving more powerful weaponry, such as artillery or air attacks, the presence of voluntary human shields often has no adverse impact on the capacity of the attacker to identify and destroy the shielded military objective. Instead, the presence of civilians around the targeted objective may shift the parameters of the proportionality assessment to the detriment of the attacker, thus increasing the probability that the expected incidental harm would have to be regarded as excessive in relation to the anticipated military advantage. The very fact that voluntary human shields are in practice considered to pose a *legal* – rather than a *physical* – obstacle to military operations demonstrates that they are recognized as protected against direct attack or, in other words, that their conduct does not amount to direct participation in hostilities. Indeed, although the presence of voluntary human shields may eventually lead to the cancellation or suspension of an operation by the attacker, the causal relation between their conduct and the resulting harm remains indirect. Depending on the circumstances, it may also be questionable whether voluntary human shielding reaches the required threshold of harm.

The fact that some civilians voluntarily and deliberately abuse their legal entitlement to protection against direct attack in order to shield military objectives does not, without more, entail the loss of their protection and their liability to direct attack independently of the shielded objective. Nevertheless, through their voluntary presence near legitimate military objectives, voluntary human shields are particularly exposed to the dangers of military operations and, therefore, incur an increased risk of suffering incidental death or injury during attacks against those objectives.

#### f) Summary

The requirement of direct causation is satisfied if either the specific act in question, or a concrete and coordinated military operation of which that act constitutes an integral part, may reasonably be expected to directly – in one causal step – cause harm that reaches the required threshold. However, even acts meeting the requirements of direct causation and reaching the required threshold of harm can only amount to direct participation in hostilities if they additionally satisfy the third requirement, that of belligerent nexus.

### 3. Belligerent nexus

**In order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.**

#### a) Basic Concept

Not every act that directly adversely affects the military operations or military capacity of a party to an armed conflict or directly inflicts death, injury, or destruction on persons and objects protected against direct attack necessarily amounts to direct participation in hostilities. As noted, the concept of direct participation in hostilities is restricted to specific acts that are so closely related to the hostilities conducted between parties to an armed conflict that they constitute an integral part of those hostilities. Treaty IHL describes the term hostilities as the resort to means and methods of “injuring the enemy”, and individual attacks as being directed “against the adversary”. In other words, in order to amount to direct participation in hostilities, an act must not only be *objectively likely* to inflict harm that meets the first two criteria, but it must also be *specifically designed to do so in support of a party to an armed conflict and to the detriment of another* (belligerent nexus).

Conversely, armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party, cannot amount to any form of “participation” in hostilities taking place between these parties. Unless such violence reaches the threshold required to give rise to a separate armed conflict, it remains of a non-belligerent nature and, therefore, must be addressed through law enforcement measures.

#### b) Belligerent nexus and subjective intent

Belligerent nexus should be distinguished from concepts such as subjective intent and hostile intent. These relate to the state of mind of the person concerned, whereas belligerent nexus relates to the objective purpose of the act. That purpose is expressed in the design of the act or operation and does not depend on the mindset of every participating individual. As an objective criterion linked to the act alone, belligerent nexus is generally not influenced by factors such as personal distress or preferences, or by the mental ability or willingness of persons to assume responsibility for their conduct. Accordingly, even civilians forced to directly participate in hostilities or children below the lawful recruitment age may lose protection against direct attack.

Only in exceptional situations could the mental state of civilians call into question the belligerent nexus of their conduct. This scenario could occur, most notably, when civilians are totally unaware of the role they are playing in the conduct of hostilities (e.g. a driver unaware that he is transporting a remote-controlled bomb) or when they are completely deprived of their physical freedom of action (e.g. when they are involuntary human shields physically coerced into providing cover in close combat). Civilians in such extreme circumstances cannot be regarded as performing an action (i.e. *as doing something*) in any meaningful sense and, therefore, remain protected against direct attack despite the belligerent nexus of the military operation in which they are being instrumentalized. As a result, these civilians would have to be taken into account in the proportionality assessment during any military operation likely to inflict incidental harm on them.

### c) Practical relevance of belligerent nexus

Many activities during armed conflict lack a belligerent nexus even though they cause a considerable level of harm. For example, the exchange of fire between police and hostage takers during an ordinary bank robbery, violent crimes committed for reasons unrelated to the conflict, and the stealing of military equipment for private use, may cause the required threshold of harm, but are not specifically designed to support a party to the conflict by harming another. Similarly, the military operations of a party to a conflict can be directly and adversely affected when roads leading to a strategically important area are blocked by large groups of refugees or other fleeing civilians. However, the conduct of these civilians is not specifically designed to support one party to the conflict by causing harm to another and, therefore, lacks belligerent nexus. This analysis would change, of course, if civilians block a road in order to facilitate the withdrawal of insurgent forces by delaying the arrival of governmental armed forces (or vice versa). When distinguishing between the activities that do and those that do not amount to direct participation in hostilities, the criterion of belligerent nexus is of particular importance in the following four situations:

**Individual self-defence:** The causation of harm in individual self-defence or defence of others against violence prohibited under IHL lacks belligerent nexus. For example, although the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers may cause the required threshold of harm, its purpose clearly is not to support a party to the conflict against another. If individual self-defence against prohibited violence were to entail loss of protection against direct attack, this would have the absurd consequence of legitimizing a previously unlawful attack. Therefore, the use of necessary and proportionate force in such situations cannot be regarded as direct participation in hostilities.

### **Exercise of power or authority over persons or territory:**

IHL makes a basic distinction between the conduct of hostilities and the exercise of power or authority over persons or territory. As a result, the infliction of death, injury, or destruction by civilians on persons or objects that have fallen into their “hands” or “power” within the meaning of IHL does not, without more, constitute part of the hostilities.

For example, the use of armed force by civilian authorities to suppress riots and other forms of civil unrest, prevent looting, or otherwise maintain law and order in a conflict area may cause death, injury, or destruction, but generally it would not constitute part of the hostilities conducted between parties to an armed conflict. Likewise, once military personnel have been captured (and, thus, are *hors de combat*), the suppression of riots and prevention of escapes or the lawful execution of death sentences is not designed to directly cause military harm to the opposing party to the conflict and, therefore, lacks belligerent nexus.

Excluded from the concept of direct participation in hostilities is not only the lawful exercise of administrative, judicial or disciplinary authority on behalf of a party to the conflict, but even the perpetration of war crimes or other violations of IHL outside the conduct of hostilities. Thus, while collective punishment, hostage-taking, and the ill-treatment and summary execution of persons in physical custody are invariably prohibited by IHL, they are not part of the conduct of hostilities. Such conduct may constitute a domestic or international crime and permit the lawful use of armed force against the perpetrators as a matter of law enforcement or defence of self or others. Loss of protection against direct attack within the meaning of IHL, however, is not a sanction for criminal behaviour but a consequence of military necessity in the conduct of hostilities.

**Civil unrest:** During armed conflict, political demonstrations, riots, and other forms of civil unrest are often marked by high levels of violence and are sometimes responded to with military force. In fact, civil unrest may well result in death, injury and destruction and, ultimately, may even benefit the general war effort of a party to the conflict by undermining the territorial authority and control of another party through political pressure, economic insecurity, destruction and disorder. It is therefore important to distinguish direct participation in hostilities – which is specifically designed to support a party to an armed conflict against another – from violent forms of civil unrest, the primary purpose of which is to express dissatisfaction with the territorial or detaining authorities.

**Inter-civilian violence:** Similarly, in order to become part of the conduct of hostilities, use of force by civilians against other civilians, even if widespread, must be specifically designed to support a party to an armed conflict in its military confrontation with another. This would not be the case where civilians merely take advantage of a breakdown of law and order to commit violent crimes. Belligerent nexus is most likely to exist where inter-civilian violence is motivated by the same political disputes or ethnic hatred that underlie the surrounding armed conflict and where it causes harm of a specifically military nature.

#### d) Practical determination of belligerent nexus

The task of determining the belligerent nexus of an act can pose considerable practical difficulties. For example, in many armed conflicts, gangsters and pirates operate in a grey zone where it is difficult to distinguish hostilities from violent crime unrelated to, or merely facilitated by, the armed conflict. These determinations must be based on the

information reasonably available to the person called on to make the determination, but they must always be deduced from objectively verifiable factors. In practice, the decisive question should be whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party. As the determination of belligerent nexus may lead to a civilian's loss of protection against direct attack, all feasible precautions must be taken to prevent erroneous or arbitrary targeting and, in situations of doubt, the person concerned must be presumed to be protected against direct attack.

#### e) Summary

In order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to an armed conflict and to the detriment of another. As a general rule, harm caused (a) in individual self-defence or defence of others against violence prohibited under IHL, (b) in exercising power or authority over persons or territory, (c) as part of civil unrest against such authority, or (d) during inter-civilian violence lacks the belligerent nexus required for a qualification as direct participation in hostilities.

#### 4. Conclusion

Applied in conjunction, the three requirements of *threshold of harm*, *direct causation* and *belligerent nexus* permit a reliable distinction between activities amounting to direct participation in hostilities and activities which, although occurring in the context of an armed conflict, are not part of the conduct of hostilities and, therefore, do not entail loss of protection against direct attack. Even where a specific act amounts to direct participation in hostilities, however, the kind and degree of force used in response must comply with the rules and principles of IHL and other applicable international law.

#### VI. Beginning and end of direct participation in hostilities

**Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.**

As civilians lose protection against direct attack “for such time” as they directly participate in hostilities, the beginning and end of specific acts amounting to direct participation in hostilities must be determined with utmost care. Without any doubt, the concept of direct participation in hostilities includes the immediate execution phase of a specific act meeting the three criteria of *threshold of harm*, *direct causation* and *belligerent nexus*. It may also include measures preparatory to the execution of such an act, as well as the deployment to and return from the location of its execution, where they constitute an integral part of such a specific act or operation.



## 1. Preparatory measures

Whether a preparatory measure amounts to direct participation in hostilities depends on a multitude of situational factors that cannot be comprehensively described in abstract terms. In essence, preparatory measures amounting to direct participation in hostilities correspond to what treaty IHL describes as “military operation[s] preparatory to an attack”. They are of a specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act. Conversely, the preparation of a general campaign of unspecified operations would not qualify as direct participation in hostilities. In line with the distinction between direct and indirect participation in hostilities, it could be said that preparatory measures *aiming to carry out a specific hostile act* qualify as direct participation in hostilities, whereas preparatory measures *aiming to establish the general capacity to carry out unspecified hostile acts* do not.

It is neither necessary nor sufficient for a qualification as direct participation that a preparatory measure occur immediately before (temporal proximity) or in close geographical proximity to the execution of a specific hostile act or that it be indispensable for its execution. For example, the loading of bombs onto an airplane for a direct attack on military objectives in an area of hostilities constitutes a measure preparatory to a specific hostile act and, therefore, qualifies as direct participation in hostilities. This is the case even if the operation will not be carried out until the next day, if the target will be selected only during the operation, and if great distance separates the preparatory measure from the location of the subsequent attack. Conversely, transporting bombs from a factory to an airfield storage place and then to an airplane for shipment to another storehouse in the conflict zone for unspecified use in the future would constitute a general preparatory measure qualifying as mere indirect participation.

Similarly, if carried out with a view to the execution of a specific hostile act, all of the following would almost certainly constitute preparatory measures amounting to direct participation in hostilities: equipment, instruction, and transport of personnel; gathering of intelligence; and preparation, transport, and positioning of weapons and equipment. Examples of general preparation not entailing loss of protection against direct attack would commonly include purchase, production, smuggling and hiding of weapons; general recruitment and training of personnel; and financial, administrative or political support to armed actors. It should be reiterated that these examples can only illustrate the principles based on which the necessary distinctions ought to be made and cannot replace a careful assessment of the totality of the circumstances prevailing in the concrete context and at the time and place of action.

## 2. Deployment and return

Where the execution of a specific act of direct participation in hostilities requires prior geographic deployment, such deployment already constitutes an integral part of the act in question. Likewise, as long as the return from the execution of a hostile act remains an integral part of the preceding operation, it constitutes a military withdrawal and should not be confused with surrender or otherwise becoming *hors de combat*.



A deployment amounting to direct participation in hostilities begins only once the deploying individual undertakes a physical displacement with a view to carrying out a specific operation. The return from the execution of a specific hostile act ends once the individual in question has physically separated from the operation, for example by laying down, storing or hiding the weapons or other equipment used and resuming activities distinct from that operation.

Whether a particular individual is engaged in deployment to or return from the execution of a specific hostile act depends on a multitude of situational factors, which cannot be comprehensively described in abstract terms. The decisive criterion is that both the deployment and return be carried out as an integral part of a specific act amounting to direct participation in hostilities. That determination must be made with utmost care and based on a reasonable evaluation of the prevailing circumstances. Where the execution of a hostile act does not require geographic displacement, as may be the case with computer network attacks or remote-controlled weapons systems, the duration of direct participation in hostilities will be restricted to the immediate execution of the act and preparatory measures forming an integral part of that act.

### **3. Conclusion**

Where preparatory measures and geographical deployments or withdrawals constitute an integral part of a specific act or operation amounting to direct participation in hostilities, they extend the beginning and end of the act or operation beyond the phase of its immediate execution.

## **C. MODALITIES GOVERNING THE LOSS OF PROTECTION**

Under customary and treaty IHL, civilians lose protection against direct attack either by directly participating in hostilities or by ceasing to be civilians altogether, namely by becoming members of State armed forces or organized armed groups belonging to a party to an armed conflict. In view of the serious consequences for the individuals concerned, the present chapter endeavours to clarify the precise modalities that govern such loss of protection under IHL. The following sections examine the temporal scope of the loss of protection against direct attack (VII), the precautions and presumptions in situations of doubt (VIII), the rules and principles governing the use of force against legitimate military targets (IX), and the consequences of regaining protection against direct attack (X).

In line with the aim of the Interpretive Guidance, this chapter will focus on examining loss of protection primarily in case of direct participation in hostilities (civilians), but also in case of continuous combat function (members of organized armed groups), as the latter concept is intrinsically linked to the concept of direct participation in hostilities. It will not, or only marginally, address the loss of protection in case of membership in State armed forces, which largely depends on criteria unrelated to direct participation in hostilities, such as formal recruitment, incorporation, discharge or retirement under domestic law. Subject to contrary provisions of IHL, this does

not exclude the applicability of the conclusions reached in Sections VII to X, *mutatis mutandis*, to members of State armed forces as well.

## **VII. Temporal scope of the loss of protection**

**Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians (see above II), and lose protection against direct attack, for as long as they assume their continuous combat function.**

### **1. Civilians**

According to treaty and customary IHL applicable in international and non-international armed conflict, civilians enjoy protection against direct attack “unless and for such time” as they take a direct part in hostilities. Civilians directly participating in hostilities do not cease to be part of the civilian population, but their protection against direct attack is temporarily suspended. The phrase “unless and for such time” clarifies that such suspension of protection lasts exactly as long as the corresponding civilian engagement in direct participation in hostilities. This necessarily entails that civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities (so-called “revolving door” of civilian protection).

The revolving door of civilian protection is an integral part, not a malfunction, of IHL. It prevents attacks on civilians who do not, at the time, represent a military threat. In contrast to members of organized armed groups, whose continuous function it is to conduct hostilities on behalf of a party to the conflict, the behaviour of individual civilians depends on a multitude of constantly changing circumstances and, therefore, is very difficult to anticipate. Even the fact that a civilian has repeatedly taken a direct part in hostilities, either voluntarily or under pressure, does not allow a reliable prediction as to future conduct. As the concept of direct participation in hostilities refers to specific hostile acts, IHL restores the civilian’s protection against direct attack each time his or her engagement in a hostile act ends. Until the civilian in question again engages in a specific act of direct participation in hostilities, the use of force against him or her must comply with the standards of law enforcement or individual self-defence.

Although the mechanism of the revolving door of protection may make it more difficult for the opposing armed forces or organized armed groups to respond effectively to the direct participation of civilians in hostilities, it remains necessary to protect the civilian population from erroneous or arbitrary attack and must be acceptable for the operating forces or groups as long as such participation occurs on a merely spontaneous, unorganized or sporadic basis.

### **2. Members of organized armed groups**

Members of organized armed groups belonging to a non-State party to the conflict cease to be civilians for as long as they remain members by virtue of their continuous

combat function. Formally, therefore, they no longer benefit from the protection provided to civilians “unless and for such time” as they take a direct part in hostilities. Indeed, the restriction of loss of protection to the duration of specific hostile acts was designed to respond to spontaneous, sporadic or unorganized hostile acts by civilians and cannot be applied to organized armed groups. It would provide members of such groups with a significant operational advantage over members of State armed forces, who can be attacked on a continuous basis. This imbalance would encourage organized armed groups to operate as farmers by day and fighters by night. In the long run, the confidence of the disadvantaged party in the capability of IHL to regulate the conduct of hostilities satisfactorily would be undermined, with serious consequences ranging from excessively liberal interpretations of IHL to outright disrespect for the protections it affords.

Instead, where individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group belonging to a party to the conflict, IHL deprives them of protection against direct attack for as long as they remain members of that group. In other words, the “revolving door” of protection starts to operate based on membership. As stated earlier, membership in an organized armed group begins in the moment when a civilian starts *de facto* to assume a continuous combat function for the group, and lasts until he or she ceases to assume such function. Disengagement from an organized armed group need not be openly declared; it can also be expressed through conclusive behaviour, such as a lasting physical distancing from the group and reintegration into civilian life or the permanent resumption of an exclusively non-combat function (e.g., political or administrative activities). In practice, assumption of, or disengagement from, a continuous combat function depends on criteria that may vary with the political, cultural, and military context. That determination must therefore be made in good faith and based on a reasonable assessment of the prevailing circumstances, presuming entitlement to civilian protection in case of doubt.

### 3. Conclusion

Under customary and treaty IHL, civilians directly participating in hostilities, as well as persons assuming a continuous combat function for an organized armed group belonging to a party to the conflict lose their entitlement to protection against direct attack. As far as the temporal scope of the loss of protection is concerned, a clear distinction must be made between civilians and organized armed actors. While civilians lose their protection for the duration of each specific act amounting to direct participation in hostilities, members of organized armed groups belonging to a party to the conflict are no longer civilians and, therefore, lose protection against direct attack for the duration of their membership, that is to say, for as long as they assume their continuous combat function.

### VIII. Precautions and presumptions in situations of doubt

**All feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities.**

**In case of doubt, the person must be presumed to be protected against direct attack.**

One of the main practical problems caused by various degrees of civilian participation in hostilities is that of doubt as to the identity of the adversary. For example, in many counterinsurgency operations, armed forces are constantly confronted with individuals adopting a more or less hostile attitude. The difficulty for such forces is to distinguish reliably between members of organized armed groups belonging to an opposing party to the conflict, civilians directly participating in hostilities on a spontaneous, sporadic, or unorganized basis, and civilians who may or may not be providing support to the adversary, but who do not, at the time, directly participate in hostilities. To avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, there must be clarity as to the precautions to be taken and the presumptions to be observed in situations of doubt.

**1. The requirement of feasible precautions**

Prior to any attack, all feasible precautions must be taken to verify that targeted persons are legitimate military targets. Once an attack has commenced, those responsible must cancel or suspend the attack if it becomes apparent that the target is not a legitimate military target. Before and during any attack, everything feasible must be done to determine whether the targeted person is a civilian and, if so, whether he or she is directly participating in hostilities.

As soon as it becomes apparent that the targeted person is entitled to civilian protection, those responsible must refrain from launching the attack, or cancel or suspend it if it is already underway. This determination must be made in good faith and in view of all information that can be said to be reasonably available in the specific situation. As stated in treaty IHL, “[f]easible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”. In addition, a direct attack against a civilian must be cancelled or suspended if he or she becomes *hors de combat*.

**2. Presumption of civilian protection**

For the purposes of the principle of distinction, IHL distinguishes between two generic categories of persons: civilians and members of the armed forces of the parties to the conflict. Members of State armed forces (except medical and religious personnel) or organized armed groups are generally regarded as legitimate military targets unless they surrender or otherwise become *hors de combat*. Civilians are generally protected against direct attack unless and for such time as they directly participate in hostilities. For each category, the general rule applies until the requirements for an exception are fulfilled.

Consequently, in case of doubt as to whether a specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not amount to direct participation in hostilities. The presumption of civilian protection applies, *a fortiori*, in case of doubt as to whether a person has become a member of an organized armed group belonging

to a party to the conflict. Obviously, the standard of doubt applicable to targeting decisions cannot be compared to the strict standard of doubt applicable in criminal proceedings but rather must reflect the level of certainty that can reasonably be achieved in the circumstances. In practice, this determination will have to take into account, *inter alia*, the intelligence available to the decision maker, the urgency of the situation, and the harm likely to result to the operating forces or to persons and objects protected against direct attack from an erroneous decision.

The presumption of civilian protection does not exclude the use of armed force against civilians whose conduct poses a grave threat to public security, law and order without clearly amounting to direct participation in hostilities. In such cases, however, the use of force must be governed by the standards of law enforcement and of individual self-defence, taking into account the threat to be addressed and the nature of the surrounding circumstances.

### 3. Conclusion

In practice, civilian direct participation in hostilities is likely to entail significant confusion and uncertainty in the implementation of the principle of distinction. In order to avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, it is therefore of particular importance that all feasible precautions be taken in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack.

## IX. Restraints on the use of force in direct attack

**In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.**

Loss of protection against direct attack, whether due to direct participation in hostilities (civilians) or continuous combat function (members of organized armed groups), does not mean that the persons concerned fall outside the law. It is a fundamental principle of customary and treaty IHL that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited”. Indeed, even direct attacks against legitimate military targets are subject to legal constraints, whether based on specific provisions of IHL, on the principles underlying IHL as a whole, or on other applicable branches of international law.

### 1. Prohibitions and restrictions laid down in specific provisions of IHL

Any military operation carried out in a situation of armed conflict must comply with the applicable provisions of customary and treaty IHL governing the conduct of hostilities. These include the rules derived from the principles of distinction, precaution, and proportionality, as well as the prohibitions of denial of quarter and

perfidy. They also include the restriction or prohibition of selected weapons and the prohibition of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering (*maux superflus*). Apart from the prohibition or restriction of certain means and methods of warfare, however, the specific provisions of IHL do not expressly regulate the kind and degree of force permissible against legitimate military targets. Instead, IHL simply refrains from providing certain categories of persons, including civilians directly participating in hostilities, with protection from direct “attacks”, that is to say, from “acts of violence against the adversary, whether in offence or in defence”. Clearly, the fact that a particular category of persons is not protected against offensive or defensive acts of violence is not equivalent to a legal entitlement to kill such persons without further considerations. At the same time, the absence of an unfettered “right” to kill does not necessarily imply a legal obligation to capture rather than kill regardless of the circumstances.

## **2. The principles of military necessity and humanity**

In the absence of express regulation, the kind and degree of force permissible in attacks against legitimate military targets should be determined, first of all, based on the fundamental principles of military necessity and humanity, which underlie and inform the entire normative framework of IHL and, therefore, shape the context in which its rules must be interpreted. Considerations of military necessity and humanity neither derogate from nor override the specific provisions of IHL, but constitute guiding principles for the interpretation of the rights and duties of belligerents within the parameters set by these provisions.

Today, the principle of military necessity is generally recognized to permit “only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources”. Complementing and implicit in the principle of military necessity is the principle of humanity, which “forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes”. In conjunction, the principles of military necessity and of humanity reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.

While it is impossible to determine, *ex ante*, the precise amount of force to be used in each situation, considerations of humanity require that, within the parameters set by the specific provisions of IHL, no more death, injury, or destruction be caused than is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances. What kind and degree of force can be regarded as necessary in an attack against a particular military target involves a complex assessment based on a wide variety of operational and contextual circumstances. The aim cannot be to replace the judgment of the military commander by inflexible or unrealistic standards; rather it is to avoid error, arbitrariness, and abuse by providing guiding principles for the choice of means and methods of warfare based on his or her assessment of the situation.

In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.

For example, an unarmed civilian sitting in a restaurant using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force would probably have to be regarded as directly participating in hostilities. Should the restaurant in question be situated within an area firmly controlled by the opposing party, however, it may be possible to neutralize the military threat posed by that civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population. Similarly, under IHL, an insurgent military commander of an organized armed group would not regain civilian protection against direct attack simply because he temporarily discarded his weapons, uniform and distinctive signs in order to visit relatives inside government-controlled territory. Nevertheless, depending on the circumstances, the armed or police forces of the government may be able to capture that commander without resorting to lethal force. Further, large numbers of unarmed civilians who deliberately gather on a bridge in order to prevent the passage of governmental ground forces in pursuit of an insurgent group would probably have to be regarded as directly participating in hostilities. In most cases, however, it would be reasonably possible for the armed forces to remove the physical obstacle posed by these civilians through means less harmful than a direct military attack on them.

In sum, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force. In such situations, the principles of military necessity and of humanity play an important role in determining the kind and degree of permissible force against legitimate military targets. Lastly, although this Interpretive Guidance concerns the analysis and interpretation of IHL only, its conclusions remain without prejudice to additional restrictions on the use of force, which may arise under other applicable frameworks of international law such as, most notably, international human rights law or the law governing the use of interstate force (*jus ad bellum*).

### 3. Conclusion

In situations of armed conflict, even the use of force against persons not entitled to protection against direct attack remains subject to legal constraints. In addition to the restraints imposed by IHL on specific means and methods of warfare, and without



prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

## **X. Consequences of regaining civilian protection**

**International humanitarian law neither prohibits nor privileges civilian direct participation in hostilities. When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-State party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack, but are not exempted from prosecution for violations of domestic and international law they may have committed.**

### **1. Lack of immunity from domestic prosecution**

IHL provides an express “right” to directly participate in hostilities only for members of the armed forces of parties to international armed conflicts and participants in a *levée en masse*. This right does not imply an entitlement to carry out acts prohibited under IHL, but merely provides combatants with immunity from domestic prosecution for acts which, although in accordance with IHL, may constitute crimes under the national criminal law of the parties to the conflict (the so-called combatant privilege). The absence in IHL of an express right for civilians to directly participate in hostilities does not necessarily imply an international prohibition of such participation. Indeed, as such, civilian direct participation in hostilities is neither prohibited by IHL nor criminalized under the statutes of any prior or current international criminal tribunal or court. However, because civilians – including those entitled to prisoner of war status under Article 4 [4] and [5] GC III – are not entitled to the combatant privilege, they do not enjoy immunity from domestic prosecution for lawful acts of war, that is, for having directly participated in hostilities while respecting IHL. Consequently, civilians who have directly participated in hostilities and members of organized armed groups belonging to a non-State party to a conflict may be prosecuted and punished to the extent that their activities, their membership, or the harm caused by them is penalized under national law (e.g., as treason, arson, murder, etc.).

### **2. Obligation to respect international humanitarian law**

The case law of international military tribunals that followed the Second World War, the ICTY and the ICTR consistently affirms that even individual civilians can violate provisions of IHL and commit war crimes. It is the character of the acts and their nexus to the conflict, not the status of the perpetrator, that are decisive for their relevance under IHL. There can be no doubt that civilians directly participating in hostilities must respect the rules of IHL, including those on the conduct of hostilities, and may be held responsible for war crimes just like members of State armed forces or organized armed groups. For example, it would violate IHL for civilians to direct hostile acts against



persons and objects protected against direct attack, to deny quarter to adversaries who are *hors de combat*, or to capture, injure or kill an adversary by resort to perfidy.

In practice, the prohibition on perfidy is of particular interest, as civilians directly participating in hostilities often do not carry arms openly or otherwise distinguish themselves from the civilian population. When civilians capture, injure, or kill an adversary and in doing so they fail to distinguish themselves from the civilian population in order to lead the adversary to believe that they are entitled to civilian protection against direct attack, this may amount to perfidy in violation of customary and treaty IHL.

### 3. Conclusion

In the final analysis, IHL neither prohibits nor privileges civilian direct participation in hostilities. Therefore, when civilians cease to directly participate in hostilities, or when individuals cease to be members of organized armed groups because they disengage from their continuous combat function, they regain full civilian protection against direct attack. However, in the absence of combatant privilege, they are not exempted from prosecution under national criminal law for acts committed during their direct participation or membership. Moreover, just like members of State armed forces or organized armed groups belonging to the parties to an armed conflict, civilians directly participating in hostilities must respect the rules of IHL governing the conduct of hostilities and may be held individually responsible for war crimes and other violations of international criminal law.

**Document No. 52, First Periodical Meeting, Chairman's Report**

[Source: *IRRC*, No. 323, 1998, pp. 366-394; available at [www.icrc.org](http://www.icrc.org)]

**First Periodical Meeting on International Humanitarian Law  
Geneva, 19-23 January 1998****Chairman's Report****I. Factual Elements**

The 26<sup>th</sup> International Conference of the Red Cross and Red Crescent (1995) requested the Swiss Government, as the depositary of the Geneva Conventions, to hold periodical meetings of the States Parties to those Conventions in order to examine general problems relating to the application of international humanitarian law.

Acting under that mandate, and after consulting the States Parties, Switzerland convened the First Periodical Meeting, which took place in Geneva from 19 to 23 January 1998. It proposed that the experts consider two topics: respect for and security of the personnel of humanitarian organizations, and armed conflicts linked to the disintegration of State structures.

At a preparatory meeting in Geneva on 13 January 1998, it was agreed that the First Periodical Meeting would be held on an informal level. This approach was endorsed by the Meeting, which was attended by the representatives of 129 States and 36 observer delegations. [...]

The debates were based on two preparatory documents drafted by the International Committee of the Red Cross and two working papers submitted by the Swiss authorities.

At the close of the Meeting, the Chairman drew up and presented the conclusions detailed below. These conclusions identify the problems encountered in implementing humanitarian law in respect of the topics discussed and list possible remedies. They reflect the Chairman's personal view and are in no way binding on the delegations which participated in the First Periodical Meeting. [...]

**II. Chairman's Conclusions****1. Respect for and Security of the Personnel of Humanitarian Organizations*****Identification of Problems***

Where civilian populations are specifically targeted by acts of violence, humanitarian assistance may be perceived as an obstacle to the very purpose of those acts;

Because they are not familiar with the concept of international humanitarian law, the persons directly participating in an armed conflict often regard humanitarian workers as friends of their enemies;

Where structures have disintegrated, there is no clear distinction between persons directly engaged in an armed conflict and civilians and no chain of command; and there is confusion about the international humanitarian law applicable among the parties to the conflict;

There is insufficient coordination between measures to restore peace and security, and measures to provide humanitarian assistance;

Humanitarian organizations do not always sufficiently coordinate their activities; they do not always observe their status of neutrality or respect local customs; and their motivation may not always be purely humanitarian;

Through lack of diligent selection, humanitarian actions are sometimes delegated to organizations that are not capable of performing them adequately;

There is insufficient observance of the duty to prosecute or extradite those who have committed acts of violence against humanitarian workers, resulting in insufficient deterrence from and prevention of such acts;

Links between political and humanitarian actions may make humanitarian workers more likely targets of attacks.

### ***Possible Remedies***

Establishment of mechanisms to prevent acts of violence against humanitarian workers, such as early warning systems for the exchange of information on situations that may lead to such acts;

Recognition that the commission of acts of violence against humanitarian workers as well as the order to commit such acts are crimes under both international and national law for which the perpetrators bear individual responsibility;

Relentless prosecution of those committing acts of violence against humanitarian workers; or extradition to another State; or, where appropriate, transferal to an independent international criminal court;

Support for and cooperation with international efforts to clear anti-personnel mines threatening the safety of humanitarian workers;

Strengthening of and increased cooperation with local providers of humanitarian assistance, in particular the National Red Cross and Red Crescent Societies;

Ratification of conventions on international humanitarian law, including conventions on anti-personnel mines, and improved implementation through national legislation;

Ratification of the United Nations Convention on the Safety of United Nations and Associated Personnel;

Fulfillment of the obligation to translate the Geneva Conventions into local languages, where necessary with the cooperation of the ICRC's advisory services;

Increased recognition of the competence of the International Humanitarian Fact-Finding Commission and, where appropriate, resort to *ad hoc* commissions;

Full compliance by humanitarian organizations with the principles of impartiality, of neutrality and of independence, which are the foundations of humanitarian ethics;

Adherence of all humanitarian organizations to the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief, and respect by these organizations for the principles of international humanitarian law;

Acceptance of the Code of Conduct by humanitarian organizations, and coordination of their activities with those of other organizations, as a prerequisite for receiving public funds;

Establishment of a system of accreditation for humanitarian organizations;

Intensification of the ICRC's advisory services as well as of the efforts of other institutions, including those of a religious character, to disseminate international humanitarian law among armed forces and civilian populations, with special emphasis on the protection of humanitarian workers and the red cross and red crescent emblems;

Improvement of the recruitment, education and training of humanitarian personnel;

Effort by humanitarian organizations to cooperate, from the outset of their operations, with the authorities controlling the territory concerned;

Improved cooperation of humanitarian organizations in international efforts to maintain peace and security, where such cooperation does not jeopardize the effectiveness of the humanitarian assistance or the safety of its providers.

## **2. Armed Conflicts Linked to the Disintegration of State Structures**

### ***Identification of Problems***

Situations where State structures have disintegrated in the course of an armed conflict are usually characterized by a lack of effective leadership capable of ensuring respect for international humanitarian law or of protecting the safety of humanitarian workers;

Where civilian populations are specifically targeted by acts of violence, the disintegration of State structures and of the common values of a society can have particularly serious consequences;

The distinction between persons directly participating in an armed conflict and civilians tends to blur, as members of local militias rarely wear distinctive signs and mingle with civilians.

### ***Possible Remedies***

International support for measures designed to prevent the disintegration of State structures;

Establishment of early warning mechanisms to detect signs of a State being in the process of disintegration;

Recognition that the basic humanitarian rules in common Article 3 of the Geneva Conventions are applicable in armed conflicts where State structures have disintegrated;

Establishment, among the main actors in an area of armed conflict, of a code of conduct taking into account local ethics and customs in addition to principles of international humanitarian law;

Support for measures aimed at building a lasting peace after a conflict has ended, such as disarmament, resettlement and economic development;

Reduction by States of the influx of weapons into areas of conflict and establishment of a code of ethics on the export of arms;

Integration of conflict prevention into development aid programmes;

Recognition of the necessity to strengthen the capacity of National Red Cross and Red Crescent Societies to enable them to continue to provide humanitarian assistance despite the disintegration of State structures;

Fulfillment of the obligation not to recruit children into armed forces or groups;

Promotion of the endeavour to define minimum humanitarian standards applicable in all circumstances;

Establishment of an independent international criminal court with jurisdiction over acts of violence committed by persons engaged in a conflict where State structures have disintegrated and prosecution by national authorities is no longer feasible;

Support for efforts of the United Nations and regional organizations at managing armed conflicts of an anarchic nature, including those made by the Security Council to restore conditions conducive to provision of humanitarian assistance;

Increased dissemination of humanitarian principles by the ICRC and other institutions, including National Red Cross and Red Crescent Societies and those of a religious character, with emphasis on the education of the young civilian population;

Identification of partners, within structures that may not yet have completely disintegrated or are re-emerging, in order to create the conditions rendering humanitarian assistance possible;

Cooperation and dialogue with local providers of humanitarian assistance who are familiar with local customs and conditions.

### **3. Follow-up**

Periodical meetings, convened by the depositary of the Geneva Conventions and the Additional Protocols, pursuant to Resolution 1, paragraph 7, of the 26<sup>th</sup> International Conference of the Red Cross and Red Crescent, which shall, as part of a continuing process, examine general problems relating to the application of international humanitarian law, in conformity with common Article 1 of the Geneva Conventions;

Regular meetings of experts on questions of dissemination of international humanitarian law, organized specifically in regions of conflict;

Communication by the Chairman of his Report on the present Meeting to all the States Parties to the Geneva Conventions, to all the participants in the Meeting, to the 27<sup>th</sup> International Conference of the Red Cross and Red Crescent, and to the Standing Commission of the Red Cross and Red Crescent;

Communication by the Chairman of his Report on the present Meeting to the Secretary-General of the United Nations to assist him in his task to report to the 53<sup>rd</sup> Session of the General Assembly on the security of United Nations personnel pursuant to United Nations Resolution 52/167 of 16 December 1997.

*Lucius Caflisch*

*Chairman*

*First Periodical Meeting*

**Case No. 53, International Law Commission, Articles on State Responsibility**

**A. International Law Commission Report, A/56/10 August 2001**

[Source: United Nations, International Law Commission, Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), available at <http://www.un.org/law/ilc/>. Footnotes partially omitted.]

[N.B.: The UN General Assembly took note of the Draft Articles in Resolution A/RES/56/83 of 12 December 2001.]

**International Law Commission  
Report on the work of its fifty-third session  
(23 April-1 June and 2 July-10 August 2001)  
General Assembly  
Official Records  
Fifty-fifth Session  
Supplement No. 10 (A/56/10) [...]**

**CHAPTER IV: STATE RESPONSIBILITY [...]**

**E. Text of the draft articles on Responsibility of States for internationally wrongful acts [...]**

**2. Text of the draft articles with commentaries thereto [...]**

**Responsibility of States for Internationally Wrongful Acts**

**PART ONE  
THE INTERNATIONALLY WRONGFUL ACT OF A STATE**

**CHAPTER I  
GENERAL PRINCIPLES**

**Article I  
Responsibility of a State for its internationally wrongful acts**

Every internationally wrongful act of a State entails the international responsibility of that State.

**Article 2  
Elements of an internationally wrongful act of a State**

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

### **Article 3**

#### **Characterization of an act of a State as internationally wrongful**

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

## **CHAPTER II**

### **ATTRIBUTION OF CONDUCT TO A STATE**

### **Article 4**

#### **Conduct of organs of a State**

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

### **Article 5**

#### **Conduct of persons or entities exercising elements of governmental authority**

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

### **Article 6**

#### **Conduct of organs placed at the disposal of a State by another State**

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

### **Article 7**

#### **Excess of authority or contravention of instructions**

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.



**Commentary [...]**

- 3) [...] "International responsibility is incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State."
- 4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists. It is confirmed, for example, in article 91 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, which provides that: "A Party to the conflict ... shall be responsible for all acts committed by persons forming part of its armed forces" this clearly covers acts committed contrary to orders or instructions. [...]

**Article 8****Conduct directed or controlled by a State**

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

**Commentary [...]**

- 4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary case*. [footnote 162: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14. [See **Case No. 153**, I.C.J., *Nicaragua v. United States* [para. 115]]] The question was whether the conduct of the *contras* was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the *contras*. This was analysed by the Court in terms of the notion of "control". On the one hand, it held that the United States was responsible for the "planning, direction and support" given by United States to Nicaraguan operatives. [footnote 163: *Ibid.*, p. 51, para. 86.] But it rejected the broader claim of Nicaragua that all the conduct of the *contras* was attributable to the United States by reason of its control over them. [...]

Thus while the United States was held responsible for its own support for the *contras*, only in certain individual instances were the acts of the *contras* themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.

- 5) The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has also addressed these issues. [See **Case No. 211**, ICTY, *The Prosecutor v. Tadic* (C. Appeals Chamber, Merits)] In *Prosecutor v. Tadic*, the Chamber stressed that: "The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance

international law should require a high threshold for the test of control". (emphasis in original)

The Appeals Chamber held that the requisite degree of control by the Yugoslavian authorities over these armed forces required by international law for considering the armed conflict to be international was "*overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations". [footnote 167: *Ibid.*, at p. 1546, para. 145 (emphasis in original).] In the course of their reasoning, the majority considered it necessary to disapprove the International Court's approach in *Military and Paramilitary activities*. But the legal issues and the factual situation in that case were different from those facing the International Court in *Military and Paramilitary activities*. The Tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law. [footnote 168: See the explanation given by Judge Shahabuddeen, *ibid.*, at pp. 1614-1615.] In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it. [...]

### Article 9

#### Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

### Commentary

- 1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase "in circumstances such as to call for". Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g., after foreign occupation.
- 2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces: [footnote 176: This principle is recognized as legitimate by article 2 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land [See **Document No. 1**, The Hague Regulations]] [...] and by article 4, paragraph A (6), of the Geneva Convention of 12 August 1949 on the Treatment of Prisoners of War [...] in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State responsibility. [...]

**Article 10****Conduct of an insurrectional or other movement**

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

**Commentary [...]**

- 2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals [...] and it is [...] not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. [...]
- 9) A comprehensive definition of the types of groups encompassed by the term “insurrectional movement” as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement’s actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in Additional Protocol II of 1977 may be taken as a guide. Article 1, paragraph 1 refers to “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”, and it contrasts such groups with situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar character (article 1, para. 2). This definition of “dissident armed forces” reflects, in the context of the Protocols, the essential idea of an “insurrectional movement”. [...]
- 11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international “legitimacy” or of any illegality in respect of their establishment as a government, despite the potential importance of such distinctions in other contexts. From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy

of its origin. Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law. [...]

- 16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. [...]

#### **Article 11**

##### **Conduct acknowledged and adopted by a State as its own**

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

### **CHAPTER III**

#### **BREACH OF AN INTERNATIONAL OBLIGATION**

#### **Article 12**

##### **Existence of a breach of an international obligation**

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

#### **Article 13**

##### **International obligation in force for a State**

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

#### **Article 14**

##### **Extension in time of the breach of an international obligation**

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

#### **Article 15**

##### **Breach consisting of a composite act**

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

#### CHAPTER IV

#### RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

##### Article 16

##### **Aid or assistance in the commission of an internationally wrongful act**

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

##### **Commentary [...]**

- 9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it [...] provides material aid to a State that uses the aid to commit human rights violations. In this respect, the United Nations General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations. [footnote 300: Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII, 14 December 1982, A/37/745, p. 50.] Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct. [...]

##### Article 17

##### **Direction and control exercised over the commission of an internationally wrongful act**

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

##### Article 18

##### **Coercion of another State**

A State which coerces another State to commit an act is internationally responsible for that act if:

- (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) The coercing State does so with knowledge of the circumstances of the act.

#### **Article 19**

##### **Effect of this chapter**

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

### **CHAPTER V**

#### **CIRCUMSTANCES PRECLUDING WRONGFULNESS**

#### **Article 20**

##### **Consent**

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

#### **Article 21**

##### **Self-defence**

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

#### **Commentary [...]**

- 2) Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph (4), of the Charter, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war. In the Charter period, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at "peace" with each other. The Vienna Convention on the Law of Treaties leaves such issues to one side by providing in article 73 that the Convention does not prejudice "any question that may arise in regard to a treaty [...] from the outbreak of hostilities between States".
- 3) This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions of 1949 and Protocol I of 1977 apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law. Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self defence. As to obligations under international humanitarian law

and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct. [...]

#### **Article 22**

##### **Countermeasures in respect of an internationally wrongful act**

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

#### **Article 23**

##### ***Force majeure***

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
2. Paragraph 1 does not apply if:
  - (a) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
  - (b) The State has assumed the risk of that situation occurring.

#### **Article 24**

##### **Distress**

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.
2. Paragraph 1 does not apply if:
  - (a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
  - (b) The act in question is likely to create a comparable or greater peril.

#### **Article 25**

##### **Necessity**

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
  - (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
  - (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
  - (a) The international obligation in question excludes the possibility of invoking necessity; or
  - (b) The State has contributed to the situation of necessity.

### **Commentary [...]**

- 19) [...] *Subparagraph (2) (a)* concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule. [...]
- 21) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of “military necessity”[.] [...] [a] doctrine [...] which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law. [footnote 435: See e.g. art. 23 (g) of the Hague Regulations Respecting the Laws and Customs of War on Land (annexed to Convention II of 1899 and Convention IV of 1907), which prohibits the destruction of enemy property “unless such destruction or seizure be imperatively demanded by the necessities of war” [...]. Similarly, art. 54 (5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), appears to permit attacks on objects indispensable to the survival of the civilian population if “imperative military necessity” so requires.] In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.

### **Article 26**

#### **Compliance with peremptory norms**

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

### **Article 27**

#### **Consequences of invoking a circumstance precluding wrongfulness**

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;



- (b) The question of compensation for any material loss caused by the act in question.

**PART TWO**  
**CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE**

**CHAPTER I**  
**GENERAL PRINCIPLES**

**Article 28**

**Legal consequences of an internationally wrongful act**

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

**Commentary [...]**

- 3) Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations of the State and not only those owed to other States. Thus State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. [...]

**Article 29**

**Continued duty of performance**

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

**Article 30**

**Cessation and non-repetition**

The State responsible for the internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;
- (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

**Article 31**

**Reparation**

- 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
- 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

**Article 32****Irrelevance of internal law**

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

**Article 33****Scope of international obligations set out in this part**

1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

**Commentary [...]**

- 4) [...] The Articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase “which may accrue directly to any person or entity other than a State”. [...]

**CHAPTER II****REPARATION FOR INJURY****Article 34****Forms of reparation**

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

**Article 35****Restitution**

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;
- (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

**Article 36**  
**Compensation**

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

**Article 37**  
**Satisfaction**

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

**Article 38**  
**Interest**

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

**Article 39**  
**Contribution to the injury**

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

**CHAPTER III**  
**SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW**

**Commentary [...]**

- 6) In line with this approach, despite the trial and conviction by the Nuremberg and Tokyo Military Tribunals of individual government officials for criminal acts committed in their official capacity, neither Germany nor Japan were treated as “criminal” by the instruments creating these tribunals. As to more recent international practice, a similar approach underlies the establishment of the *ad hoc* tribunals for Yugoslavia and Rwanda by the United Nations Security Council.

Both tribunals are concerned only with the prosecution of individuals. In its decision relating to a *subpoena duces tecum* in *Prosecutor v Blaskic*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that “[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems”. The Rome Statute for an International Criminal Court of 17 July 1998 likewise establishes jurisdiction over the “most serious crimes of concern to the international community as a whole”, but limits this jurisdiction to “natural persons” (art. 25 (1)). The same article specifies that no provision of the Statute “relating to individual criminal responsibility shall affect the responsibility of States under international law”. [footnote 673: Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, art. 25 (4). See also art. 10: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute” [See **Case No. 23**, The International Criminal Court [A. The Statute]]

- 7) Accordingly the present Articles do not recognize the existence of any distinction between State “crimes” and “delicts” for the purposes of Part One. On the other hand, it is necessary for the Articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which the International Court has given of obligations towards the international community as a whole [footnote 674: According to the International Court of Justice, obligations *erga omnes* “derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”: *Barcelona Traction, Light and Power Company, Limited, Second Phase*, I.C.J. Reports 1970, p. 3, at p. 32, para. 34. See also *East Timor (Portugal v. Australia)*, I.C.J. Reports 1995, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, p. 226, at p. 258, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, I.C.J. Reports 1996, p. 595, at pp. 615-616, paras. 31-32.] all concern obligations which, it is generally accepted, arise under peremptory norms of general international law.

#### Article 40

##### Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

#### Commentary [...]

- 5) [...] In the light of the International Court’s description of the basic rules of international humanitarian law applicable in armed conflict as “intransgressible”

in character, it would also seem justified to treat these as peremptory. [See Case No. 62, ICJ, Nuclear Weapons Advisory Opinion [para. 79]]. [...]

### Article 41

#### Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

#### Commentary [...]

- 2) Pursuant to paragraph 1 of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.
- 3) Neither does paragraph 1 prescribe what measures States should take in order to bring an end to serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation. It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. [...]
- 14) [...] In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.

**PART THREE**  
**THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE**

**CHAPTER I**  
**INVOCATION OF THE RESPONSIBILITY OF A STATE**

**Article 42**

**Invocation of responsibility by an injured State**

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) That State individually; or
- (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
  - (i) Specially affects that State; or
  - (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

**Article 43**

**Notice of claim by an injured State**

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
2. The injured State may specify in particular:
  - (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
  - (b) What form reparation should take in accordance with the provisions of part two.

**Article 44**

**Admissibility of claims**

The responsibility of a State may not be invoked if:

- (a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- (b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

**Article 45**

**Loss of the right to invoke responsibility**

The responsibility of a State may not be invoked if:

- (a) The injured State has validly waived the claim;

- (b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

#### **Article 46**

##### **Plurality of injured States**

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

#### **Article 47**

##### **Plurality of responsible States**

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.
2. Paragraph 1:
  - (a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
  - (b) Is without prejudice to any right of recourse against the other responsible States.

#### **Article 48**

##### **Invocation of responsibility by a State other than an injured State**

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
  - (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
  - (b) The obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
  - (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
  - (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

#### **Commentary [...]**

- 4) Paragraph 1 refers to “[a]ny State other than an injured State”. [...] [T]he term “[a]ny State” is intended to avoid any implication that these States have to act together or in unison. [...]

- 8) Under subparagraph (1) (b), States other than the injured State may invoke responsibility if the obligation in question was owed “to the international community as a whole”. The provision intends to give effect to the International Court’s statement in the *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33, and see commentary to Part Two, chapter III, paras (2)-(6).] With regard to the latter, the Court went on to state that “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.
- 9) [...] The Court itself has given useful guidance: in its 1970 judgment it referred by way of example to “the outlawing of acts of aggression, and of genocide” and to “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”. [footnote 769: *Ibid.*, at p. 32, para. 34.]. [...]

## CHAPTER II COUNTERMEASURES

### Article 49

#### Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

### Article 50

#### Obligations not affected by countermeasures

1. Countermeasures shall not affect:
  - (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
  - (b) Obligations for the protection of fundamental human rights;
  - (c) Obligations of a humanitarian character prohibiting reprisals;
  - (d) Other obligations under peremptory norms of general international law.
2. A State taking countermeasures is not relieved from fulfilling its obligations:
  - (a) Under any dispute settlement procedure applicable between it and the responsible State;



- (b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

### Commentary [...]

- 6) Subparagraph (1) (b) provides that countermeasures may not affect obligations for the protection of fundamental human rights. [...]
- 7) In its General Comment 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present Articles, as well as with measures imposed by individual States or groups of States. It stressed that “whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights”, [footnote 805: E/C.12/1997/8, 5 December 1997, para. 1 [available on <http://www.un.org>]] and went on to state that:

“it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country”. [footnote 806: *ibid.*, para. 4.]

Analogies can be drawn from other elements of general international law. For example, Additional Protocol I of 1977, article 54 (1) stipulates unconditionally that “[s]tarvation of civilians as a method of warfare is prohibited”. [footnote 807: [...]. See also arts. 54 (2) (“objects indispensable to the survival of the civilian population”), 75. See also Protocol II [...] art. 4.]. Likewise, the final sentence of article 1 (2) of the two United Nations Covenants on Human Rights states that “In no case may a people be deprived of its own means of subsistence”. [footnote 808: Art. 1 (2) of the International Covenant on Economic, Social and Cultural Rights, United Nations, [...] and art. 1 (2) of the International Covenant on Civil and Political Rights, United Nations, [...] [available on <http://www.un.org>]]

- 8) Subparagraph (1) (c) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60 (5) of the Vienna Convention on the Law of Treaties. [See Quotation, Part I, Chapter 13, IX., 2., c), dd), but no reciprocity] The subparagraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the 1929 Hague and 1949 Geneva Conventions and Additional Protocol I of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted. [...]

### Article 51 Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

### **Article 52**

#### **Conditions relating to resort to countermeasures**

1. Before taking countermeasures, an injured State shall:
  - (a) Call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;
  - (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.
3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
  - (a) The internationally wrongful act has ceased; and
  - (b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

### **Article 53**

#### **Termination of countermeasures**

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.

### **Article 54**

#### **Measures taken by States other than an injured State**

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

#### **Commentary [...]**

- 6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently it is not appropriate to include in the present Articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law. [...]

## **PART FOUR GENERAL PROVISIONS**

### **Article 55** *Lex specialis*

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

### **Article 56** **Questions of State responsibility not regulated by these articles**

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

### **Article 57** **Responsibility of an international organization**

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

### **Article 58** **Individual responsibility**

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

### **Article 59** **Charter of the United Nations**

These articles are without prejudice to the Charter of the United Nations.

## **B. Commentary to Article 10 adopted on first reading**

[Source: Commentary of the International Law Commission on Article 10 of the Draft Article on State Responsibility, adopted on first reading at its twenty-seventh session, para 26, Yearbook of the International Law Commission, 1975, Vol. II, p. 69.]

[...]

- 26) On the other hand, with regard to actions or omissions which persons with the status of State organs may have committed in their capacity as private individuals, the Commission considered that they had no connexion whatsoever with the fact that the persons in question were part of the machinery of the State and accordingly could not be attributed to the State under international law. [...] That naturally does not prevent States from sometimes assuming responsibility for such actions by treaty, as is the case for instance, of the Convention IV respecting the laws and customs of war on land (The Hague, 1907), article 3 of which attributes to the State responsibility for “all acts committed by persons forming part of its

armed forces” in violation of the regulations annexed to the Convention, whether they acted as organs or as individuals. [...]

## DISCUSSION

### 1. (*Art. 7 and Commentary to Art. 10 adopted on first reading*)

Is a State responsible for all acts committed by members of its armed forces? Even if those members contravened the orders given? Even if they acted in their private capacity? Does the rule found in IHL reflect the general rule or is it more demanding for States? (Hague Convention IV, Art. 3; P I, Art. 91)

### 2. (*Art. 8*)

- a. When and in what circumstances may an individual engaged in an armed conflict against his government be considered as an agent for a foreign State? According to the International Court of Justice (ICJ) in the case of *Nicaragua v. United States*? [See **Case No. 153**, ICJ, *Nicaragua v. United States*] According to the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* case? [See **Case No. 211**, ICTY, *The Prosecutor v. Tadic*] According to the International Law Commission (ILC)? In your opinion?
- b. Did the ICTY have to answer the same question as the ICJ in the *Nicaragua* case? According to the ICTY? According to the ILC? What do you think? Is the fact decisive that the ICJ considered the behaviour of a State and the ICTY that of an individual?

### 3. (*Art. 9*)

- a. Is a State whose authority disintegrates during a conflict responsible for the behaviour of groups or individuals trying to restore order? What are the practical consequences of such a responsibility? Are the acts committed by participants in a *levée en masse* attributable to the State? (HR, Art. 2; GC III, Art. 4(A)(6))
- b. When is a State whose authority disintegrates during a conflict responsible for violations of IHL committed by a group or individuals who are not trying to restore order? What are the practical consequences of such responsibility? Are the Articles adapted to this problem?

### 4. (*Art. 10*)

- a. In what circumstances is a State responsible for violations of IHL committed by a rebel movement? Is the rebel movement itself responsible for the violations it commits? Is the rebel movement responsible if it does not become the new government of a State? (GC I-IV, common Art. 3)
- b. Is it acceptable that responsibility for violations of IHL by a rebel movement depends on that movement's success? Does it also depend on the legitimacy of its struggle?
- c. When can we say that a movement is sufficiently organized for the State, of which it later becomes the government, to be responsible for the violations of IHL committed by that movement before obtaining power? From what level of organization does the movement itself become responsible for its violations? (GC I-IV, common Art. 3; P II, Art. 1)

### 5. (*Art. 16*)

When can we consider that a State is aiding or assisting another State to commit violations of IHL? Are the obligations contained in Art. 1 common to the Geneva Conventions and to Protocol I the same as those contained in Art. 16 of the Articles? Is the supplying of weapons, when the supplier knows that they will be used in violations of IHL, itself a violation of IHL? Is the supplying of weapons whose use is banned by IHL a violation of IHL? For it to be a violation, must both States be

subject to the ban? Is there illegal aid if only the supplier State is subject to the ban? Is there wrongful aid if only the buyer State is subject to the ban, but not the supplier State?

6. (Art. 21)

May self-defence ever be a circumstance which precludes wrongfulness of what would otherwise be a violation of IHL by a State? Does the same apply to a grave breach committed by an individual? [ICC Statute, Art. 31(1)(c), See **Case No. 23**, The International Criminal Court [A. The Statute]]

7. (Art. 25)

- a. May necessity be a circumstance precluding wrongfulness of what would otherwise be a violation of IHL by a State? If yes, in what circumstances? Why may it generally not be invoked for this purpose? Is it because IHL implicitly excludes this possibility?
- b. Which rules of IHL allow certain behaviour in the case of military necessity? Are they primary or secondary rules?
- c. May necessity be a defence for a grave breach of IHL by an individual? [ICC Statute, Art. 31(1)(c), See **Case No. 23**, The International Criminal Court [A. The Statute]] In what circumstances? Are the answers to questions a. and c. the same? Are they determined by the same rules?

8. Does Art. 26 in itself not imply that Arts 21 and 25 of the Articles can never be invoked to justify a violation of IHL?

9. In the case of a violation of IHL, does the responsible State have duties towards the individuals who are victims of the violation (GC I-IV, Arts 6/6/6/7, 7/7/7/8 and 51/52/131/148 respectively)? Even if the individuals are nationals of the responsible State? How can these victims invoke this responsibility? Do Art. 3 of Hague Convention IV and Art. 91 of Protocol I imply that victims may seek compensation?

10. What duties does a State have when it is responsible for a violation of IHL?

11. Are the general rules on forms and content of reparation all fully applicable in the case of violations of IHL? Who must pay compensation to whom?

12. (Arts 40 and 41)

- a. Which violations of IHL come under Chapter III of Part Two of the Articles?
- b. What is the relationship between Art. 41(1) of the Articles, Art. 1 common to the Geneva Conventions and to Protocol I, and Art. 89 of Protocol I? Does this first provision mean that Art. 89 is also valid in non-international armed conflicts?
- c. What are the lawful means to be used in order to put a stop to violations of IHL? Must they have been prescribed by IHL? By international law? Is it sufficient that they are not contrary to a prohibition in international law? May the legality of a method also flow from the legality of countermeasures that violate rules other than IHL? Are the conditions of Arts 49-51 of the Articles applicable to countermeasures taken by third States under Art. 41(1) of the Articles? Under Art. 1 common to the Conventions and to Protocol I?
- d. Is Art. 54 of the Articles applicable for violations covered by Chapter III of Part Two of the Articles?

13. (*Arts 42 and 48*)

- a. Which is the injured State in the case of a violation of IHL? Of a violation of the IHL of non-international armed conflict? Do Art. 1 common to the Conventions and Art 1(1) of Protocol I mean that all States Parties are injured in the case of a violation of IHL?
- b. If not, which violations of IHL entitle States other than the injured State to invoke State responsibility? All violations of IHL? Must these States act together?
- c. What is the relationship between Art. 48 of the Articles and Art. 1 common to the Conventions and to Protocol I?
- d. What is the relationship between Art. 48(1)(b) and Art. 41(1) of the Articles?

14. (*Arts 49-51*)

- a. May a State injured by a violation of IHL take countermeasures? If yes, which ones? What are the limits?
- b. May a State injured by a violation of international law (humanitarian or other) take countermeasures that consist in the temporary non-execution of its obligations under IHL? At least obligations that do not preclude their violation as a reprisal? (GC I-IV, Arts 46/47/13(3)/33(3) respectively; P I, Arts 20, 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4); CIHL, Rules 145-147)
- c. Are reprisals that are not banned by IHL but which consist in the non-performance of obligations under IHL (for example the use of certain weapons against combatants) prohibited by Art. 50(1)(d) of the Articles?
- d. Is the use of famine as a countermeasure against a civilian population prohibited? In an armed conflict, does this prohibition come from IHL or from Art. 50(1)(b), (c) or (d) of the Articles? (P I, Art. 54; CIHL, Rule 53)

15. (*Art. 54*)

- a. What measures does Art. 54 allow a third State to take in response to a violation of IHL by another State? In this case are countermeasures allowed? Does Art. 54 preclude countermeasures which violate international law (other than humanitarian)?
- b. Is Art. 1 common to the Conventions and to Protocol I *lex specialis* with regard to Art. 54 of the Articles and if so, does it authorize countermeasures by all States if IHL is violated?

16. (*Art. 55*)

List some special rules of IHL on State responsibility.

**Case No. 54, UN, ICRC Granted Observer Status****A. Resolution of the General Assembly**

[Source: UN Doc. A/RES/45/6 (October 16, 1990); available on <http://www.icrc.org>]

**Observer status for the International Committee of the Red Cross  
in consideration of the special role and mandates  
conferred upon it by the Geneva Conventions of 12 August 1949**

*The General Assembly,*

*Recalling* the mandates conferred upon the International Committee of the Red Cross by the Geneva Conventions of 12 August 1949,

*Considering* the special role carried on accordingly by the International Committee of the Red Cross in international humanitarian relations,

*Desirous* of promoting co-operation between the United Nations and the International Committee of the Red Cross,

1. *Decides* to invite the International Committee of the Red Cross to participate in the sessions and the work of the General Assembly in the capacity of observer;
2. *Requests* the Secretary-General to take the necessary action to implement the present resolution.

**B. Explanatory Memorandum**

[Source: Annex to UN Doc. A/45/191 (August 16, 1990), letter to the UN Secretary-General by the permanent representatives of 21 States asking that the question of observer status for the ICRC be included in the agenda of the UN General Assembly; available on <http://www.icrc.org>]

**Observer status for the International Committee of the Red Cross  
in Consideration of the Special Role and Mandates Conferred upon it  
by the Geneva Conventions of 12 August 1949**

**Explanatory memorandum**

1. The International Committee of the Red Cross (ICRC) is an independent humanitarian institution that was founded at Geneva, Switzerland, in 1863. In conformity with the mandate conferred on it by the international community of States through universally ratified international treaties, ICRC acts as a neutral intermediary to provide protection and assistance to the victims of international and non-international armed conflicts.
2. The four Geneva Conventions of 12 August 1949 for the protection of war victims, to which 166 States are party, and their two Additional Protocols of 1977 explicitly

establish the role of the ICRC as a neutral and impartial humanitarian intermediary. The treaties of international humanitarian law thus assign duties to ICRC that are similar to those of a Protecting Power responsible for safeguarding the interests of a State at war, in that ICRC may act as a substitute for the Protecting Power within the meaning of the 1949 Geneva Conventions and 1977 Additional Protocol I. Moreover, the International Committee of the Red Cross has the same right of access as a Protecting Power to prisoners of war (the Third Geneva Convention) and civilians covered by the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention). In addition to these specific tasks ICRC, as a neutral institution, has a right of initiative deriving from a provision common to the four Geneva Conventions that entitles it to make any proposal it deems to be in the interest of the victims of the conflict.

3. The Statutes of the International Red Cross and Red Crescent Movement, as adopted by the International Conference of the Red Cross and Red Crescent, in which the States parties to the Geneva Conventions take part, require ICRC to spread knowledge and increase understanding of international humanitarian law and promote the development thereof. The Statutes also provide that ICRC shall uphold and make known the Movements fundamental principles, namely, humanity, impartiality, neutrality, independence, voluntary service, unity and universality.
4. It was at the initiative of ICRC that the original Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted by Governments in 1864. Ever since, ICRC has endeavoured to develop international humanitarian law to keep pace with the evolution of conflicts.
5. In order to fulfill the mandate conferred on it by international humanitarian law, the resolutions of the International Conference of the Red Cross and Red Crescent and the Statutes of the Movement, ICRC has concluded with many States headquarters agreements governing the status of its delegations and their staff. In the course of its work, ICRC has concluded other agreements with States and intergovernmental organizations.
6. With an average of 590 delegates working in 48 delegations, ICRC was active in 1989 in nearly 90 countries in Africa, Asia, Europe, Latin America and the Middle East including the countries covered from its various regional delegations providing protection and assistance to the victims of armed conflicts by virtue of the Geneva Conventions and, with the agreement of the Governments concerned, to victims of internal disturbances and tension.
7. In the event of international armed conflict, the mandate of ICRC is to visit prisoners of war and civilians in accordance with the provisions of the Geneva Convention relative to the Treatment of Prisoners of War (Third Convention), the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention) and the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I). In situations of non-international armed conflict, ICRC bases



its requests for access to persons deprived of their freedom on account of the conflict on Article 3 common to the Geneva Conventions and on the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

8. In situations other than those covered by the Geneva Conventions and their Additional Protocols, ICRC may avail itself of its statutory right of initiative to propose to Governments that it be granted access to persons deprived of their freedom as a result of internal disturbances and tension.
9. The purpose of ICRC visits to persons deprived of their freedom is exclusively humanitarian: ICRC authorities to take steps to improve the detainees treatment and living conditions. ICRC never expresses an opinion on the grounds for detention. Its findings are recorded in confidential reports that are not intended for publication.
10. In the event of armed conflicts or internal disturbances, ICRC provides material and medical assistance, with the consent of the Governments concerned and on condition that it is allowed to assess the urgency of victims needs on the spot, to carry out surveys in the field to identify the categories and the number of people requiring assistance and to organize and monitor relief distributions.
11. The activities of the Central Tracing Agency of ICRC are based on the institutions obligations under the Geneva Conventions to assist military and civilian victims of international armed conflicts and on its right of humanitarian initiative in other situations. The work of the Agency and its delegates in the field consists in collecting, recording, centralizing and, where appropriate, forwarding information concerning people entitled to ICRC assistance, such as prisoners of war, civilian internees, detainees, displaced persons and refugees. It also includes restoring contact between separated family members, essentially by means of family messages where normal means of communication do not exist or have been disrupted because of a conflict, tracing persons reported missing or whose families have no news of them, organizing family reunification's, transfers to safe places and repatriation operations.
12. The tasks of ICRC and the United Nations increasingly complement one another and cooperation between the two institutions is closer, both in their field activities and in their efforts to enhance respect for international humanitarian law. In recent years, this has been seen in many operations to provide protection and assistance to the victims of conflict in all parts of the world.
13. ICRC and the United Nations have also cooperated closely on legal matters, with ICRC contributing to United Nations work in this field. This is also reflected in resolutions of the Security Council, the General Assembly and its subsidiary bodies and reports of the Secretary-General.
14. Participants of ICRC as an observer at the proceedings of the General Assembly would further enhance cooperation between the United Nations and ICRC and facilitate the work of ICRC.

**DISCUSSION**

1.
  - a. Before the ICRC obtained observer status, which status could it have within the United Nations?
  - b. Given that the ICRC was included in category II of the NGOs granted consultative status with the Economic and Social Council under ECOSOC Resolution 1296 (XLIV), has the General Assembly created a precedent by granting observer status to an entity which is neither a State nor an intergovernmental organization?
  - c. What are the main differences between observer status and consultative status? Has this change of status conferred a more important role on the ICRC in the United Nations arena?
2.
  - a. Is the ICRC undermining its principle of neutrality or abandoning its confidential working method by its acceptance of observer status? What impact would the ICRC's observer status have on its possible role in conflict management?
  - b. Does the ICRC have international legal personality? How would you qualify the legal personality of the ICRC? Does the fact that the Geneva Conventions assign certain tasks to the ICRC necessarily imply that it is a subject of international law?
3. What impact does the ICRC have in international relations because of the status granted to it by the Geneva Conventions and Protocol I? What is the relationship between the right of initiative of the ICRC under Art. 3 common to the Geneva Conventions and Arts. 10/10/10/11, respectively, of the four Geneva Conventions, and its more active role within the United Nations fora? Do they contradict or reinforce each other?

**Document No. 55, UN, Minimum Humanitarian Standards****A. Turku Declaration**

[Source: UN Doc. E/CN.4/Sub.2/1991/55 (December 2, 1990), available on [www.un.org](http://www.un.org)]

**Declaration of Minimum Humanitarian Standards****Adopted by a meeting of experts, organised by the Human Rights  
Institute of Åbo Akademi in Turku/Åbo (Finland)**

[The appropriate United Nations organ,]

*Recalling* the reaffirmation by the Charter of the United Nations and the Universal Declaration of Human Rights of faith in the dignity and worth of the human person;

*Considering* that situations of internal violence, disturbances, tensions and public emergency continue to cause serious instability and great suffering in all parts of the world;

*Concerned* that in such situations human rights and humanitarian principles have often been violated;

*Recognizing* the importance of respecting existing human rights and humanitarian norms;

*Noting* that international law relating to human rights and humanitarian norms applicable in armed conflicts do not adequately protect human beings in situations of internal violence, disturbances, tensions and public emergency;

*Confirming* that any derogations from obligations relating to human rights during a state of public emergency must remain strictly within the limits provided for by international law, that certain rights can never be derogated from and that humanitarian law does not admit of any derogations on grounds of public emergency;

*Confirming further* that measures derogating from such obligations must be taken in strict conformity with the procedural requirements laid down in those instruments, that the imposition of a state of emergency must be proclaimed officially, publicly, and in accordance with the provisions laid down by law, that measures derogating from such obligations will be limited to the extent strictly required by the exigencies of the situations, and that such measures must not discriminate on the grounds of race, colour, sex, language, religion, social, national or ethnic origin;

*Recognizing* that in cases not covered by human rights and humanitarian instruments, all persons and groups remain under the protection of the principles of international law derived from established custom, from the principles of humanity and the dictates of public conscience;

*Believing* that it is important to reaffirm and develop principles governing behaviour of all persons, groups, and authorities in situations of internal violence, disturbances, tensions and public emergency;

*Believing further* in the need for the development and strict implementation of national legislation applicable to such situations, for strengthening cooperation necessary for more efficient implementation of national and international norms, including international mechanisms for monitoring, and for the dissemination and teaching of such norms;

*Proclaims* this Declaration of Minimum Humanitarian Standards.

### **Article 1**

This Declaration affirms minimum humanitarian standards which are applicable in all situations, including internal violence, disturbances, tensions, and public emergency, and which cannot be derogated from under any circumstances. These standards must be respected whether or not a state of emergency has been proclaimed.

### **Article 2**

These standards shall be respected by, and applied to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination.

### **Article 3**

1. Everyone shall have the right to recognition everywhere as a person before the law. All persons, even if their liberty has been restricted, are entitled to respect for their person, honour and convictions, freedom of thought, conscience and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction.
2. The following acts are and shall remain prohibited:
  - a) violence to the life, health and physical or mental well-being of persons, in particular murder, torture, mutilation, rape, as well as cruel, inhuman or degrading treatment or punishment and other outrages upon personal dignity;
  - b) collective punishments against persons and their property;
  - c) the taking of hostages;
  - d) practising, permitting or tolerating the involuntary disappearance of individuals, including their abduction or unacknowledged detention;
  - e) pillage;
  - f) deliberate deprivation of access to necessary food, drinking water and medicine;
  - g) threats or incitement to commit any of the foregoing acts.

**Article 4**

1. All persons deprived of their liberty shall be held in recognized places of detention. Accurate information on their detention and whereabouts, including transfers, shall be made promptly available to their family members and counsel or other persons having a legitimate interest in the information.
2. All persons deprived of their liberty shall be allowed to communicate with the outside world including counsel in accordance with reasonable regulations promulgated by the competent authority.
3. The right to an effective remedy, including habeas corpus, shall be guaranteed as a mean to determine the whereabouts or the state of health of persons deprived of their liberty and for identifying the authority ordering or carrying out the deprivation of liberty. Everyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of the detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful.
4. All persons deprived of their liberty shall be treated humanely, provided with adequate food and drinking water, decent accommodation and clothing, and be afforded safeguards as regards health, hygiene, and working and social conditions.

**Article 5**

1. Attacks against persons not taking part in acts of violence shall be prohibited in all circumstances.
2. Whenever the use of force is unavoidable, it shall be in proportion to the seriousness of the offence or the objective to be achieved.
3. Weapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances.

**Article 6**

Acts or threats of violence the primary purpose of foreseeable effect of which is to spread terror among the population are prohibited.

**Article 7**

1. The displacement of the population or parts thereof shall not be ordered unless their safety or imperative security reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the population may be transferred and received under satisfactory conditions of shelter, hygiene, health, safety, and nutrition. Persons or groups thus displaced shall be allowed to return to their homes as soon as the conditions which made their displacement imperative have ceased. Every effort shall be made to enable those so displaced who wish to remain together to do so. Families whose members wish to remain together must be allowed to do so. The persons thus displaced shall be free to move around in the territory, subject only to the safety of the persons involved or reasons of imperative security.

2. No persons shall be compelled to leave their own territory.

#### **Article 8**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his or her life.
2. In addition to the guarantees of the inherent right to life, and the prohibition of genocide, in existing human rights and humanitarian instruments, the following provisions shall be respected as a minimum.
3. In countries which have not yet abolished the death penalty, sentences of death shall be carried out only for the most serious crimes. Sentences of death shall not be carried out on pregnant women, mothers of young children or on children under 18 years of age at the time of the commission of the offence.
4. No death sentence shall be carried out before the expiration of at least six months from the notification of the final judgment confirming such death sentence.

#### **Article 9**

No sentence shall be passed and no penalty shall be executed, on a person found guilty of an offence without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by the community of nations. In particular:

- a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him or her, shall provide for a trial within a reasonable time, and shall afford the accused before and during his or her trial all necessary rights and means of defence;
- b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
- c) anyone charged with an offence is presumed innocent until proved guilty according to law;
- d) anyone charged with an offence shall have the right to be tried in his or her presence;
- e) no one shall be compelled to testify against himself or herself or to confess guilt;
- f) no one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure;
- g) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under applicable law, at the time when it was committed.

**Article 10**

Every child has the right to the measures of protection required by his or her condition as a minor and shall be provided with the care and aid the child requires. Children who have not yet attained the age of fifteen years shall not be recruited in or allowed to join armed forces or armed groups or allowed to take part in acts of violence. All efforts shall be made not to allow persons below the age of 18 to take part in acts of violence.

**Article 11**

If it is considered necessary for imperative reasons of security to subject any person to assigned residence, internment or administrative detention, such decisions shall be subject to a regular procedure prescribed by law affording all the judicial guarantees which are recognized as indispensable by the international community, including the right of appeal or to a periodical review.

**Article 12**

In every circumstance, the wounded and sick, whether or not they have taken part in acts of violence, shall be protected and treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them on any grounds other than their medical condition.

**Article 13**

Every possible measure shall be taken, without delay, to search for and collect wounded, sick and missing persons and to protect them against pillage and ill-treatment, to ensure their adequate care; and to search for the dead, prevent their being despoiled or mutilated, and to dispose of them with respect.

**Article 14**

1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian missions.
2. Under no circumstances shall any person be punished for having carried out medical activities compatible with the principles of medical ethics, regardless of the person benefitting therefrom.

**Article 15**

In situations of internal violence, disturbances, tensions or public emergency, humanitarian organizations shall be granted all the facilities necessary to enable them to carry out their humanitarian activities.

**Article 16**

In observing these standards, all efforts shall be made to protect the rights of groups, minorities and peoples, including their dignity and identity.

### **Article 17**

The observance of these standards shall not affect the legal status of any authorities, groups, or persons involved in situations of internal violence, disturbances, tensions or public emergency.

### **Article 18**

1. Nothing in the present standards shall be interpreted as restricting or impairing the provisions of any international humanitarian or human rights instrument.
2. No restriction upon or derogation from any of the fundamental rights of human beings recognized or existing in any country by virtue of law, treaties, regulations, custom, or principles of humanity shall be admitted on the pretext that the present standards do not recognize such rights or that they recognize them to a lesser extent.

## **B. UN, Minimum Humanitarian Standards**

[Source: UN Doc. E/CN.4/1998/87 (January 5, 1998). Footnotes omitted.]

### **REPORT OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES**

#### **Minimum humanitarian standards Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21**

### **Introduction**

1. In its resolution 1997/21 entitled "Minimum humanitarian standards", the Commission on Human Rights requested the Secretary-General to prepare "an analytical report on the issue of fundamental standards of humanity" for submission at its fifty-fourth session, taking into consideration in particular the issues raised in the report of the International Workshop on Minimum Humanitarian Standards held in Cape Town, South Africa in September 1996 and identifying, *inter alia*, common rules of human rights and humanitarian law that are applicable in all circumstances.

[...]

3. The Commission in resolution 1997/21 also requested the Secretary-General to seek the views of and information from Governments, United Nations bodies, in particular the Office of the United Nations High Commissioner for Refugees (UNHCR), the human rights treaty bodies and intergovernmental organizations, as well as regional organizations and non-governmental organizations. [...] To date, most of the responses received from Governments and intergovernmental



organizations have indicated their support, in general terms, for the development of “minimum humanitarian standards” or fundamental standards of humanity, although they have often recommended further consideration of certain issues. The responses received to date have been carefully reviewed and many of the points raised in them are reflected in this report.

4. The Secretary-General was requested to prepare his report in coordination with the International Committee of the Red Cross (ICRC), and their comments and advice are gratefully acknowledged.

## I. TERMINOLOGY

5. At the outset, it will assist the discussion if a few points are made regarding the use of particular terms and phrases. The issue under discussion had been given the designation “minimum humanitarian standards”, following from a declaration with that title which was submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1991 (see E/CN.4/Sub.2/1991/55) and led to the present discussion. However, the latest Commission resolution refers explicitly to “fundamental standards of humanity”, and this term is to be preferred for a number of reasons. First, the use of the qualifying word “minimum” has been criticized (including at the workshop in Cape Town), and second because the phrase “humanitarian standards” might give the impression that the exercise is solely concerned with international *humanitarian* law (the law regulating armed conflicts), whereas in fact that branch of international law is only one part of the discussion. As originally used, the phrase “humanitarian standards” was intended to include standards of both international human rights and humanitarian law, but it would seem that “standards of humanity” better serves this purpose. Also, in recent years there has been a good deal of discussion concerning *humanitarian* assistance, including criteria to guide the provision and delivery of such assistance. While this is a related point, it is not the main focus of the present discussion and, to avoid confusion, the term “standards of humanity” is therefore preferable.
6. A second issue of terminology concerns the manner in which to describe fighting and violence inside countries. Only “armed conflicts”, whether of an international or non-international character, are regulated by international humanitarian law. This law provides some criteria for determining whether violence inside a country amounts to an internal armed conflict so as to come within the scope of the relevant rules. However, there is often disagreement about the application of these criteria, and this can lead to misunderstandings about the use of terms such as “internal armed conflict” or even “internal conflict”. To avoid such misunderstandings, this report will generally use the term “internal violence” to describe situations where fighting and conflict, of whatever intensity, is taking place inside countries, and without prejudice to any legal characterization of the fighting for the purposes of applying international humanitarian law.

7. A third issue of terminology concerns the description of groups who have taken up arms against the Government. A number of appellations can be used: terrorist groups, guerrillas, resistance movements, etc., each of the terms carrying different connotations. In this report, the terms “armed group” or “non-State armed group” will be used to describe those who take up arms in a challenge to government authority, leaving aside the question of whether their activities and aims qualify them as “terrorists” or “freedom fighters”. The choice of the more neutral term – armed group – is in no way meant to imply any legitimacy for the group or its cause; such groups can, and frequently do, engage in acts of terrorism.

## **II. BACKGROUND**

### **A. Brief history of the discussion**

8. The need for identifying fundamental standards of humanity arises from the observation that, at the present time, it is often situations of internal violence that pose the greatest threat to human dignity and freedom. The truth of this observation is borne out in many countries around the world. The reports prepared by or for United Nations human rights bodies repeatedly draw attention to the link between human rights abuses and ongoing violence and confrontation between armed groups and government forces, or simply between different armed groups. Although such situations frequently lead to the most gross human rights abuses, there are disagreements and doubts regarding the applicable norms of both human rights and humanitarian law. The rules of international humanitarian law are different depending on the nature and intensity of the conflict. There are disagreements concerning the point at which internal violence reaches a level where the humanitarian law rules regulating internal armed conflicts become operable. Even when these rules manifestly do apply, it is generally acknowledged that, in contrast to the rules applying in international armed conflicts, they provide only the bare minimum of protection.
9. Further, until now, the rules of international human rights law have generally been interpreted as only creating legal obligations for Governments, whereas in situations of internal violence it is also important to address the behaviour of non-State armed groups. It is also argued that some human rights norms lack the specificity required to be effective in situations of violent conflict. Finally, concern has been expressed about the possibilities for Governments to derogate from certain obligations under human rights law in these situations.
10. The discrepancy between the scale of the abuses perpetrated in situations of internal violence, and the apparent lack of clear rules, has been the inspiration for efforts to draw up “minimum humanitarian standards” or fundamental standards of humanity. The most notable effort in this regard has been the elaboration, by a group of non-governmental experts, of the Declaration on Minimum Humanitarian Standards in Turku/Åbo, Finland, in 1990 [See Part A]. [...]

11. This document was considered by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its forty-third session in 1991. At its forty-sixth session in 1994 the Sub-Commission decided to transmit the document to the Commission on Human Rights “with a view to its further elaboration and eventual adoption” (resolution 1994/26). In 1995 the Commission on Human Rights, in resolution 1995/29, taking note of the Sub-Commission’s resolution, recognized the need to address principles applicable to situations of internal and related violence, disturbance, tension and public emergency in a manner consistent with international law and the Charter of the United Nations and requested that the Declaration on Minimum Humanitarian Standards be sent to Governments and intergovernmental and non-governmental organizations for their comments.
12. In considering the issue at its forty-second session in 1996, the Commission on Human Rights did not make a specific reference to any particular document, but again recognized the need to address principles applicable to situations of internal violence. It also welcomed the offer by the Nordic countries, in cooperation with the ICRC, to organize a workshop to consider the issue (resolution 1996/26). As noted, this workshop was held in Cape Town, South Africa, in September 1996, and a report of the workshop [...] was made available to the Commission on Human Rights at its last session.
13. The main issue for consideration therefore is the necessity and desirability of identifying principles or standards for the better protection of the human person in situations of internal violence. Bearing in mind the terrible toll of atrocities and suffering associated with such situations in recent years, the opportunity to address this topic is both welcome and timely.

## **B. A reminder**

14. Before proceeding, it is worth recalling that in many situations war itself, or the recourse to violence, is a negation of human rights. As stated in the preamble to the United Nations Declaration on the Right of Peoples to Peace (General Assembly resolution 39/11 of 12 November 1984, annex)  
  
“[The General Assembly,]  
  
“*Convinced* that life without war serves as the primary international prerequisite for the material well-being, development and progress of countries, and for the full implementation of the rights and fundamental human freedoms proclaimed by the United Nations ...”
15. Measures aimed at reducing human rights abuses in situations of internal violence must not detract from efforts to prevent or end such violence. Neither must they lend weight to the argument of despair that such efforts are doomed to failure. The importance of addressing the root causes of violence and conflict must always be at the centre of United Nations efforts; in this regard, special emphasis needs to be placed on ensuring the protection of minorities, of

strengthening democracy and democratic institutions, of overcoming obstacles to the realization of the right to development, and of securing respect for human rights generally.

16. This report is firmly grounded in the understanding that human rights are interdependent and interrelated. Efforts to minimize human rights abuses in situations of internal violence depend on achieving a greater awareness of and respect for all human rights. Preventing the use of starvation of civilians as a method of warfare will be easier if there is an acceptance of the right to food, and an understanding of the obligations associated with that right. At the same time, while there are no “clean” wars, recent history shows us that conflicts fought with a minimum of violence, and with greater attention to fundamental standards of humanity, lend themselves more readily to a peaceful solution and provide the conditions in which reconciliation and justice can prevail.

### **III. HUMAN RIGHTS ABUSES IN SITUATIONS OF INTERNAL VIOLENCE**

#### **A. Common characteristics**

17. At the outset, it seems necessary to make some comments concerning the characteristics of situations of internal violence in the post-cold war world. In recent years, several reports issued to or by United Nations bodies and specialized agencies have considered the problems posed by such situations. For the purposes of this report, a number of relevant observations emerge.
18. The decrease in the number of international armed conflicts has been offset by an increase in the number of civil wars and other situations of violence inside countries. Quantifying the scale of the problem is difficult as there is no firm agreement on the factors to apply in deciding which are the most serious situations. If the factor of number of deaths is used, then, according to some researchers, in 1996 there were 19 situations of internal violence in which at least 1,000 people were killed (“high intensity conflicts”) and which, cumulatively (since their beginning, in some cases many years ago), had led to between 6.5 and 8.4 million deaths. If one includes situations of internal violence which, in 1996, had de-escalated or ended, another 2 million deaths could be added. In addition, in 1996 there were approximately 40 other internal situations causing between 100 and 1,000 deaths (“low intensity conflicts”), which cumulatively have also led to thousands of deaths. Of course, the number of conflict-related deaths is but a small part of the suffering and devastation found in such situations. Whatever the number, there is no doubting the scale of the problem.
19. These situations are characterized by the existence of an armed challenge to the Government, in the form of one or more groups taking up arms in pursuit of, broadly speaking, political objectives. These objectives might include demands for more autonomy or even secession for particular ethnic, religious or linguistic minorities within the State concerned, overthrowing the existing Government, rejection of the existing constitutional order, or challenges to the territorial integrity of the State. In other situations, where an existing Government collapses

or is unable or unwilling to intervene, armed groups fight among themselves; for example, for the right to establish a new Government or to ensure the supremacy or continuation of their own particular political programme.

20. The degree of organization of these armed groups, their size, sophistication, and the extent to which they exercise actual control over territory and population vary from one situation to the next. At one extreme, such groups might resemble *de facto* Governments, with control over territory and population and establishing and/or maintaining public services such as schools, hospitals, forces of law and order, etc. At the other extreme, some armed groups will operate only sporadically, or in an entirely clandestine manner, and exercise no direct control over territory. Some armed groups operate under clear lines of command and control; others are loosely organized and various units might not be under effective central command.
21. In many situations of internal violence there will be a breakdown in the operation of public institutions. Schools will be closed, local government unable to function, and police and judicial institutions may suffer. Such breakdowns might be limited to particular areas of the country, or apply more generally. The functions of government often become increasingly militarized, with the armed forces assuming civilian police functions and military courts trying civilians; often the military's power is beyond the reach of civilian control. Depending on the degree and scope of the violence, there is also likely to be an impact on the livelihood of the civilian population. This impact often is felt most in rural areas (where the fighting usually takes place); farmers and others dependent on the land are particularly vulnerable.
22. There is no doubt that the ready availability of weapons is a predominant characteristic of these situations. Both government forces and armed groups appear to be well supplied with light weaponry. While the devastating impact of anti-personnel landmines has received a good deal of publicity and significant steps are now being taken to ban this weapon, a majority of civilian casualties result from the use of other weapons – such as assault rifles, light artillery (e.g., mortars), and fragmentation bombs or grenades – the indiscriminate use of which attracts little international condemnation.
23. A final common element in these situations is the link between criminal and “political” violence. While some armed groups might limit themselves to military activities, others, though allegedly contesting political power, are more reminiscent of criminal gangs, engaging in theft, extortion and banditry on a mass scale. Government forces too engage in such activities, the collapse in civil institutions creating a climate of general lawlessness in which preying on the civilian population is common and corruption rampant. Banditry and extortion are used to fund and supply the continuation of the fighting.

## **B. Patterns of abuse**

24. In her report Ms. Machel drew attention to the “shocking” statistic of over 2 million children killed in conflicts in the last decade, the vast majority of them in situations of internal violence and conflict. The conclusion to be drawn, according to the report, is that
 

“... more and more of the world is being sucked into a desolate moral vacuum. This is a space devoid of the most basic human values; a space in which children are slaughtered, raped and maimed; a space in which children are exploited as soldiers; a space in which children are starved and exposed to extreme brutality. Such unregulated terror and violence speak of deliberate victimization. There are few further depths to which humanity can sink” (A/51/306, para. 3).
25. While children are the most vulnerable, other groups too are at risk of experiencing this “unregulated terror and violence”. These include women, minority ethnic populations, refugees and the displaced, and those detained in connection with the violence; indeed, the civilian population generally is at risk.
26. While the statistic of 2 million dead children speaks volumes about the scale of the abuse, some further comments should be made about the nature and type of the most common human rights abuses in these situations. A comprehensive survey is beyond the scope of the present report. But again, some general observations may be made.
27. The most serious abuses involve arbitrary deprivation of the right to life. Civilians are directly or indiscriminately attacked and killed by armed forces and armed groups. Massacres of civilians are common. Often civilian deaths are the result of the indiscriminate use of weapons. Captured combatants are summarily executed, as are non-combatants whose religious or ethnic identity, or political opinion, make them suspect in the eyes of their captors. Others die from starvation or disease, when relief supplies are arbitrarily withheld from them. Those exercising their right to peaceful protest are killed when police or security forces respond with excessive force.
28. The practice of torture, or cruel, inhuman or degrading treatment or punishment, is frequently related to internal violence. Those detained in connection with the violence are tortured to extract confessions, to obtain information about opposition groups, or to brutalize or intimidate them. Captured combatants, members of political organizations who speak out, villagers and peasants in areas where fighting is taking place and suspected sympathizers of the opposing party are all at risk of being tortured. New recruits into armed forces and armed groups are beaten and ill-treated to force them into obedience. Villagers are forced to act as labourers for armed forces and armed groups, often under appalling conditions.
29. Conflicts tend to lead to displacement as people flee affected areas but deliberate interference with freedom of movement is also common. People are rounded up and moved out of their home areas against their will, and without

any justification. This is done to create “security” zones, to deprive armed groups of indirect civilian support or as a means of punishing or terrorizing minority ethnic, linguistic or religious populations viewed as hostile, or to expel such populations from particular territories. Those who flee or who are expelled are denied access to safety – in their own or other countries – or are forced back to unsafe areas. When it is safe to return, they are often prevented from doing so and condemned to a life in exile. Also, the displaced are often restricted to camps, in circumstances akin to internment or detention.

30. Children’s vulnerability means they are at particular risk of suffering abuses and the attack on children’s human rights in internal conflicts was also highlighted by Ms. Machel. The impact of the violence on rights associated with their education, health, and general well-being and development can be enormous. If orphaned or separated (often forcibly) from their families as a result of the fighting, these problems are exacerbated. In addition, children are recruited into the armed forces and are sent into combat, are used as a ready supply of forced labour for armed forces, and are subject to sexual abuse.
31. War is for the most part waged by men – this fact has enormous implications for the protection of women’s human rights in situations of internal violence. Women and girls are raped by soldiers and members of armed groups and are abducted into forced prostitution. A majority of civilians caught up in the fighting are often women and children, including those displaced, and they therefore suffer a disproportionate share of the abuses directed at the civilian population.
32. Rights associated with arbitrary deprivation of liberty and due process are also commonly abused. Hundreds or even thousands of people might be detained in connection with the fighting; in many cases suspected members of armed groups or their supporters are detained for months and years without being charged or tried. If trials do take place, fundamental fair trial guarantees are often ignored; military courts are used to try and sentence civilians. Armed groups take people hostage, and hold “trials” of suspected political opponents or “traitors”. Both government forces and armed groups take people into custody but deny they are holding them – tens of thousands of people have disappeared or gone missing in this way in recent years. Usually, they have been killed and their bodies secretly disposed of.
33. Finally, there is a widespread disregard for the protections owed to civilians. Civilian property – homes, belongings, crops, livestock – is wantonly destroyed or pillaged. Hospitals and schools are deliberately destroyed, as are religious and cultural buildings. Civilians are denied access to relief supplies, such as food and medicine, or the distribution of such supplies is subject to unwarranted interference. The protections owed to medical and religious personnel are ignored. Recognized humanitarian agencies are prevented from operating, their staff are threatened and attacked and their equipment is stolen or destroyed.
34. A recurring theme that applies to all of these human rights abuses is that, in the overwhelming majority of cases, the victims, or their families, find no

justice. Those who kill, torture, rape, or attack them do so with virtual impunity, apparently confident that they will never be called to account for their misdeeds.

35. Also common to all these abuses is the difficulty, in some situations, of attributing responsibility for the violence. The existence of a situation of internal violence usually means that at least two – and often more – opposing forces or groups have resorted to the use of force; the hostility and distrust between them gives ample scope for the dissemination of misinformation and propaganda. Allegations that one side might commit abuses in such a manner as to make the other side appear responsible cannot always be dismissed. When abuses take place in remote areas, identifying the perpetrators can be very difficult. These difficulties are further increased when the authorities place restrictions on the free flow of information and the operation of news media, including denying journalists access to conflict zones. Journalists are also threatened and killed – another means of preventing disclosure of information on abuses. United Nations investigators and human rights monitors are also denied access to places where abuses are alleged to have taken place.
36. It should be emphasized that the above is just a general overview of the human rights abuses common in situations of internal violence, and of some of the most relevant characteristics of these situations. It is by no means an exhaustive survey. It is interesting to note that a good deal of information, including from United Nations sources, is available regarding these issues for example, in the reports of country and thematic rapporteurs and working groups of the Commission on Human Rights.
37. It might be useful, within the framework of further study, to collect information from existing sources on types of human rights abuse in situations of internal violence – including abuses committed by armed groups. The purpose would be to expand considerably on the typology set out above, and therefore gain a fuller picture of the human rights abuses that we are aiming to prevent, and the context in which they take place.

#### **IV. OUTLINE OF THE ISSUES INVOLVED**

38. Throughout the consideration by the United Nations of the issues of human rights bodies addressing principles applicable to situations of internal violence, a number of questions have repeatedly emerged. This section aims to organize and set out very briefly these questions, and the issues they raise. The following sections (V-IX) will then address the questions in more detail.

#### **What are the problems regarding the scope of existing standards?**

39. As indicated briefly above, the initiative to identify fundamental standards of humanity is based on the argument that existing standards, of both human rights and humanitarian law, do not adequately address situations of internal violence. The issue for consideration therefore is the extent to which this is the case, and to identify with some precision the problems concerning existing norms.



40. As regards human rights law, the main issues concern the possibilities for States to derogate from some of their commitments during situations of internal violence, and the extent to which, if at all, armed groups can be held accountable under international human rights law. It is further argued that some human rights guarantees lack the specificity required to be applied effectively in situations where fighting is taking place.
41. As regards international humanitarian law, the main issue concerns the difficulties in determining in which situations the rules regulating non-international armed conflicts become operable, and the fact that some situations of internal violence fall outside of existing treaty law. In addition, there is the question of the adequacy of the existing rules even in cases where the situation meets the thresholds set out in international humanitarian law. Further, there is also the need to identify customary rules of international humanitarian law.

**What would be the advantages of identifying “fundamental standards of humanity” and are there significant disadvantages?**

42. Obviously, if there are significant problems regarding the scope of existing standards, then in principle finding a means to extend their scope is desirable. But, the question must involve an assessment of how, in concrete terms, a more precise statement about norms of conduct would contribute to alleviating the plight of those affected by such situations.
43. Regarding the possible disadvantages, the key question is the relationship of a statement of fundamental standards of humanity to existing international law. Would such a statement undermine or in any way detract from existing standards? [...]

**What would be the nature of a statement of fundamental standards of humanity?**

45. Finally, assuming the desirability of identifying and setting out fundamental standards of humanity, the question arises of the means by which this should be done.

**V. INTERNATIONAL HUMAN RIGHTS LAW AND SITUATIONS OF INTERNAL VIOLENCE**

46. There exists an impressive body of international law concerning the protection of human rights and fundamental freedoms. Since the advent of the United Nations, covenants, conventions and declarations, as well as resolutions adopted by competent United Nations organs, have elaborated in considerable detail the scope of human rights protection. While further standard-setting in the field of human rights protection continues, and will remain necessary to keep pace with a changing world, the breadth of the existing regulation is impressive.
47. Complementing the Universal Declaration of Human Rights, there are the two International Covenants, adopted in 1966, on Civil and Political Rights and on

Economic, Social and Cultural Rights, the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Convention on the Rights of the Child (1989). In addition, there are the Convention and Protocol relating to the Status of Refugees (1951 and 1967 respectively), the many conventions with human rights provisions adopted under the auspices of the International Labour Organization and several non-treaty declarations and other resolutions adopted by the General Assembly. Among the latter are the Declaration on the Right to Development (1986), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989) and the Declaration on the Protection of All Persons from Enforced Disappearance (1992). These are just some of the many human rights standards developed by the United Nations and do not include any of the standards adopted at a regional level.

48. Given the scope of existing standards, the argument that there is a gap in the protection provided by international human rights law needs to be carefully examined. After all, the main human rights instruments (the Universal Declaration of Human Rights and the two International Covenants) taken together guarantee protection, at least in a general form, for the most important human rights and fundamental freedoms. This includes those rights of most immediate relevance to individuals in situations of internal violence. The two International Covenants have been ratified by a solid majority of Member States, and there is no doubt that some of their provisions have become norms of customary international law binding on all States. It is widely accepted that the Universal Declaration of Human Rights, though it is not a treaty per se, creates obligations on all States Members of the United Nations. Most importantly, as the Universal Declaration states, human rights are “inalienable”, individuals are “born free and equal in dignity and rights” – it follows that we possess these rights regardless of whether the countries we live in are at war or at peace.
49. However, the argument about the inadequacies of human rights law is more complex. It rests essentially on three points: the possibility of derogation, the position of non-State armed groups vis-à-vis human rights obligations, and the lack of specificity of existing standards.

#### **A. Derogation**

50. Some human rights treaties allow States, in exceptional circumstances, to take measures derogating from their obligations with regard to certain human rights commitments they have undertaken. It is widely understood that a situation of internal violence *might* be of such an exceptional nature as to justify derogation. The International Covenant on Civil and Political Rights (ICCPR) provides, in article 4 (1), that

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

51. A similar provision can be found in two regional human rights treaties, the American Convention on Human Rights (article 27) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 15).
52. However, article 4 (2) of the ICCPR provides that States may not derogate from their obligations regarding several of the rights protected in the Covenant, including the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude, the right not to be imprisoned for failure to perform a contractual obligation, the right not to be subject to retroactive penal measures, the right to recognition as a person before the law, and the right to freedom of thought, conscience and religion. Similar so-called non-derogable rights can be found in the two regional conventions mentioned above.
53. Significantly, among others, rights related to freedom of movement, equality, protection of minorities, fair trial, freedom of expression and protection from arbitrary detention or imprisonment are rights subject to derogation under these treaties. This means that, if a situation of internal violence justifies invoking the derogation clauses, there is the possibility that States may legitimately restrict the exercise of such rights.
54. On the other hand, the possibility that a situation of fighting inside a country might allow for the legitimate restriction of certain rights does not necessarily support the conclusion that there is a gap in the protection offered by international law. First, it must be emphasized that rights which are subject to derogation are not automatically thereby subject to outright suspension at the State's discretion. Article 4 of the ICCPR includes a number of qualifications which place concrete limits on a State's use of the derogation clauses. These include the requirements that no measures taken involve discrimination solely on the ground of race, colour, sex, language, religion or social origin; and that each of the specific measures taken to restrict particular rights are only “to the extent strictly required by the exigencies of the situation”. The latter stipulation is particularly important as it requires that the restriction must be proportional. A state of emergency might justify some restrictions on freedom of assembly and movement (for example, a nighttime curfew), but not necessarily any restriction. Restrictions which are sweeping or general in nature will be inherently suspect. There are other requirements, such as the temporary nature of derogation, and its basis in law, which also limit a State's discretion.

55. Second, derogations must not be inconsistent with a State's other obligations under international law. Some human rights treaties, including the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination against Women contain no derogation clauses, and many States that have ratified the ICCPR are also parties to these treaties.
56. Third, only the most serious internal situations justify invoking the derogation clauses. The mere existence of violence inside a country does not *ipso facto* justify derogation. The phrase "threatens the life of the nation" in article 4 clearly envisages a truly exceptional situation.
57. Taken together, these constraints on the application of derogation clauses appear to provide a solid basis in international law for ensuring these clauses are not abused. In this regard it is interesting to note the conclusions of expert meetings which have developed in some detail guidelines for applying derogation clauses in such a manner as to ensure the greatest possible protection for human rights consistent with a State's legitimate need to respond to an exceptional situation. The use of such guidelines, firmly based in the treaty law, seems a promising means of overcoming some of the problems posed by derogation clauses in situations of internal violence.
58. In sum, it is not clear that the derogation argument provides, on its own, a clear justification for developing fundamental standards of humanity. That is, even though there is no doubt that states of emergency do create serious problems for the protection of human rights, it is not clear that such problems arise primarily from the possibility for States to derogate from certain human rights obligations. It would seem that further analysis would be needed to identify the extent to which the human rights abuses which are most prevalent in situations of internal violence can be attributed to the proper and faithful application of derogation clauses set out in international treaties.

## **B. Non-State armed groups and human rights law**

59. A second problem concerning the adequacy of human rights law arises in regard to the activities of non-State actors. It is clear that measures taken by actors other than States can have a negative impact on the enjoyment of human rights and fundamental freedoms. In particular, armed groups, operating at different levels of sophistication and organization, are often responsible for the most grave human rights abuses. Yet these groups are not, strictly speaking, legally bound to respect the provisions of international human rights treaties which are instruments adopted by States and can only be formally acceded to or ratified by States. The supervisory mechanisms established by these treaties are not empowered to monitor or take action on reports on the activities of armed groups.

60. In situations where international humanitarian law applies (discussed below), armed groups are bound by its provisions. However, in situations where that law does not apply the *international legal* accountability of such groups for human rights abuses is unclear (although clearly such acts should be penalized under domestic criminal law). There are different schools of opinion regarding the proper standard of accountability. Some Governments argue that armed groups can commit human rights violations, and should be held accountable under international human rights law. Other Governments maintain that, while the abuses of armed groups are deserving of condemnation, they are not properly speaking human rights violations since the legal obligation which is violated is one that is only binding on Governments. This divergence of views is found also among scholars and commentators.
61. The modern concept of human rights is grounded in an understanding that these rights are held by individuals vis-à-vis the State and create legal obligations on the State of both a negative and positive nature to ensure the full enjoyment of those rights. Human rights protection developed as a means of checking the exercise of State power, and, particularly with regard to economic, social and cultural rights, also as legitimate demands for State intervention to ensure rights were respected (for example, as regards the right to education or the right to health). Later, with the recognition of the right to development, obligations for implementation were placed on States acting alone and in cooperation with each other.
62. And yet, this conception of human rights (while dominant, and rightly so given the scale of violations of human rights by Governments) has never provided a fully adequate description of the scope of international human rights concern. The Universal Declaration of Human Rights, as well as the two International Covenants, in their preamble paragraphs recognize duties on individuals to promote respect for human rights. The two Covenants include this statement in their preambles:

*"Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant"*

Such references clearly indicate the responsibility of individuals to *promote* human rights, although it is not clear whether that includes legal obligations regarding human rights violations. Early efforts to abolish the slave trade, though not explicitly framed in the language of human rights, were directed at suppressing the practice of slavery in all its forms including when the enslavement of others was carried out by non-State actors. The very first United Nations-sponsored human rights treaty, the Convention on the Prevention and Punishment of the Crime of Genocide, clearly applied to "constitutionally responsible rulers, public officials or *private individuals*" (emphasis added). More recently, resolutions adopted on "Human rights and terrorism" in the Sub-Commission and Commission on Human Rights have expressed concern about the "gross violations of human rights perpetrated by terrorist groups".

63. Also relevant is the fact that certain acts committed by individuals can attract international criminal responsibility regardless of whether the individual acts on behalf of a State or not. These include acts which violate human rights law. The crime of genocide, noted above, is an example, but it is just one of several crimes against humanity which can be committed by non-State agents. [...] The discussion on the establishment of an International Criminal Court, due to be finalized at a diplomatic conference of plenipotentiaries in Rome in July 1998, includes the issue of identifying those crimes, including crimes against humanity and war crimes, which will be within the competence of the court. The results of the diplomatic conference will therefore be of particular interest and relevance to this question of determining the accountability of members of armed groups for violations of human rights law.
64. Clearly, given the divergent views on this issue, and its complexity, further study is needed. It seems beyond doubt that when an armed group kills civilians, arbitrarily expels people from their homes, or otherwise engages in acts of terror or indiscriminate violence, it raises an issue of potential international concern. This will be especially true in countries where the Government has lost the ability to apprehend and punish those who commit such acts. But very serious consequences could follow from a rushed effort to address such acts through the vehicle of existing international human rights law, not least that it might serve to legitimize actions taken against members of such groups in a manner that violates human rights. The development of international human rights law as a means of holding Governments accountable to a common standard has been one of the major achievements of the United Nations. The challenge is to sustain that achievement and at the same time ensure that our conception of human rights remains relevant to the world around us. [...]

### **C. Lack of specificity of existing human rights rules**

66. A third possible problem with the application of existing human rights standards to situations of internal violence concerns the lack of specificity of some of the most relevant rights and protections. One of the great advantages of international humanitarian law is that its provisions speak in a direct and detailed manner to the abuses associated with conflict, offering potential victims relatively clear guidance regarding their rights in specific circumstances. Just as importantly, the duties and responsibilities of armed forces are also spelt out in some detail. In contrast, many human rights guarantees which are of critical importance in situations of internal violence are stated in rather general terms. [...]

[...]

## **VI. INTERNATIONAL HUMANITARIAN LAW AND SITUATIONS OF INTERNAL VIOLENCE**

70. International humanitarian law covers a wide range of international treaties and agreements, some dating back over a hundred years. The most important

instruments are the Four Geneva Conventions for the protection of victims of war of 1949, and their two Additional Protocols. [...]

71. As indicated above, the argument concerning the problems of applying international humanitarian law to situations of internal violence rests essentially on two points: first, that there are difficulties in determining in which circumstances the treaty rules regulating internal conflicts become operable, and second, that even when these rules do apply they only provide a minimum of protection. In addition, neither argument can be properly examined without also considering the scope of customary law.
72. Before examining these issues, however, one important caveat should be made. Whatever problems there might be with the scope of the existing rules, it is always important to ask ourselves whether the continuing abuses result from legal ambiguities or rather reflect other realities. That is, it would be unwise and unhelpful to focus too heavily on examining the inadequacies of the existing law if that leads to the assumption that addressing these inadequacies will in itself be sufficient. The following discussion should be read with this in mind, and it is a point returned to in the concluding paragraphs of this report.

**A. Scope of application of international humanitarian law to situations of internal violence and conflict**

73. When the 1949 Geneva Conventions were drafted and adopted, it was possible to spell out in considerable detail rules regarding the care of the wounded, sick and shipwrecked, the treatment of prisoners of war, and even the protection of civilians in occupied territories. But these detailed rules were only applicable in wars between States. As regards “non-international armed conflicts”, only one article could be agreed. [...]
74. The importance of common article 3 should not be underestimated. It sets out in straightforward terms a number of important protections that *all* parties to a conflict must respect, and applies to any armed conflict “not of an international character”. It is now considered to be part of customary international law. However, common article 3 has two shortcomings. First, it provides only a minimum of protection; for example, it is silent on issues relating to freedom of movement, does not explicitly prohibit rape, and does not explicitly address matters relating to the methods and means of warfare. Second, while common article 3 does not define “armed conflicts not of an international character”, in practice this wording has left room for Governments to contest its applicability to situations of internal violence inside their countries.
75. However, efforts to improve upon the shortcomings of common article 3 have met with only limited success. The most significant of these efforts grew out of a resolution adopted at the International Conference on Human Rights, held in Tehran in 1968. Resolution XXIII specifically requested the General Assembly to invite the Secretary-General to study, *inter alia*:

"The need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in *all* armed conflicts ...". (emphasis added)

This request was based on the consideration that the 1949 Geneva Conventions were "not sufficiently broad in scope to cover all armed conflicts". The studies subsequently prepared by the Secretary-General, in close consultation with the ICRC, recommended that, among other things, efforts be undertaken to considerably expand the scope of protection in internal armed conflicts. [...]

76. Protocol II sets out numerous important guarantees for the protection of those affected by non-international armed conflicts. It expands the protection offered by common article 3 to include prohibitions on collective punishments, violence to health and physical or mental well-being, acts of terrorism, rape, enforced prostitution and indecent assault, slavery and pillage. In addition, it includes provisions for the protection of children, for the protection and rights of those detained for reasons related to the conflict, and provides fair trial guarantees for those prosecuted for criminal offences related to the conflict. There are also articles dealing with the protection and care of the wounded, sick and shipwrecked and the protection of medical and religious personnel. Protocol II also prohibits attacks on the civilian population, the use of starvation as a method of war, and the arbitrary displacement of the civilian population.
77. The protections offered by Protocol II are a considerable improvement on common article 3. However, measured against the rules for inter-State wars, they are still quite basic. The most serious omissions concern the many specific protections for civilians against the effects of hostilities found in Protocol I. For example, Protocol I prohibits direct *and* indiscriminate attacks on civilians, including providing examples of specific types of prohibited indiscriminate attacks; it places fairly detailed obligations on armed forces regarding precautions to be taken to ensure the protection of the civilian population and civilian objects; and it establishes rules regarding non-defended localities and demilitarized zones. Protocol II provides only a few general rules on these matters.
78. However, the bigger difficulty with Protocol II is that the protections it offers only apply in internal conflicts meeting a certain threshold of intensity and nature. Under article 1 (1), the Protocol applies to armed conflicts:

"... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

And article 1 (2) specifically excludes from the scope of the Protocol:

"... situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."



79. This two-fold test would appear to limit the application of Protocol II to situations at or near the level of a full-scale civil war, and certainly few Governments are prepared to admit the application of the Protocol to situations of lesser intensity. Since neither the Protocol nor any other agreement allows for an impartial outside body to decide on whether the criteria are met to apply the Protocol, it is largely left to the goodwill of the Government concerned. This goodwill is often lacking – admitting the application of the Protocol is seen as conferring international legitimacy on the opposition forces (even though such an interpretation is specifically ruled out by another provision of the Protocol), and/or an implicit admission on the Government's part of its lack of effective control in the country.
80. The result is that there are many situations of internal violence – including ones leading to thousands of deaths – where there are no clear treaty rules in place to regulate important aspects of the behaviour of the armed forces and armed groups involved. It is revealing to note that there are occasions where the Security Council has determined that an internal situation amounts to a threat to international peace and security (so as to initiate action under the Charter), but where it is unclear as to whether Protocol II would apply.
81. Clearly, from the point of view of the actual or potential victims, this is an unsatisfactory state of affairs. Civilians and civilian objects should be clearly protected against direct and indiscriminate attack in all circumstances. Weapons or methods of warfare the use of which is prohibited in international armed conflicts should also generally be prohibited in situations of internal violence and conflict. Likewise, obligations on armed forces to take precautions in attack so as to reduce the risk of civilian casualties, and detailed rules regarding facilitating and protecting the work of humanitarian agencies providing relief to the civilian population should apply regardless of the nature or scale of the conflict. It seems illogical, and indeed morally indefensible, to suggest that armed forces are free to engage in behaviour against citizens of their own country which would be outlawed were they involved in military operations abroad. Likewise, why should armed groups be held internationally accountable for arbitrarily expelling people from their homes, for example, only when the conflict they are engaged in meets the high threshold established in Protocol II? [...]
83. The key question [...] is whether it is feasible to further develop the rules regulating internal violence in such a way as to ensure protection to all who need it whenever they need it. Given past difficulties, it would seem unrealistic to assume that the problems can be overcome by redrafting or updating existing treaties. Moreover, in this regard it is important to point out the importance of customary rules of international humanitarian law rules separate from treaty law and which are of cardinal importance when it comes to overcoming the problems of applying international humanitarian law in situations of internal violence. As discussed in the next section, there are a number of developments regarding the identification of customary rules which could assist in identifying fundamental standards of humanity.

## **B. Customary international humanitarian law**

84. The above analysis has been restricted to existing rules found in international treaties. It needs to be stressed that separate from treaty rules, internal armed conflicts are still regulated by the rules of customary international law. As far back as 1907, States have seen fit when drafting international agreements concerning the law of war to explicitly indicate that in situations not covered by treaty rules, both combatants and civilians:

*"... remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."*

This clause, known as the Martens clause, is found also in the Preamble to Protocol II:

*"Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience."*

85. Like common article 3, the importance of the Martens clause should not be underestimated. It shows a concrete recognition and acceptance by States that rules of customary international law above and beyond existing treaty rules can apply to fighting inside countries. To date, the problem has been in determining, both in general and as regards any specific case, what is prohibited by the "principles of humanity and the dictates of the public conscience". Does this mean, for example, that weapons the use of which is prohibited in international conflicts cannot generally be used in internal conflicts? Does it mean that prohibitions on arbitrary displacement and on the use of starvation as a method of war apply at all times, and not just in internal conflicts meeting the high threshold of Protocol II? Or does it also mean that indiscriminate attacks are prohibited at all times and not just in international conflicts? [...]

## **VII. ADVANTAGES AND DISADVANTAGES OF IDENTIFYING FUNDAMENTAL STANDARDS OF HUMANITY**

89. The question of weighing the desirability of a statement of fundamental standards of humanity turns on a full analysis of whether existing standards are sufficient. As set out above, there are some problems with the scope and application of existing law, but more analysis is needed to identify precisely where further elaboration and clarification are needed, and to see how developments elsewhere assist in that regard.
90. Separate from the legal point, however, a key issue is the more practical point as to the impact a statement of fundamental standards of humanity would have on actually reducing or preventing abuses. In other words, such a statement should not be viewed as an end in itself.
91. Insofar as there is confusion about the application of existing rules, a statement of fundamental standards of humanity would provide a useful reference for those

advocating greater respect for human rights in situations of internal violence. This applies especially to those engaged in education and training programmes with members of armed forces. It is also likely that a statement of fundamental standards of humanity would be useful to the work of humanitarian workers involved in situations of internal violence.

92. As regards education or training programmes, the view has been expressed that a statement of fundamental standards of humanity would be an extremely useful document for explaining the basic principles of protecting human rights in situations of internal violence. The idea is that if this statement set out principles in a simple and straightforward manner, it would facilitate the process of making these principles known, rather than trying to explain all the complexities of existing law. This point might be of particular relevance as regards seeking to influence the behaviour of armed groups.
93. However, to ensure the rules are not only known but also respected is the key challenge. It seems likely that a statement of principles would depend on existing bodies for its implementation. [...]
94. The potential disadvantages of identifying fundamental standards of humanity centre on the fear that a statement of such standards might undermine existing international standards. This fear is based on a number of factors. In particular, because the original proposal involved identifying a set of *minimum* standards there was the possibility that, by implication, rights not included would be somehow diminished. Also, there is always the risk that when any new text is agreed upon it might fall below or somehow undermine existing rules. On the other hand, it is possible to guard against such results or interpretations through including specific clauses in the new text, as has been done in numerous human rights instruments. Also, there are other examples where the development of codes of conduct or statements of principles have been agreed to which do not undermine, but rather support, treaty rules. If work does proceed on identifying fundamental standards of humanity, there will be a need to ensure it does not pose a risk to existing treaty law. [...]

## VIII. WHAT ARE THE FUNDAMENTAL STANDARDS OF HUMANITY?

[...]

97. [...] [T]o recognize the complexity of the task is not to cast doubt on its usefulness. Certainly, developing a compilation of existing norms, whether treaty based or customary, that apply in situations of internal violence would be a worthwhile undertaking. It would be the best means of reaching definitive conclusions on the adequacy of the existing standards. But, as indicated by the discussion above, given relevant ongoing developments in both human rights law (as regards the elaboration of crimes against humanity) and international humanitarian law (as regards the identification of customary rules and the international criminalization of some acts), it would seem that coming up with a conclusive and authoritative list at the present time would be premature. Still, a number of points can be made.

98. First, it is clear that to effectively address human rights abuses in situations of internal violence, at a minimum standard dealing with the abuses set out in section II.B would need to be included, namely: deprivation of the right to life; torture and cruel, inhuman or degrading treatment; freedom of movement; the rights of the child; women's human rights; arbitrary deprivation of liberty and due process; and protection of the civilian population. Also, the standards would need to be stated in a way that was specific enough to be meaningful in actual situations, and yet at the same time be clear and understandable.
99. Second, the need to find rules *common* to both branches of relevant law points to one of the most interesting aspects of the whole problem – namely, the need, where appropriate, to consider a fusion of the rules. For too long, these two branches of law have operated in distinct spheres, even though both take as their starting point concern for human dignity. Of course, in some areas there are good reasons to maintain the distinctness – particularly as regards the rules regulating international armed conflicts, or internal armed conflicts of the nature of a civil war. But in situations of internal violence where there is considerable overlap and complementarity – this distinctness can be counter-productive. One must be careful not to muddle existing mandates, or to undermine existing rules, but within these constraints there is still considerable scope for building a common framework of protection.

## **IX. NATURE OF A STATEMENT OF FUNDAMENTAL STANDARDS OF HUMANITY**

100. This report has left open the question of the form an eventual statement of fundamental standards of humanity might take. The Sub-Commission resolution in 1994 which forwarded the Turku/Åbo Declaration on Minimum Humanitarian Standards to the Commission on Human Rights recommended its "... further elaboration and eventual adoption". To date, the resolutions adopted by the Commission have only recognized "the desirability of identifying principles", without indicating in what manner such principles might be agreed upon and adopted.
101. Previous sets of principles and standards in the human rights field have normally been developed in working groups established by the Commission on Human Rights, and then forwarded to the General Assembly for adoption through a General Assembly resolution. However, there might be other options for developing a statement of fundamental standards of humanity. Given the close relationship with issues of international humanitarian law and the ICRC's acknowledged expertise in this field, there is no doubt that the ICRC should be closely involved in any efforts to develop these standards. [...]

## **X. CONCLUSIONS AND SUGGESTIONS FOR FURTHER STUDY**

103. The aim of this report has been to set out the various issues involved in the possible identification of fundamental standards of humanity. Where possible, tentative conclusions on certain points have been put forward; elsewhere, issues have been identified as deserving of further consultation and analysis.

104. Of necessity, an analysis of whether an elaboration of standards is required must consider the legal questions involved. To the non-lawyer this exercise might seem a bit abstract. In concluding, therefore, it is appropriate first to reiterate and emphasize the starting point for the discussion, namely the horrific impact on the lives of millions of individuals of the many situations of internal violence which continue to plague our world. Most of the country-specific resolutions adopted by the Commission on Human Rights concern countries in which there is some degree of internal violence, and such countries figure prominently also in the reports of the Commission's various thematic rapporteurs and working groups. There is clearly a close relationship between the existence of these conflicts and human rights abuse. It is therefore timely and appropriate to look again at the tools we have at hand to prevent these abuses.
105. One of these tools is international law, and as regards internal violence we have legal standards from both human rights and humanitarian law. The picture that emerges from this initial report is that there are some problems with both branches of law. The extent to which international human rights law creates obligations on non-State armed groups is unclear, and it can be argued that some of the most important rights – for example, the right to life as set out in international instruments lack the specificity to give them real impact in internal conflicts. On the other hand, international humanitarian law can be applied to non-State armed groups, and its rules are specific and detailed, but its application in many internal situations is hampered by troublesome threshold tests and the absence – in the treaty law – of some important protections.
106. Insofar as the development of fundamental standards of humanity can overcome these problems, it is an initiative that deserves serious attention and support. Clearly, however, the initiative needs to proceed with close attention to ongoing developments in both branches of law. Further study and activity might, among other issues, focus on the following:
- (a) Examining the international legal accountability of non-State armed groups for abuses, including views as to whether a statement of fundamental standards of humanity would be an appropriate means of holding these groups accountable;
  - (b) Examining how relevant provisions of human rights law could be made more specific so as to ensure respect for them in situations of internal violence, and considering whether this could be accomplished through a statement of fundamental standards of humanity;
  - (c) Following closely developments regarding the identification of crimes against humanity and customary rules of international humanitarian law relevant to the protection of human dignity in situations of internal violence, and assessing how these developments relate to the identification of fundamental standards of humanity;

- (d) Soliciting views from Governments and other relevant actors concerning the issues set out in this report, and engaging in consultations for this purpose. [...]

**Document No. 56, UN, Guiding Principles on Internal Displacement**

[Source: Report of the Representative of the Secretary-General on Internally Displaced persons: Guidelines of Principles, UN Doc. E/CN.4/1998/53/Add.2 (May 1998); available on <http://www.ohchr.org>]

**Guiding Principles on Internal Displacement****INTRODUCTORY NOTE TO THE GUIDING PRINCIPLES**

1. Internal displacement, affecting some 25 million people worldwide, has become increasingly recognized as one of the most tragic phenomena of the contemporary world. Often the consequence of traumatic experiences with violent conflicts, gross violations of human rights and related causes in which discrimination features significantly, displacement nearly always generates conditions of severe hardship and suffering for the affected populations. It breaks up families, cuts social and cultural ties, terminates dependable employment relationships, disrupts educational opportunities, denies access to such vital necessities as food, shelter and medicine, and exposes innocent persons to such acts of violence as attacks on camps, disappearances and rape. Whether they cluster in camps, escape into the countryside to hide from potential sources of persecution and violence or submerge into the community of the equally poor and dispossessed, the internally displaced are among the most vulnerable populations, desperately in need of protection and assistance.
2. In recent years, the international community has become increasingly aware of the plight of the internally displaced and is taking steps to address their needs. In 1992, at the request of the Commission on Human Rights, the Secretary-General of the United Nations appointed a Representative on internally displaced persons to study the causes and consequences of internal displacement, the status of the internally displaced in international law, the extent of the coverage accorded them within existing international institutional arrangements and ways in which their protection and assistance could be improved, including through dialogue with Governments and other pertinent actors.
3. Accordingly, the Representative of the Secretary-General has focused the activities of his mandate on developing appropriate normative and institutional frameworks for the protection and assistance of the internally displaced, undertaking country missions in an ongoing dialogue with Governments and others concerned, and promoting a systemic international response to the plight of internally displaced populations.
4. Since the United Nations initially drew international attention to the crisis of internal displacement, many organizations, intergovernmental and non-governmental, have broadened their mandates or scope of activities to address more effectively the needs of the internally displaced. Governments have become more responsive by acknowledging their primary responsibility of protecting and assisting affected populations under their control, and when they cannot discharge that

responsibility for lack of capacity, they are becoming less reticent to seek assistance from the international community. On the other hand, it is fair to say that the international community is more inclined than it is prepared, both normatively and institutionally, to respond effectively to the phenomenon of internal displacement.

5. One area in which the mandate of the Secretary-General's Representative has made significant progress has been in the development of a normative framework relating to all aspects of internal displacement. Working in close collaboration with a team of international legal experts, the Representative prepared a "Compilation and Analysis of Legal Norms" relevant to the needs and rights of the internally displaced and to the corresponding duties and obligations of States and the international community for their protection and assistance. The Compilation and Analysis was submitted to the Commission on Human Rights by the Representative of the Secretary-General in 1996 (E/CN.4/1996/52/Add.2).
6. It is important to note that the Office of the United Nations High Commissioner for Refugees (UNHCR) has developed a manual, based on the Compilation and Analysis, for the practical use of its staff, especially in field operations. There are also indications that other organizations and agencies will follow the example of UNHCR in making use of the document.
7. The Compilation and Analysis examines international human rights law, humanitarian law, and refugee law by analogy, and concludes that while existing law provides substantial coverage for the internally displaced, there are significant areas in which it fails to provide an adequate basis for their protection and assistance. Besides, the provisions of existing law are dispersed in a wide variety of international instruments which make them too diffused and unfocused to be effective in providing adequate protection and assistance for the internally displaced.
8. In response to the Compilation and Analysis and to remedy the deficiencies in existing law, the Commission on Human Rights and the General Assembly requested the Representative of the Secretary-General to prepare an appropriate framework for the protection and assistance of the internally displaced (see resolutions 50/195 of 22 December 1995 and 1996/52 of 19 April 1996, respectively). Accordingly, and in continued collaboration with the team of experts that had prepared the Compilation and Analysis, the drafting of guiding principles was undertaken. The Commission on Human Rights, at its fifty-third session in April 1997, adopted resolution 1997/39 in which it took note of the preparations for guiding principles and requested the Representative to report thereon to the Commission at its fifty-fourth session. The Guiding Principles on Internal Displacement, completed in 1998, are annexed to the present document.
9. The purpose of the Guiding Principles is to address the specific needs of internally displaced persons worldwide by identifying rights and guarantees relevant to their protection. The Principles reflect and are consistent with international human rights law and international humanitarian law. They restate the relevant principles applicable to the internally displaced, which are now widely spread out



in existing instruments, clarify any grey areas that might exist, and address the gaps identified in the Compilation and Analysis. They apply to the different phases of displacement, providing protection against arbitrary displacement, access to protection and assistance during displacement and guarantees during return or alternative settlement and reintegration. [...]

11. The Guiding Principles will enable the Representative to monitor more effectively situations of displacement and to dialogue with Governments and all pertinent actors on behalf of the internally displaced; to invite States to apply the Principles in providing protection, assistance, reintegration and development support for them; and to mobilize response by international agencies, regional intergovernmental and non-governmental organizations on the basis of the Principles. The Guiding Principles are therefore intended to be a persuasive statement that should provide not only practical guidance, but also an instrument for public policy education and consciousness-raising. By the same token, they have the potential to perform a preventive function in the urgently needed response to the global crisis of internal displacement.
12. The preparation of the Guiding Principles has benefited from the work, experience and support of many institutions and individuals. [...]

[...]

## **ANNEX**

### **GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT**

#### **INTRODUCTION: SCOPE AND PURPOSE**

1. These Guiding Principles address the specific needs of internally displaced persons worldwide. They identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration.
2. For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.
3. These Principles reflect and are consistent with international human rights law and international humanitarian law. They provide guidance to:
  - (a) The Representative of the Secretary-General on internally displaced persons in carrying out his mandate;
  - (b) States when faced with the phenomenon of internal displacement;

- (c) All other authorities, groups and persons in their relations with internally displaced persons; and
  - (d) Intergovernmental and non-governmental organizations when addressing internal displacement.
4. These Guiding Principles should be disseminated and applied as widely as possible.

## **SECTION I - GENERAL PRINCIPLES**

### **Principle 1**

1. Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.
2. These Principles are without prejudice to individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity and war crimes.

### **Principle 2**

1. These Principles shall be observed by all authorities, groups and persons irrespective of their legal status and applied without any adverse distinction. The observance of these Principles shall not affect the legal status of any authorities, groups or persons involved.
2. These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law. In particular, these Principles are without prejudice to the right to seek and enjoy asylum in other countries.

### **Principle 3**

1. National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.
2. Internally displaced persons have the right to request and to receive protection and humanitarian assistance from these authorities. They shall not be persecuted or punished for making such a request.

### **Principle 4**

1. These Principles shall be applied without discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.

2. Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.

## **SECTION II - PRINCIPLES RELATING TO PROTECTION FROM DISPLACEMENT**

### **Principle 5**

All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.

### **Principle 6**

1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
2. The prohibition of arbitrary displacement includes displacement:
  - (a) When it is based on policies of apartheid, “ethnic cleansing” or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;
  - (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
  - (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests;
  - (d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and
  - (e) When it is used as a collective punishment.
3. Displacement shall last no longer than required by the circumstances.

### **Principle 7**

1. Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.
2. The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.

3. If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with:
- (a) A specific decision shall be taken by a State authority empowered by law to order such measures;
  - (b) Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;
  - (c) The free and informed consent of those to be displaced shall be sought;
  - (d) The authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation;
  - (e) Law enforcement measures, where required, shall be carried out by competent legal authorities; and
  - (f) The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.

#### **Principle 8**

Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected.

#### **Principle 9**

States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.

### **SECTION III - PRINCIPLES RELATING TO PROTECTION DURING DISPLACEMENT**

#### **Principle 10**

1. Every human being has the inherent right to life which shall be protected by law. No one shall be arbitrarily deprived of his or her life. Internally displaced persons shall be protected in particular against:
- (a) Genocide;
  - (b) Murder;
  - (c) Summary or arbitrary executions; and
  - (d) Enforced disappearances, including abduction or unacknowledged detention, threatening or resulting in death.

Threats and incitement to commit any of the foregoing acts shall be prohibited.

2. Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances. Internally displaced persons shall be protected, in particular, against:

- (a) Direct or indiscriminate attacks or other acts of violence, including the creation of areas wherein attacks on civilians are permitted;
- (b) Starvation as a method of combat;
- (c) Their use to shield military objectives from attack or to shield, favour or impede military operations;
- (d) Attacks against their camps or settlements; and
- (e) The use of anti-personnel landmines.

**Principle 11**

1. Every human being has the right to dignity and physical, mental and moral integrity.
2. Internally displaced persons, whether or not their liberty has been restricted, shall be protected in particular against:
  - (a) Rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence, forced prostitution and any form of indecent assault;
  - (b) Slavery or any contemporary form of slavery, such as sale into marriage, sexual exploitation, or forced labour of children; and
  - (c) Acts of violence intended to spread terror among internally displaced persons.Threats and incitement to commit any of the foregoing acts shall be prohibited.

**Principle 12**

1. Every human being has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.
2. To give effect to this right for internally displaced persons, they shall not be interned in or confined to a camp. If in exceptional circumstances such internment or confinement is absolutely necessary, it shall not last longer than required by the circumstances.
3. Internally displaced persons shall be protected from discriminatory arrest and detention as a result of their displacement.
4. In no case shall internally displaced persons be taken hostage.

**Principle 13**

1. In no circumstances shall displaced children be recruited nor be required or permitted to take part in hostilities.
2. Internally displaced persons shall be protected against discriminatory practices of recruitment into any armed forces or groups as a result of their displacement. In particular any cruel, inhuman or degrading practices that compel compliance or punish non-compliance with recruitment are prohibited in all circumstances.

**Principle 14**

1. Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.
2. In particular, internally displaced persons have the right to move freely in and out of camps or other settlements.

**Principle 15**

Internally displaced persons have:

- (a) The right to seek safety in another part of the country;
- (b) The right to leave their country;
- (c) The right to seek asylum in another country; and
- (d) The right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

**Principle 16**

1. All internally displaced persons have the right to know the fate and whereabouts of missing relatives.
2. The authorities concerned shall endeavour to establish the fate and whereabouts of internally displaced persons reported missing, and cooperate with relevant international organizations engaged in this task. They shall inform the next of kin on the progress of the investigation and notify them of any result.
3. The authorities concerned shall endeavour to collect and identify the mortal remains of those deceased, prevent their despoliation or mutilation, and facilitate the return of those remains to the next of kin or dispose of them respectfully.
4. Grave sites of internally displaced persons should be protected and respected in all circumstances. Internally displaced persons should have the right of access to the grave sites of their deceased relatives.

**Principle 17**

1. Every human being has the right to respect of his or her family life.
2. To give effect to this right for internally displaced persons, family members who wish to remain together shall be allowed to do so.
3. Families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved. The responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification.
4. Members of internally displaced families whose personal liberty has been restricted by internment or confinement in camps shall have the right to remain together.

**Principle 18**

1. All internally displaced persons have the right to an adequate standard of living.
2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:
  - (a) Essential food and potable water;
  - (b) Basic shelter and housing;
  - (c) Appropriate clothing; and
  - (d) Essential medical services and sanitation.
3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.

**Principle 19**

1. All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.
2. Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counselling for victims of sexual and other abuses.
3. Special attention should also be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.

**Principle 20**

1. Every human being has the right to recognition everywhere as a person before the law.
2. To give effect to this right for internally displaced persons, the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents.
3. Women and men shall have equal rights to obtain such necessary documents and shall have the right to have such documentation issued in their own names.

**Principle 21**

1. No one shall be arbitrarily deprived of property and possessions.

2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:
  - (a) Pillage;
  - (b) Direct or indiscriminate attacks or other acts of violence;
  - (c) Being used to shield military operations or objectives;
  - (d) Being made the object of reprisal; and
  - (e) Being destroyed or appropriated as a form of collective punishment.
3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.

#### **Principle 22**

1. Internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of the following rights:
  - (a) The rights to freedom of thought, conscience, religion or belief, opinion and expression;
  - (b) The right to seek freely opportunities for employment and to participate in economic activities;
  - (c) The right to associate freely and participate equally in community affairs;
  - (d) The right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right; and
  - (e) The right to communicate in a language they understand.

#### **Principle 23**

1. Every human being has the right to education.
2. To give effect to this right for internally displaced persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion.
3. Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes.
4. Education and training facilities shall be made available to internally displaced persons, in particular adolescents and women, whether or not living in camps, as soon as conditions permit.



**SECTION IV - PRINCIPLES RELATING TO HUMANITARIAN ASSISTANCE****Principle 24**

1. All humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination.
2. Humanitarian assistance to internally displaced persons shall not be diverted, in particular for political or military reasons.

**Principle 25**

1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
2. International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.
3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

**Principle 26**

Persons engaged in humanitarian assistance, their transport and supplies shall be respected and protected. They shall not be the object of attack or other acts of violence.

**Principle 27**

1. International humanitarian organizations and other appropriate actors when providing assistance should give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard. In so doing, these organizations and actors should respect relevant international standards and codes of conduct.
2. The preceding paragraph is without prejudice to the protection responsibilities of international organizations mandated for this purpose, whose services may be offered or requested by States.

**SECTION V - PRINCIPLES RELATING TO RETURN,  
RESETTLEMENT AND REINTEGRATION****Principle 28**

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities

shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.

2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

**Principle 29**

1. Internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.
2. Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

**Principle 30**

All authorities concerned shall grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandates, rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration.

**Case No. 57, UN, Guidelines for UN Forces****A. Press Release**

[Source: *ICRC News*, 96/19, May 15, 1996]

**ICRC-UN, Guidelines for UN Forces**

On 10 May in New York ICRC President Cornelio Sommaruga handed over to UN Secretary-General Boutros Boutros-Ghali a document entitled Guidelines for UN forces regarding respect for international humanitarian law. The document specifies the principles and rules of the 1949 Geneva Conventions and their 1977 Additional Protocols applicable to UN forces deployed in areas affected by armed conflicts. Until now the situation was ill-defined since it is the States, not the UN, that are party to the humanitarian law treaties. Thanks to the new guidelines, it should be possible in future to ensure that UN military operations do not have adverse consequences for war victims or certain categories of prisoners.

The guidelines, which are the result of a series of meetings of legal experts organized by the ICRC, were drafted in close cooperation with the UN services concerned and must be observed by all UN contingents, whatever the mandate involved. Their main purpose, as that of international humanitarian law as a whole, is to preserve human dignity.

The rules applicable to UN forces are essentially those prohibiting attacks on civilian property, those prohibiting or restricting certain means or methods of warfare and those stipulating that only the urgency of a wounded person's medical condition should determine the order in which he is treated.

The guidelines also stress that in all circumstances the ICRC must be notified without delay of all persons captured or detained by UN forces so that those persons can be visited by ICRC delegates and their families informed of their whereabouts.

**B. Guidelines for UN Forces Regarding Respect for International Humanitarian Law**

[Source: UN Doc. ST/SGB/1999/13 (August 6, 1999)]

**Secretary-General's Bulletin****Observance by United Nations forces of international humanitarian law**

The Secretary-General, for the purpose of setting out fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control, promulgates the following:

## **Section 1: Field of application**

- 1.1 The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.
- 1.2 The promulgation of this bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel [See **Case No. 22**, Convention on the Safety of UN Personnel] or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict.

## **Section 2: Application of national law**

The present provisions do not constitute an exhaustive list of principles and rules of international humanitarian law binding upon military personnel, and do not prejudice the application thereof, nor do they replace the national laws by which military personnel remain bound throughout the operation.

## **Section 3: Status-of-forces agreement**

In the status-of-forces agreement concluded between the United Nations and a State in whose territory a United Nations force is deployed, the United Nations undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel. The United Nations also undertakes to ensure that members of the military personnel of the force are fully acquainted with the principles and rules of those international instruments. The obligation to respect the said principles and rules is applicable to United Nations forces even in the absence of a status-of-forces agreement.

## **Section 4: Violations of international humanitarian law**

In case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts.

## **Section 5: Protection of the civilian population**

- 5.1 The United Nations force shall make a clear distinction at all times between civilians and combatants and between civilian objects and military objectives. Military operations shall be directed only against combatants and military objectives. Attacks on civilians or civilian objects are prohibited.
- 5.2 Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

- 5.3 The United Nations force shall take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians or damage to civilian property.
- 5.4 In its area of operation, the United Nations force shall avoid, to the extent feasible, locating military objectives within or near densely populated areas, and take all necessary precautions to protect the civilian population, individual civilians and civilian objects against the dangers resulting from military operations. Military installations and equipment of peacekeeping operations, as such, shall not be considered military objectives.
- 5.5 The United Nations force is prohibited from launching operations of a nature likely to strike military objectives and civilians in an indiscriminate manner, as well as operations that may be expected to cause incidental loss of life among the civilian population or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated.
- 5.6 The United Nations force shall not engage in reprisals against civilians or civilian objects.

#### **Section 6: Means and methods of combat**

- 6.1 The right of the United Nations force to choose methods and means of combat is not unlimited.
- 6.2 The United Nations force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of international humanitarian law. These include, in particular, the prohibition on the use of asphyxiating, poisonous or other gases and biological methods of warfare; bullets which explode, expand or flatten easily in the human body; and certain explosive projectiles. The use of certain conventional weapons, such as non-detectable fragments, anti-personnel mines, booby traps and incendiary weapons, is prohibited.
- 6.3 The United Nations force is prohibited from employing methods of warfare which may cause superfluous injury or unnecessary suffering, or which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment.
- 6.4 The United Nations force is prohibited from using weapons or methods of combat of a nature to cause unnecessary suffering.
- 6.5 It is forbidden to order that there shall be no survivors.
- 6.6 The United Nations force is prohibited from attacking monuments of art, architecture or history, archaeological sites, works of art, places of worship and museums and libraries which constitute the cultural or spiritual heritage of peoples. In its area of operation, the United Nations force shall not use such cultural property or their immediate surroundings for purposes which might

expose them to destruction or damage. Theft, pillage, misappropriation and any act of vandalism directed against cultural property is strictly prohibited.

- 6.7 The United Nations force is prohibited from attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population, such as foodstuff, crops, livestock and drinking-water installations and supplies.
- 6.8 The United Nations force shall not make installations containing dangerous forces, namely dams, dikes and nuclear electrical generating stations, the object of military operations if such operations may cause the release of dangerous forces and consequent severe losses among the civilian population.
- 6.9 The United Nations force shall not engage in reprisals against objects and installations protected under this section.

### **Section 7: Treatment of civilians and persons *hors de combat***

- 7.1 Persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reason of sickness, wounds or detention, shall, in all circumstances, be treated humanely and without any adverse distinction based on race, sex, religious convictions or any other ground. They shall be accorded full respect for their person, honour and religious and other convictions.
- 7.2 The following acts against any of the persons mentioned in section 7.1 are prohibited at any time and in any place: violence to life or physical integrity; murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; collective punishment; reprisals; the taking of hostages; rape; enforced prostitution; any form of sexual assault and humiliation and degrading treatment; enslavement; and pillage.
- 7.3 Women shall be especially protected against any attack, in particular against rape, enforced prostitution or any other form of indecent assault.
- 7.4 Children shall be the object of special respect and shall be protected against any form of indecent assault.

### **Section 8: Treatment of detained persons**

The United Nations force shall treat with humanity and respect for their dignity detained members of the armed forces and other persons who no longer take part in military operations by reason of detention. Without prejudice to their legal status, they shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949, as may be applicable to them *mutatis mutandis*. In particular:

- (a) Their capture and detention shall be notified without delay to the party on which they depend and to the Central Tracing Agency of the International Committee of the Red Cross (ICRC), in particular in order to inform their families;

- (b) They shall be held in secure and safe premises which provide all possible safeguards of hygiene and health, and shall not be detained in areas exposed to the dangers of the combat zone;
- (c) They shall be entitled to receive food and clothing, hygiene and medical attention;
- (d) They shall under no circumstances be subjected to any form of torture or ill-treatment;
- (e) Women whose liberty has been restricted shall be held in quarters separated from men's quarters, and shall be under the immediate supervision of women;
- (f) In cases where children who have not attained the age of sixteen years take a direct part in hostilities and are arrested, detained or interned by the United Nations force, they shall continue to benefit from special protection. In particular, they shall be held in quarters separate from the quarters of adults, except when accommodated with their families;
- (g) ICRC's right to visit prisoners and detained persons shall be respected and guaranteed.

### **Section 9: Protection of the wounded, the sick, and medical and relief personnel**

- 9.1 Members of the armed forces and other persons in the power of the United Nations force who are wounded or sick shall be respected and protected in all circumstances. They shall be treated humanely and receive the medical care and attention required by their condition, without adverse distinction. Only urgent medical reasons will authorize priority in the order of treatment to be administered.
- 9.2 Whenever circumstances permit, a suspension of fire shall be arranged, or other local arrangements made, to permit the search for and identification of the wounded, the sick and the dead left on the battlefield and allow for their collection, removal, exchange and transport.
- 9.3 The United Nations force shall not attack medical establishments or mobile medical units. These shall at all times be respected and protected, unless they are used, outside their humanitarian functions, to attack or otherwise commit harmful acts against the United Nations force.
- 9.4 The United Nations force shall in all circumstances respect and protect medical personnel exclusively engaged in the search for, transport or treatment of the wounded or sick, as well as religious personnel.
- 9.5 The United Nations force shall respect and protect transports of wounded and sick or medical equipment in the same way as mobile medical units.
- 9.6 The United Nations force shall not engage in reprisals against the wounded, the sick or the personnel, establishments and equipment protected under this section.
- 9.7 The United Nations force shall in all circumstances respect the Red Cross and Red Crescent emblems. These emblems may not be employed except to indicate or to

protect medical units and medical establishments, personnel and material. Any misuse of the Red Cross or Red Crescent emblems is prohibited.

- 9.8 The United Nations force shall respect the right of the families to know about the fate of their sick, wounded and deceased relatives. To this end, the force shall facilitate the work of the ICRC Central Tracing Agency.
- 9.9 The United Nations force shall facilitate the work of relief operations which are humanitarian and impartial in character and conducted without any adverse distinction, and shall respect personnel, vehicles and premises involved in such operations.

## Section 10: Entry into force

The present bulletin shall enter into force on 12 August 1999.

*(Signed)*

**Kofi A. Annan**

Secretary-General

## DISCUSSION

1. a. What is the value of these Guidelines? Are they binding? Do you think that the fact that UN forces are bound by IHL has become customary law?
- b. Before the Guidelines came into force, were the UN forces involved in an armed conflict allowed not to respect IHL? Are UN forces involved in an armed conflict now bound by IHL? By all of IHL? By customary IHL? In which circumstances? By which rules?
- c. As UN forces are military personnel placed at the UN's disposal by contributing States that are party to the Geneva Conventions, are these forces not already bound by IHL?
2. Were the Guidelines the only possibility for IHL to apply to UN forces? Could the UN become a party to the Geneva Conventions and the Additional Protocols? Can the UN conceivably be a party to an international armed conflict in the sense of Art. 2 common to the Conventions?
3. (*Guidelines, Section 1*) Who do the Guidelines apply to? Do they apply to all UN forces? Do they apply to UN forces as soon as they are deployed in the context of an armed conflict? Only when they become party to the conflict?
4. a. (*Guidelines, Section 2*) Are UN forces obliged to respect only the provisions listed in the Guidelines? Or are they bound by all the provisions of IHL?
- b. Are all rules of the Guidelines customary IHL? Do the Guidelines contain all rules of customary IHL? Are UN forces bound by customary IHL independently of the Guidelines?
- c. Which rules of the IHL of international armed conflicts do not appear in the Guidelines? Only those that the UN, not being a State, not having legislation, and not having a territory, by definition cannot respect?
- d. Are UN forces never bound by the IHL of military occupation? By the rules of Convention IV applicable to aliens on the territory of a State?



5.
  - a. (*Guidelines, Section 4*) May members of UN forces be prosecuted only if they violate the provisions listed in the Guidelines? Or may they be prosecuted for any violation of IHL? Does not this mean that they are bound by all the rules of IHL?
  - b. (*Guidelines, Section 4*) May members of UN forces be prosecuted only in their national courts? Could any international or regional tribunal have jurisdiction to prosecute violations of IHL committed by UN forces?
6. Do the Guidelines distinguish between international and non-international armed conflict? Does this mean that UN forces must respect the provisions listed in the Guidelines regardless of the law applicable in each type of conflict? Are all the listed provisions applicable in non-international armed conflict?
7.
  - a. Do the Guidelines clarify the status of UN forces involved in an armed conflict? Should they always be considered as civilians? Should they always be considered as combatants? May their status vary according to the circumstances?
  - b. As long as members of UN forces are civilians [*see Case No. 23, The International Criminal Court [A. The Statute], Art. 8(2)(b)(iii) and (e)(iii)*], are they bound by the Guidelines? By IHL? Are only combatants bound by IHL?
  - c. If a member of UN forces is attacked and reacts by attacking those who attack him, is he a combatant? Is he a civilian? Is he a civilian directly participating in hostilities, losing protection against attacks? What if the member of the UN forces uses force first? In which of these circumstances do the Guidelines apply? [*See Document No. 51, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities*]
8. (*Guidelines, Section 8*)
  - a. Do UN military personnel captured by armed forces of a State during a hostile encounter have prisoner-of-war status? Do members of the armed forces of a State captured by UN military forces during a hostile encounter have prisoner-of-war status? Is it conceivable that the answers to these two questions differ? (GC III, Arts 2 and 4)
  - b. Does Section 8 mean that all members of enemy forces captured by UN forces must be treated in accordance with the relevant provisions of GC III? Or at least with the provisions listed in Section 8? Even if they are members of an organized armed group captured during a non-international armed conflict? Does this preclude their punishment for having attacked members of the UN forces? Does this preclude their transfer to the host government? (GC III, Art. 12)
  - c. If members of an organized armed group capture UN forces in the context of a non-international armed conflict, must they treat the UN forces according to the provisions listed in Section 8? Are organized armed groups bound by these provisions? Are they bound by similar provisions of IHL applicable in non-international armed conflict?

**Document No. 58, UN, Guidelines on the Right to a Remedy and Reparation for Violations of International Humanitarian Law and Human Rights Law**

[Source: United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147, 21 March 2006; available at [www.un.org](http://www.un.org). Footnotes omitted.]

**Resolution adopted by the General Assembly****60/147****Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**

*The General Assembly,*

*Guided* by the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights, other relevant human rights instruments and the Vienna Declaration and Programme of Action,

*Affirming* the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels,

*Recognizing* that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field,

*Recalling* the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law by the Commission on Human Rights in its resolution 2005/35 of 19 April 2005 and by the Economic and Social Council in its resolution 2005/30 of 25 July 2005, in which the Council recommended to the General Assembly that it adopt the Basic Principles and Guidelines,

1. *Adopts* the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law annexed to the present resolution;
2. *Recommends* that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general;
3. *Requests* the Secretary-General to take steps to ensure the widest possible dissemination of the Basic Principles and Guidelines in all the official languages of the United Nations, including by transmitting them to Governments and

intergovernmental and non-governmental organizations and by including the Basic Principles and Guidelines in the United Nations publication entitled *Human Rights: A Compilation of International Instruments*.

64<sup>th</sup> plenary meeting  
16 December 2005

## **Annex**

### **Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**

#### **Preamble**

*The General Assembly,*

*Recalling* the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court,

*Recalling* the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular article 7 of the African Charter on Human and Peoples' Rights, article 25 of the American Convention on Human Rights, and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms,

*Recalling* the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and General Assembly resolution 40/34 of 29 November 1985 by which the Assembly adopted the text recommended by the Congress,

*Reaffirming* the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion

of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims,

*Noting* that the Rome Statute of the International Criminal Court requires the establishment of “principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”, requires the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and mandates the Court “to protect the safety, physical and psychological well-being, dignity and privacy of victims” and to permit the participation of victims at all “stages of the proceedings determined to be appropriate by the Court”,

*Affirming* that the Basic Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity,

*Emphasizing* that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms,

*Recalling* that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,

*Noting* that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively,

*Recognizing* that, in honouring the victims’ right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law,

*Convinced* that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines,

*Adopts* the following Basic Principles and Guidelines:

## **I. Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law**

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:
  - (a) Treaties to which a State is a party;
  - (b) Customary international law;
  - (c) The domestic law of each State.
2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:
  - (a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
  - (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;
  - (c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;
  - (d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

## **II. Scope of the obligation**

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:
  - (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
  - (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
  - (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
  - (d) Provide effective remedies to victims, including reparation, as described below.

### **III. Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law**

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.
5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

### **IV. Statutes of limitations**

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.
7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

### **V. Victims of gross violations of international human rights law and serious violations of international humanitarian law**

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

#### **VI. Treatment of victims**

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

#### **VII. Victims' right to remedies**

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:
  - (a) Equal and effective access to justice;
  - (b) Adequate, effective and prompt reparation for harm suffered;
  - (c) Access to relevant information concerning violations and reparation mechanisms.

#### **VIII. Access to justice**

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:
  - (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
  - (b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
  - (c) Provide proper assistance to victims seeking access to justice;

- (d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.
- 13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.
- 14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

### **IX. Reparation for harm suffered**

- 15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.
- 16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.
- 17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.
- 18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
- 19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations



of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
  - (a) Physical or mental harm;
  - (b) Lost opportunities, including employment, education and social benefits;
  - (c) Material damages and loss of earnings, including loss of earning potential;
  - (d) Moral damage;
  - (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
21. *Rehabilitation* should include medical and psychological care as well as legal and social services.
22. *Satisfaction* should include, where applicable, any or all of the following:
  - (a) Effective measures aimed at the cessation of continuing violations;
  - (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
  - (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
  - (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
  - (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
  - (f) Judicial and administrative sanctions against persons liable for the violations;
  - (g) Commemorations and tributes to the victims;
  - (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

23. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention:
- (a) Ensuring effective civilian control of military and security forces;
  - (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
  - (c) Strengthening the independence of the judiciary;
  - (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
  - (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
  - (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
  - (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
  - (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

#### **X. Access to relevant information concerning violations and reparation mechanisms**

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

#### **XI. Non-discrimination**

25. The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.

## **XII. Non-derogation**

26. Nothing in these Basic Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Basic Principles and Guidelines are without prejudice to special rules of international law.

## **XIII. Rights of others**

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.

**Document No. 59, UN, Review of Peace Operations**

[Source: United Nations Document A/55/305-S/2000/809, *Comprehensive review of the whole question of peacekeeping operations in all their aspects*, 21 August 2000, <http://www.un.org>]

**UNITED NATIONS – A/55/305-S/2000/809  
GENERAL ASSEMBLY – SECURITY COUNCIL****21 August 2000 [...]****COMPREHENSIVE REVIEW OF THE WHOLE QUESTION  
OF PEACEKEEPING OPERATIONS IN ALL THEIR ASPECTS [...]****REPORT OF THE PANEL ON UNITED NATIONS PEACE OPERATIONS [...]****Executive Summary**

[...] The Secretary-General has asked the Panel on United Nations Peace Operations, composed of individuals experienced in various aspects of conflict prevention, peacekeeping and peace-building, to assess the shortcomings of the existing system and to make frank, specific and realistic recommendations for change. Our recommendations focus not only on politics and strategy but also and perhaps even more so on operational and organizational areas of need.

For preventive initiatives to succeed in reducing tension and averting conflict, the Secretary-General needs clear, strong and sustained political support from Member States. Furthermore, as the United Nations has bitterly and repeatedly discovered over the last decade, no amount of good intentions can substitute for the fundamental ability to project credible force if complex peacekeeping, in particular, is to succeed. But force alone cannot create peace; it can only create the space in which peace may be built. Moreover, the changes that the Panel recommends will have no lasting impact unless Member States summon the political will to support the United Nations politically, financially and operationally to enable the United Nations to be truly credible as a force for peace.

Each of the recommendations contained in the present report is designed to remedy a serious problem in strategic direction, decision-making, rapid deployment, operational planning and support, and the use of modern information technology. [...]

**I. THE NEED FOR CHANGE**

1. The United Nations was founded, in the words of its Charter, in order “to save succeeding generations from the scourge of war.” Meeting this challenge is the most important function of the Organization, and, to a very significant degree, the yardstick by which it is judged by the peoples it exists to serve. [...]
6. The recommendations that the Panel presents balance principle and pragmatism, while honouring the spirit and letter of the Charter of the United Nations and the respective roles of the Organization’s legislative bodies. They are based on the following premises: [...]

- (e) The essential importance of the United Nations system adhering to and promoting international human rights instruments and standards and international humanitarian law in all aspects of its peace and security activities; [...]

## **II. DOCTRINE, STRATEGY AND DECISION-MAKING FOR PEACE OPERATIONS [...]**

### **D. Implications for peace-building strategy**

- 35. The Security Council and the General Assembly's Special Committee on Peacekeeping Operations have each recognized and acknowledged the importance of peace-building as integral to the success of peacekeeping operations. [...]
- 41. [...] The human rights components within peace operations have not always received the political and administrative support that they require, however, nor are their functions always clearly understood by other components. Thus, the Panel stresses the importance of training military, police and other civilian personnel on human rights issues and on the relevant provisions of international humanitarian law. In this respect, the Panel commends the Secretary-General's bulletin of 6 August 1999 entitled "Observance by United Nations forces of international humanitarian law" (ST/SGB/1999/13). [See Case No. 57, UN, Guidelines for UN Forces [Part B.]] [...]

### **E. Implications for peacekeeping doctrine and strategy [...]**

- 49. [...] Once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully. This means that United Nations military units must be capable of defending themselves, other mission components and the mission's mandate. Rules of engagement should not limit contingents to stroke-for-stroke responses but should allow ripostes sufficient to silence a source of deadly fire that is directed at United Nations troops or at the people they are charged to protect and, in particularly dangerous situations, should not force United Nations contingents to cede the initiative to their attackers.
- 50. Impartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement. In some cases, local parties consist not of moral equals but of obvious aggressors and victims, and peacekeepers may not only be operationally justified in using force but morally compelled to do so. Genocide in Rwanda went as far as it did in part because the international community failed to use or to reinforce the operation then on the ground in that country to oppose obvious evil. The Security Council has since established, in its resolution 1296 (2000), that the targeting of civilians in armed conflict and the denial of humanitarian access to civilian populations afflicted by war may themselves constitute threats to international peace and security and thus be triggers for Security Council action. If a United Nations peace

operation is already on the ground, carrying out those actions may become its responsibility, and it should be prepared. [...]

#### **F. Clear, credible and achievable mandates**

56. As a political body, the Security Council focuses on consensus-building, even though it can take decisions with less than unanimity. But the compromises required to build consensus can be made at the expense of specificity, and the resulting ambiguity can have serious consequences in the field if the mandate is then subject to varying interpretation by different elements of a peace operation, or if local actors perceive a less than complete Council commitment to peace implementation that offers encouragement to spoilers. [...] Rather than send an operation into danger with unclear instructions, the Panel urges that the Council refrain from mandating such a mission. [...]
58. The Panel believes that the Secretariat must be able to make a strong case to the Security Council that requests for United Nations implementation of ceasefires or peace agreements need to meet certain minimum conditions before the Council commits United Nations-led forces to implement such accords, including [...] that any agreement be consistent with prevailing international human rights standards and humanitarian law; [...]
62. Finally, the desire on the part of the Secretary-General to extend additional protection to civilians in armed conflicts and the actions of the Security Council to give United Nations peacekeepers explicit authority to protect civilians in conflict situations are positive developments. Indeed, peacekeepers – troops or police – who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles and, as stated in the report of the Independent Inquiry on Rwanda, consistent with “the perception and the expectation of protection created by [an operation’s] very presence” (see S/1999/1257). [...]

### **ANNEX III SUMMARY OF RECOMMENDATIONS**

#### **1. Preventive action**

- (a) The Panel endorses the recommendations of the Secretary-General with respect to conflict prevention contained in the Millennium Report and in his remarks before the Security Council’s second open meeting on conflict prevention in July 2000, in particular his appeal to “all who are engaged in conflict prevention and development – the United Nations, the Bretton Woods institutions, Governments and civil society organizations – [to] address these challenges in a more integrated fashion”;
- (b) The Panel supports the Secretary-General’s more frequent use of fact-finding missions to areas of tension, and stresses Member States’ obligations, under Article 2(5) of the Charter, to give “every assistance” to such activities of the United Nations.

## **2. Peace-building strategy**

[See *supra* D.]

- (a) A small percentage of a mission's first-year budget should be made available to the representative or special representative of the Secretary-General leading the mission to fund quick impact projects in its area of operations [...];
- (b) The Panel recommends a doctrinal shift in the use of civilian police, other rule of law elements and human rights experts in complex peace operations to reflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post-conflict environments;
- (c) The Panel recommends that the legislative bodies consider bringing demobilization and reintegration programmes into the assessed budgets of complex peace operations for the first phase of an operation in order to facilitate the rapid disassembly of fighting factions and reduce the likelihood of resumed conflict; [...]

## **4. Clear, credible and achievable mandates**

[See *supra* F.]

[...]

- (b) The Security Council should leave in draft form resolutions authorizing missions with sizeable troop levels until such time as the Secretary-General has firm commitments of troops and other critical mission support elements, including peace-building elements, from Member States;
- (c) Security Council resolutions should meet the requirements of peacekeeping operations when they deploy into potentially dangerous situations, especially the need for a clear chain of command and unity of effort;
- (d) The Secretariat must tell the Security Council what it needs to know, not what it wants to hear, when formulating or changing mission mandates, and countries that have committed military units to an operation should have access to Secretariat briefings to the Council on matters affecting the safety and security of their personnel, especially those meetings with implications for a mission's use of force.

## **5. Information and strategic analysis**

The Secretary-General should establish an entity, referred to here as the ECPS Information and Strategic Analysis Secretariat (EISAS), which would support the information and analysis needs of all members of ECPS; [...]

## **6. Transitional civil administration**

The Panel recommends that the Secretary-General invite a panel of international legal experts, including individuals with experience in United Nations operations that

have transitional administration mandates, to evaluate the feasibility and utility of developing an interim criminal code, including any regional adaptations potentially required, for use by such operations pending the reestablishment of local rule of law and local law enforcement capacity.

## **7. Determining deployment timelines**

The United Nations should define “rapid and effective deployment capacities” as the ability, from an operational perspective, to fully deploy traditional peacekeeping operations within 30 days after the adoption of a Security Council resolution, and within 90 days in the case of complex peacekeeping operations.

## **8. Mission leadership**

- (a) The Secretary-General should systematize the method of selecting mission leaders, [...]
- (b) The entire leadership of a mission should be selected and assembled at Headquarters as early as possible in order to enable their participation in key aspects of the mission planning process, for briefings on the situation in the mission area and to meet and work with their colleagues in mission leadership;
- (c) The Secretariat should routinely provide the mission leadership with strategic guidance and plans for anticipating and overcoming challenges to mandate implementation; [...]

## **9. Military personnel**

- (a) Member States should be encouraged, where appropriate, to enter into partnerships with one another, within the context of the United Nations Standby Arrangements System (UNSAS), to form several coherent brigade-size forces, with necessary enabling forces, ready for effective deployment within 30 days of the adoption of a Security Council operation and within 90 days for complex peacekeeping operations;
- (b) The Secretary-General should be given the authority to formally canvass Member States participating in UNSAS regarding their willingness to contribute troops to a potential operation, once it appeared likely that a ceasefire accord or agreement envisaging an implementing role for the United Nations, might be reached;
- (c) The Secretariat should, as a standard practice, send a team to confirm the preparedness of each potential troop contributor to meet the provisions of the memoranda of understanding on the requisite training and equipment requirements, prior to deployment; those that do not meet the requirements must not deploy; [...]



## **10. Civilian police personnel**

- (a) Member States are encouraged to each establish a national pool of civilian police officers that would be ready for deployment to United Nations peace operations on short notice, within the context of the United Nations Standby Arrangements System;
- (b) Member States are encouraged to enter into regional training partnerships for civilian police in the respective national pools, to promote a common level of preparedness in accordance with guidelines, standard operating procedures and performance standards to be promulgated by the United Nations; [...]
- (e) The Panel recommends that parallel arrangements to recommendations (a), (b) [...] above be established for judicial, penal, human rights and other relevant specialists, who with specialist civilian police will make up collegial “rule of law” teams.

## **11. Civilian specialists**

- (a) The Secretariat should establish a central Internet/Intranet-based roster of pre-selected civilian candidates available to deploy to peace operations on short notice. [...]

## **12. Rapidly deployable capacity for public information**

Additional resources should be devoted in mission budgets to public information and the associated personnel and information technology required to get an operation’s message out and build effective internal communications links.

## **13. Logistics support and expenditure management**

- (a) The Secretariat should prepare a global logistics support strategy to enable rapid and effective mission deployment within the timelines proposed and corresponding to planning assumptions established by the substantive offices of DPKO; [...]

## **14. Funding Headquarters support for peacekeeping operations**

- (a) The Panel recommends a substantial increase in resources for Headquarters support of peacekeeping operations, and urges the Secretary-General to submit a proposal to the General Assembly outlining his requirements in full;
- (b) Headquarters support for peacekeeping should be treated as a core activity of the United Nations, and as such the majority of its resource requirements for this purpose should be funded through the mechanism of the regular biennial programme budget of the Organization; [...]

**15. Integrated mission planning and support [...]****16. Other structural adjustments in DPKO [...]****17. Operational support for public information**

A unit for operational planning and support of public information in peace operations should be established. [...]

**18. Peace-building support in the Department of Political Affairs**

- (a) The Panel supports the Secretariat's effort to create a pilot Peace-building Unit within DPA. [...]

**19. Peace operations support in the Office of the United Nations High Commissioner for Human Rights**

The Panel recommends substantially enhancing the field mission planning and preparation capacity of the Office of the United Nations High Commissioner for Human Rights, with funding partly from the regular budget and partly from peace operations mission budgets.

**20. Peace operations and the information age**

- (a) Headquarters peace and security departments need a responsibility centre to devise and oversee the implementation of common information technology strategy and training for peace operations, residing in EISAS. Mission counterparts to the responsibility centre should also be appointed to serve in the offices of the special representatives of the Secretary-General in complex peace operations to oversee the implementation of that strategy; [...]
- (c) Peace operations could benefit greatly from more extensive use of geographic information systems (GIS) technology, which quickly integrates operational information with electronic maps of the mission area, for applications as diverse as demobilization, civilian policing, voter registration, human rights monitoring and reconstruction;
- (d) The IT needs of mission components with unique information technology needs, such as civilian police and human rights, should be anticipated and met more consistently in mission planning and implementation;
- (e) The Panel encourages the development of web site co-management by Headquarters and the field missions, in which Headquarters would maintain oversight but individual missions would have staff authorized to produce and post web content that conforms to basic presentational standards and policy.

**Document No. 60, UN, Report on Threats, Challenges and Change**

[Source: United Nations, <http://www.un.org/secureworld/report.pdf>; Highlights in the original]

**UNITED NATIONS, GENERAL ASSEMBLY,  
DOCUMENT A/59/565  
2 DECEMBER 2004**

**FIFTY-NINTH SESSION,  
AGENDA ITEM 55,  
FOLLOW-UP TO THE OUTCOME  
OF THE MILLENNIUM SUMMIT**

**NOTE BY THE SECRETARY-GENERAL**

[...]

2. I asked Anand Panyarachun, former Prime Minister of Thailand, to chair the High-level Panel on Threats, Challenges and Change [...].
3. I asked the High-level Panel to assess current threats to international peace and security; to evaluate how our existing policies and institutions have done in addressing those threats; and to make recommendations for strengthening the United Nations so that it can provide collective security for all in the twenty-first century.

[...]

**A more secure world: our shared responsibility  
Report of the High-level Panel on Threats, Challenges and Change**

[...]

**PART ONE  
TOWARDS A NEW SECURITY CONSENSUS**

[...]

**II. The case for comprehensive collective security**

[...]

***B. The limits of self-protection***

24. No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today's threats. Every State requires the cooperation of other States to make itself secure. [...]

***C. Sovereignty and responsibility***

29. [...] Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it

the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community. [...]

**D. *Elements of a credible collective security system***

31. To be credible and sustainable a collective security system must be effective, efficient and equitable. [...]

**PART TWO  
COLLECTIVE SECURITY AND THE CHALLENGE OF PREVENTION**

[...]

**IV. Conflict between and within States**

[...]

**C. *Meeting the challenge of prevention***

1. *Better international regulatory frameworks and norms*

[...]

90. In the area of legal mechanisms, there have been few more important recent developments than the Rome Statute creating the International Criminal Court. In cases of mounting conflict, early indication by the Security Council that it is carefully monitoring the conflict in question and that it is willing to use its powers under the Rome Statute might deter parties from committing crimes against humanity and violating the laws of war. **The Security Council should stand ready to use the authority it has under the Rome Statute to refer cases to the International Criminal Court.**

91. More legal mechanisms are necessary in the area of natural resources, fights over which have often been an obstacle to peace. Alarmed by the inflammatory role of natural resources in wars in Sierra Leone, Angola and the Democratic Republic of the Congo, civil society organizations and the Security Council have turned to the "naming and shaming" of, and the imposition of sanctions against, individuals and corporations involved in illicit trade, and States have made a particular attempt to restrict the sale of "conflict diamonds". [...]

92. **The United Nations should work with national authorities, international financial institutions, civil society organizations and the private sector to develop norms governing the management of natural resources for countries emerging from or at risk of conflict.** [...]

**VI. Terrorism**

[...]

**B. *Meeting the challenge of prevention***

[...]

## 2. *Better counter-terrorism instruments*

[...]

152. However, the Security Council must proceed with caution. The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions. **The Al-Qaida and Taliban Sanctions Committee should institute a process for reviewing the cases of individuals and institutions claiming to have been wrongly placed or retained on its watch lists.** [...]

## 4. *Defining terrorism*

[...]

158. Since 1945, an ever stronger set of norms and laws – including the Charter of the United Nations, the Geneva Conventions and the Rome Statute for the International Criminal Court – has regulated and constrained States' decisions to use force and their conduct in war – for example in the requirement to distinguish between combatants and civilians, to use force proportionally and to live up to basic humanitarian principles. Violations of these obligations should continue to be met with widespread condemnation and war crimes should be prosecuted.
159. The norms governing the use of force by non-State actors have not kept pace with those pertaining to States. This is not so much a legal question as a political one. Legally, virtually all forms of terrorism are prohibited by one of 12 international counter-terrorism conventions, international customary law, the Geneva Conventions or the Rome Statutes. Legal scholars know this, but there is a clear difference between this scattered list of conventions and little-known provisions of other treaties and the compelling normative framework, understood by all, that should surround the question of terrorism. The United Nations must achieve the same degree of normative strength concerning non-State use of force as it has concerning State use of force. Lack of agreement on a clear and well-known definition undermines the normative and moral stance against terrorism and has stained the United Nations image. Achieving a comprehensive convention on terrorism, including a clear definition, is a political imperative.

[...]

163. **Nevertheless, we believe there is particular value in achieving a consensus definition within the General Assembly, [...].**
164. **That definition of terrorism should include the following elements:**
- (a) **Recognition, in the preamble, that State use of force against civilians is regulated by the Geneva Conventions and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity;**

- (b) **Restatement that acts under the 12 preceding anti-terrorism conventions are terrorism, and a declaration that they are a crime under international law; and. restatement that terrorism in time of armed conflict is prohibited by the Geneva Conventions and Protocols;**

[...]

- (d) **Description of terrorism as “any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act”.**

[...]

### **PART THREE COLLECTIVE SECURITY AND THE USE OF FORCE**

[...]

#### **IX. Using force: rules and guidelines**

[...]

#### **A. The question of legality**

[...]

##### **1. Article 51 of the Charter of the United Nations and self-defence**

188. The language of this article is restrictive: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures to maintain international peace and security”. However, a threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate. [...]

##### **192. We do not favour the rewriting or reinterpretation of Article 51.**

##### **2. Chapter VII of the Charter of the United Nations and external threats**

[...]

##### **3. Chapter VII of the Charter of the United Nations, internal threats and the responsibility to protect**

[...]

203. **We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other largescale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.**

**B. The question of legitimacy**

[...]

207. **In considering whether to authorize or endorse the use of military force, the Security Council should always address – whatever other considerations it may take into account – at least the following five basic criteria of legitimacy:**

- (a) ***Seriousness of threat.*** Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?
- (b) ***Proper purpose.*** Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?
- (c) ***Last resort.*** Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?
- (d) ***Proportional means.*** Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?
- (e) ***Balance of consequences.*** Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

208. **The above guidelines for authorizing the use of force should be embodied in declaratory resolutions of the Security Council and General Assembly.**

[...]

**X. Peace enforcement and peacekeeping capability**

[...]

211. Discussion of the necessary capacities has been confused by the tendency to refer to peacekeeping missions as “Chapter VI operations” and peace

enforcement missions as “Chapter VII operations” – meaning consent-based or coercion-based, respectively. [...]

212. Both characterizations are to some extent misleading. There *is* a distinction between operations in which the robust use of force is integral to the mission from the outset (e.g., responses to cross-border invasions or an explosion of violence, in which the recent practice has been to mandate multinational forces) and operations in which there is a reasonable expectation that force may not be needed at all (e.g., traditional peacekeeping missions monitoring and verifying a ceasefire or those assisting in implementing peace agreements, where blue helmets are still the norm).
213. But both kinds of operation need the authorization of the Security Council (Article 51 self-defence cases apart), and in peacekeeping cases as much as in peace-enforcement cases it is now the usual practice for a Chapter VII mandate to be given (even if that is not always welcomed by troop contributors). This is on the basis that even the most benign environment can turn sour [...] and that it is desirable for there to be complete certainty about the mission’s capacity to respond with force, if necessary. On the other hand, the difference between Chapter VI and VII mandates can be exaggerated: there is little doubt that peacekeeping missions operating under Chapter VI (and thus operating without enforcement powers) have the right to use force in self-defence – and this right is widely understood to extend to “defence of the mission”.

[...]

## XII. Protecting civilians

231. In many civil wars, combatants target civilians and relief workers with impunity. Beyond direct violence, deaths from starvation, disease and the collapse of public health dwarf the numbers killed by bullets and bombs. Millions more are displaced internally or across borders. Human rights abuses and gender violence are rampant.
232. Under international law, the primary responsibility to protect civilians from suffering in war lies with belligerents – State or non-State. International humanitarian law provides minimum protection and standards applicable to the most vulnerable in situations of armed conflict, including women, children and refugees, and must be respected.
233. **All combatants must abide by the provisions of the Geneva Conventions. All Member States should sign, ratify and act on all treaties relating to the protection of civilians, such as the Genocide Convention, the Geneva Conventions, the Rome Statute of the International Criminal Court and all refugee conventions.**
234. Humanitarian aid is a vital tool for helping Governments to fulfil this responsibility. Its core purpose is to protect civilian victims, minimize their suffering and keep them alive during the conflict so that when war ends they have the opportunity



to rebuild shattered lives. The provision of assistance is a necessary part of this effort. Donors must fully and equitably fund humanitarian protection and assistance operations.

235. The Secretary-General, based in part on work undertaken by the United Nations High Commissioner for Refugees and strong advocacy efforts by non-governmental organizations, has prepared a 10-point platform for action for the protection of civilians in armed conflict. The Secretary-General's 10-point platform for action should be considered by all actors – States, NGOs and international organizations – in their efforts to protect civilians in armed conflict.
236. From this platform, particular attention should be placed on the question of access to civilians, which is routinely and often flagrantly denied. United Nations humanitarian field staff, as well as United Nations political and peacekeeping representatives, should be well trained and well supported to negotiate access. Such efforts also require better coordination of bilateral initiatives. The Security Council can use field missions and other diplomatic measures to enhance access to and protection of civilians.
237. Particularly egregious violations, such as occur when armed groups militarize refugee camps, require emphatic responses from the international community, including from the Security Council acting under Chapter VII of the Charter of the United Nations. Although the Security Council has acknowledged that such militarization is a threat to peace and security, it has not developed the capacity or shown the will to confront the problem. **The Security Council should fully implement resolution 1265 (1999) on the protection of civilians in armed conflict.**
238. Of special concern is the use of sexual violence as a weapon of conflict. The human rights components of peacekeeping operations should be given explicit mandates and sufficient resources to investigate and report on human rights violations against women. Security Council resolution 1325 (2000) on women, peace and security and the associated Independent Experts' Assessment provide important additional recommendations for the protection of women. **The Security Council, United Nations agencies and Member States should fully implement its recommendations.**

**Case No. 61, UN, Secretary-General's Reports on the Protection of Civilians in Armed Conflict**

**A. 2001 Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict**

[Source: United Nations, S/2001/331, 30 March 2001, this report and other UN documents cited are available on [www.un.org](http://www.un.org)]

**REPORT OF THE SECRETARY-GENERAL TO THE SECURITY COUNCIL  
ON THE PROTECTION OF CIVILIANS IN ARMED CONFLICT**

**I. Towards a culture of protection [...]**

2. [...] Recruitment and use of child soldiers, the proliferation of small arms, the indiscriminate use of landmines, large-scale forced displacement and ethnic cleansing, the targeting of women and children, the denial of even the most basic human rights, and widespread impunity for atrocities are still all too familiar features of war. The growing number of threats to the lives of local and international staff members of international organizations and other aid groups has added one more shameful characteristic to the reality of today's conflicts.
3. The context is therefore clear: as internal armed conflicts proliferate, civilians have become the principal victims. It is now conventional to say that, in recent decades, the proportion of war victims who are civilians has leaped dramatically, to an estimated 75 per cent, and in some cases even more. I say "conventional" because the truth is that no one really knows. Relief agencies rightly devote their resources to helping the living rather than counting the dead. Whereas armies count their losses, there is no agency mandated to keep a tally of civilians killed. The victims of today's atrocious conflicts are not merely anonymous, but literally countless. To some extent, this can be explained by changes in the nature of conflict. The decline of inter-State warfare waged by regular armies has been matched by a rise in intra-State warfare waged by irregular forces. Furthermore, and particularly in conflicts with an element of ethnic or religious hatred, the affected civilians tend not to be the incidental victims of these new irregular forces; they are their principal object.
4. In September 2000, all the States Members of the Organization pledged, in the United Nations Millennium Declaration (General Assembly resolution 55/2), to expand and strengthen the protection of civilians in complex emergencies, in conformity with international humanitarian law. Yet just as Member States have too often failed to address the calamitous impact of modern warfare on civilians, so, too, has the United Nations often been unable to respond adequately to their need for protection and assistance. My hope now is to move beyond an analysis of our past failures and to identify ways in which the international system can be strengthened to help meet the growing needs of civilians in war. [...] In the

present report, I wish to focus on additional steps which Member States must take to strengthen their own capacity to protect the civilian victims of war more effectively, and on initiatives that the Security Council and other organs of the United Nations can take to complement these efforts.

5. I believe that Member States, supported by the United Nations and other actors, must work towards creating a culture of protection. In such a culture, Governments would live up to their responsibilities, armed groups would respect the recognized rules of international humanitarian law, the private sector would be conscious of the impact of its engagement in crisis areas, and Member States and international organizations would display the necessary commitment to ensuring decisive and rapid action in the face of crisis. [...]

## **II. Parameters of protection [...]**

7. The primary responsibility for the protection of civilians rests with Governments, as set out in the guiding principles on humanitarian assistance adopted by the General Assembly in its resolution 46/182 of 19 December 1991. At the same time, armed groups have a direct responsibility, according to Article 3 common to the four Geneva Conventions of 1949 and to customary international humanitarian law, to protect civilian populations in armed conflict. International instruments require not only Governments but also armed groups to behave responsibly in conflict situations, and to take measures to ensure the basic needs and protection of civilian populations. Where Governments do not have resources and capacities to do this unaided, it is incumbent on them to invoke the support of the international system. Protection efforts must be focused on the individual rather than the security interests of the State, whose primary function is precisely to ensure the security of its civilian population. [...]

## **III. Measures to enhance protection**

### **A. Prosecution of violations of international criminal law**

9. Internationally recognized standards of protection will be effectively upheld only when they are given the force of law, and when violations are regularly and reliably sanctioned. The establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, and the adoption of the Rome Statute to establish a permanent International Criminal Court are important steps in this direction. Safe havens for mass murderers and torturers are disappearing. These developments are complemented by significant advances in international criminal law through the jurisprudence of the two *ad hoc* tribunals and by the rapidly growing number of ratifications of the Rome Statute. This emerging paradigm of international criminal justice confronts perpetrators of grave violations with the real possibility of prosecution for past, present and future crimes.

### **1. Denial of amnesty for serious crimes**

10. The recent arrest, indictment and eventual sentencing of former or current heads of State or Government has allowed prosecutors to further penetrate the shield of immunity. Courts are increasingly willing to send the message that nobody is above

the law. Let me therefore be clear: the granting of amnesties to those who committed serious violations of international humanitarian and criminal law is not acceptable. [...]

## **2. Impact of criminal justice**

11. The fair prosecution and trial of individual suspects can help significantly to build confidence and facilitate reconciliation in post-conflict societies, by removing collective attributions of guilt. Well-publicized prosecutions can deter crimes in current and future conflicts. [...] Establishing courts without secure and sustained funding, and without follow-up efforts to rebuild national criminal justice systems, can do a disservice to victims of large-scale violence and undermine their confidence in justice. [...]

## **3. Importance of national jurisdictions**

12. Despite the important role that international prosecution plays in encouraging compliance with international law, consistent enforcement depends primarily on the commitment and cooperation of national jurisdictions. The prosecution of individuals is, first and foremost, a responsibility of the State concerned. International justice can only complement those efforts when States are genuinely unable or unwilling to investigate and prosecute. In particular, a growing number of States have started to apply the principle of universal jurisdiction. The most publicized examples were the arrest by the United Kingdom of Great Britain and Northern Ireland of the former President of Chile, Augusto Pinochet, on charges of torture, at the request of Spanish authorities, and the arrest of the former President of Chad, Hissein Habré, by Senegal on similar charges. The application of this principle can be an essential stimulus for justice and reconciliation in the country of origin of the perpetrator. Its successful exercise requires closer cooperation between States, however, notably on issues of evidence and extradition. States therefore need to adapt their national legislation to the recognized standards of international humanitarian and criminal law and to ensure that they have a fair and credible judiciary.

## **4. Truth and reconciliation efforts**

13. The experiences of Rwanda and other places have shown, however, that neither international nor national judicial systems command the necessary resources to prosecute the suspected perpetrators of conflict-related crimes, who may number in the thousands. Truth and reconciliation efforts, considered exceptional only a few years ago, have become an accepted method of overcoming a violent past. [...] Truth and reconciliation, however, should not become a substitute for individual prosecution. The objective of such efforts should be to combine the search for truth, accounting for past abuses, promotion of national reconciliation and the bolstering of an emerging democratic order. [...]

## **Recommendations**

1. **I urge the Security Council and the General Assembly to provide, from the outset, reliable, sufficient and sustained funding for international efforts, whether existing or future international tribunals, arrangements established in the context of United Nations peace operations, or initiatives undertaken**

**in concert with individual Member States, to bring to justice perpetrators of grave violations of international humanitarian and human rights law.**

- 2. I recommend that the Security Council consider the establishment of arrangements addressing impunity and, as appropriate, for truth and reconciliation, during the crafting of peacekeeping mandates, in particular where this response has been triggered by widespread and systematic violations of international humanitarian and human rights law.**
- 3. I encourage Member States to introduce or strengthen domestic legislation and arrangements providing for the investigation, prosecution and trial of those responsible for systematic and widespread violations of international criminal law. To this end, I endorse efforts aimed at supporting Member States in building capable and credible judicial institutions that are equipped to provide fair proceedings.**

## **B. Access to vulnerable populations**

14. In many conflicts, safe and unhindered access to vulnerable civilian populations is granted only sporadically, and is often subject to conditions, delayed, or even bluntly denied. The consequences for those populations are often devastating: entire communities are deprived of even basic assistance and protection. The agony of civilians in such isolated circumstances is further exacerbated as, in modern warfare, particularly internal conflicts, civilians are often targeted as part of a political strategy. [...]
15. Because of the internal nature of most conflicts, United Nations agencies, the International Committee of the Red Cross and non-governmental organizations have increasingly had to negotiate to ensure access to those in need. [...] Common ground rules would help to make access negotiations more predictable and effective, and reduce the risk of mistakes or of agencies being played off against each other by warring parties.

### **1. Obtaining meaningful access**

16. As a general rule, access negotiations should always have a clear objective, namely, humanitarian space providing unimpeded, timely, safe and sustained access to people in need. Access must be obtained, managed and maintained throughout a conflict by keeping the parties continuously engaged. [...]

### **2. Complexities on the ground**

17. Despite the Security Council's repeated reaffirmation of the importance of safe and unimpeded access [...], gaining safe and regular access is a daily struggle marked by a plethora of practical concerns, including demands of conditionality – warring parties requesting their share of aid before granting access to vulnerable populations; the deliberate starving of civilians to attract food aid in order to feed combatants; or the delivery of dual-purpose items that could also serve the war effort. Under international law, displaced persons and other victims of conflict are entitled to international protection and assistance where this is not available from

national authorities. However, negotiations on the ground often revolve around the practical implications: for example, the failure of warring parties to admit the delivery of certain food items because they are perceived as jeopardizing the objectives of their war effort.

18. The approach to these challenges often defines the credibility and effectiveness of the humanitarian effort. Strengthening access negotiations thus requires the development of common policies and common criteria for engagement among aid agencies. These criteria should address clearance procedures, monitoring of delivery to minimize diffusion of goods to combatants, and efficient coordination.

### **3. Engaging the parties to a conflict**

19. In a multi-faction conflict, such as that in the Democratic Republic of the Congo, experience has shown that, in order to gain meaningful and regular access to vulnerable populations within different combat zones, where front lines are shifting from day to day, the consent of many parties has to be obtained at the local, regional, national and international levels. [...] In most intra-State conflicts, armed groups exercise de facto control of parts of a country and the civilian population living there. Negotiating and obtaining access to those populations therefore requires the engagement of those groups.
20. Whereas Governments are sometimes concerned that such engagements might legitimize armed groups, these concerns must be balanced against the urgent need for humanitarian action. It is the obligation to preserve the physical integrity of each and every civilian within their jurisdiction, regardless of gender, ethnicity, religion or political conviction, that should guide Governments in exercising their sovereign responsibility. Where Governments are prevented from reaching civilians because they are under the control of armed groups, they must allow impartial actors to carry out their humanitarian task. Such a loss of control does not release Governments from their responsibility for all civilians within their jurisdiction.
21. Engaging armed groups in a constructive dialogue is also of vital importance for guaranteeing the security of humanitarian operations in a conflict area. Often, combatants perceive the provision of humanitarian assistance and protection to vulnerable populations as being not a neutral but rather a politically motivated act. [...] [H]umanitarian agencies, although pursuing neutral objectives enshrined in international law, are frequently perceived as partisan, and therefore become targets themselves. [...]

### **4. Internally displaced persons**

22. Meaningful access is particularly important when reaching out to the estimated 20 to 25 million people who are displaced within the borders of their country. The plight of this exceptionally vulnerable group has gained urgency in the 1990s as their number has dramatically increased in the wake of the numerous internal armed conflicts of that decade. Forced to leave their homes, they regularly suffer from severe deprivation, lack of shelter, insecurity and discrimination. Their protection is, first and foremost, a responsibility of the relevant national authorities.

23. In many cases, however, national authorities fail to provide the necessary protection and assistance to such people or to provide safe and meaningful access for international organizations. As a result, and because there is no established system of international protection and assistance for internally displaced persons, the response to their needs has often been inconsistent and ineffective. [...]

## **5. Coordinated approach**

25. Developing a coordinated approach to access negotiations can therefore be a matter of life and death, both for vulnerable populations and for humanitarian workers. Often, the large number of domestic and international aid agencies in a conflict area poses a challenge in itself. Driven by differing mandates and interests, international agencies often negotiate access independently, thereby diminishing the effectiveness of their own and other agencies' response. [...] It is therefore essential to develop more coordinated and creative approaches to access negotiations, for example, by pooling agency interests consistent with their mandates, and agreeing on mutually complementary sectoral negotiations. [...]

## **Recommendations**

- 4. Recalling the Security Council's recognition, in its resolution 1265 (1999), of the importance of gaining safe and unimpeded access of humanitarian personnel to civilian populations in need, I urge the Council to actively engage the parties to each conflict in a dialogue aimed at sustaining safe access for humanitarian operations, and to demonstrate its willingness to act where such access is denied.**
- 5. I encourage the Security Council to conduct more frequent fact-finding missions to conflict areas with a view to identifying the specific requirements for humanitarian assistance, and in particular obtaining safe and meaningful access to vulnerable populations.**

## **C. Separation of civilians and armed elements**

28. [...] [M]assive movements of displaced populations across international borders, most frequently prompted by civil wars in the region, have altered delicate ethnic balances in neighbouring States and thereby destabilized the recipient societies. Furthermore, there is a grave risk that the movement of people – sometimes in their hundreds of thousands – alongside armed elements will undermine the security of entire subregions or regions, and thereby internationalize an initially local conflict.
29. [...] It is therefore a matter of utmost urgency to preserve, at the earliest stage possible, the civilian character of camps and settlements for displaced persons – both refugees and internally displaced – by separating civilians from armed elements that move alongside them. Such separation can prevent further aggravation of conflict, and ensure that persons fleeing persecution or war get the protection and assistance they require.

**1. Impact of the mixing of displaced populations and armed elements**

30. Failure to separate armed elements from civilians has led to devastating situations in and around camps and settlements. As the example of West Timor (Indonesia) shows, not separating combatants from civilians allows armed groups to take control of a camp and its population, politicizing their situation and gradually establishing a military culture within the camp. The impact on the safety and security of both the refugees and the neighbouring local population is severe. Entire camp populations can be held hostage by militias that operate freely in the camps, spread terror, press-gang civilians, including children, into serving their forces, sexually assault and exploit women, and deliberately prevent displaced people from returning home. In addition, humanitarian aid and supplies are often diverted to these armed elements, depriving the intended civilian beneficiaries. Finally, blurred lines between the civilian and military character of camps expose civilians inside to the risk of attack by opposing forces, where camps are perceived to serve as launching pads for renewed fighting.

**2. Constraints of response**

31. And yet, for practical and political reasons, the response to this phenomenon has been inadequate. Host countries, which have the primary responsibility for ensuring the security of refugees on their territory, feel increasingly overburdened by the logistical, and material challenge of accommodating large influxes of population. [...] In fact, in order to avoid such strain, and in fear of being drawn into the conflict, potential host countries increasingly deny asylum by closing their borders, thereby further exacerbating the situation of displaced civilians within the conflict area. While recognizing the genuine interest of host States in preserving their neutrality in the conflict, we must be clear that it is the responsibility of States to grant asylum to distressed and persecuted populations and to ensure their protection and the provision of relief and assistance to them.
32. Humanitarian agencies, often the first and only presence on the ground in these situations, cannot identify, intern, disarm and demobilize armed elements present in refugee camps. They have neither the mandate nor the means to do so. Already, the identification of armed elements leads to enormous problems. Legally, international humanitarian law does not define fighters in internal conflicts, because Member States are reluctant to confer a formal status on those whom they consider insurgents or rebels. Practically, militia and armed elements, often attempting to hide among fleeing civilian populations, do not necessarily wear military uniforms or otherwise identify themselves. [...] The existence of part-time combatants – farmer by day, fighter by night – and the provision by civilians of basic help and shelter to combatants further obscure the issue. As a result, humanitarian operations are increasingly threatened by the lack of security in refugee camps. The murders of aid workers in West Timor (Indonesia) and Guinea are distressing illustrations. As a result, operations have had to withdraw from camps, and often an entire area, further aggravating the distress of the civilian camp population. [...]



### **3. Development of a toolkit**

34. The potential for large population flows, mixed with armed elements, to destabilize entire regions and, eventually, to ignite an international conflict has been sadly demonstrated by events in West Africa and the Great Lakes region. I therefore believe that it is within the purview of the Security Council to deter threats to international peace and security deriving from such population movements by supporting host States in taking appropriate and timely measures to separate civilians and armed elements. [...]
36. In addition, Member States should support the efforts of host States by providing bilateral assistance to their law and order authorities in establishing adequate security arrangements in camps, so as to deter infiltration by armed elements. As a first step, assistance in locating refugee camps and settlements at a significant distance from the border would help to prevent militarization. [...]

### **Recommendation**

- 6. I encourage the Security Council to further develop the concept of regional approaches to regional and subregional crises, in particular when formulating mandates.**
- 7. I further encourage the Security Council to support the development of clear criteria and procedures for the identification and separation of armed elements in situations of massive population displacement.**

### **D. Media and information in conflict situations**

38. The misuse of information can have deadly consequences in armed conflicts, just as information correctly employed can be life-saving. The “hate media” that were used to incite genocide in Rwanda are an extreme example of the way information can be manipulated to foment conflict and incite mass violence. Hate speech, misinformation and hostile propaganda continue to be used as blunt instruments against civilians, triggering ethnic violence and forcing displacement. Preventing such activities and ensuring that accurate information is disseminated, is thus an essential part of the work of protecting civilians in armed conflict. Impartial information on conflicts, zones of combat, the location of minefields and the availability of humanitarian assistance, can be as vital a requirement for distressed populations caught in areas of violent upheaval as shelter, food, water and medical services.

#### **1. Countering hate media used to incite violence [...]**

40. The best antidote to hate speech and incitement to violence is the development of free and independent media serving the needs of all parts of society. [...]

#### **2. Use of media and information in support of humanitarian operations**

42. In the global information age, giving victims a voice is essential for mobilizing the support necessary to preserve and improve the quality of human life. While recognizing that at times massive media campaigns can distort policy priorities, reliable media accounts and adequate information management are an essential

basis for decisions by Governments, donors, international organizations and non-governmental organizations.

43. The awareness of even distant events allows informed assessments and helps, in particular, humanitarian agencies to shape an appropriate response before going into a conflict area. Concrete and verified information about massive displacements of people, security conditions, and violations of international humanitarian and human rights law can be vital for distressed populations and international aid workers alike. [...]

### **3. Protection of journalists**

45. Many initiatives rely on the courage and commitment of journalists in conflict areas. Their protection from harassment, intimidation and threats must therefore be of concern to all. [...]

### **Recommendation**

- 8. I recommend that the Security Council make provision for the regular integration in mission mandates of media monitoring mechanisms that would ensure the effective monitoring, reporting and documenting of the incidence and origins of “hate media”. Such mechanisms would involve relevant information stakeholders from within the United Nations and other relevant international organizations, expert non-governmental organizations, and representatives of independent local media.**

## **IV. Entities providing protection**

46. [...] [T]he number of actors involved in rendering assistance and protection has significantly expanded: new actors have entered the stage and previously overlooked actors have gained greater importance. Although often profoundly differing in their resources, mandates, philosophies and interests, they can enhance our capacity to respond to violent conflict by providing additional resources, new approaches and comparative advantages. Faced with the increasingly opaque web of local and global politics, economic interests and criminal activity that characterizes many of today's conflicts, we must make the best use of organizations' limited resources by engaging all relevant actors in our work to improve the protection of civilians.

### **A. Entities bearing primary responsibility**

#### **1. Governments**

47. International efforts to protect civilians can only complement the efforts of Governments. [...] Where a Government is prevented from protecting its civilians, for lack of either resources or *de facto* control over part of its territory, it may need to seek the support of the international system, which has been established for precisely this purpose. Regrettably, in times of conflict, many Governments are unwilling to live up to this responsibility; in fact, they often constitute the major

impediment to any meaningful humanitarian assistance and protection. This interface between national responsibility and international support continues to pose a major challenge to the international community.

## **2. Armed groups**

48. The recent prevalence of civil wars has drawn increasing attention to the potential role of armed groups that are parties to the conflict in protecting civilian populations. In most intra-State conflicts armed groups have gained control over part of a country's territory and the population living there. Again and again, however, we see them misuse their power by attacking defenceless civilians, in blatant disregard of international humanitarian law. I would therefore like to recall the prohibition against targeting civilians and conducting indiscriminate attacks on civilians, enshrined in customary international humanitarian law, which is binding not only on States and their Governments but equally and directly so on armed groups that are parties to the conflict, as stated in article 3 common to the Geneva Conventions of 1949. The practice of the two *ad hoc* tribunals and the statute of the International Criminal Court have underlined the principle of direct responsibility of armed groups for violations of international humanitarian law.
49. Experience has shown, however, that many armed groups deliberately operate outside the recognized normative and ethical framework in furtherance of their objectives. In order to promote respect for international humanitarian and human rights law in these situations and to facilitate the necessary provision of humanitarian assistance and protection to vulnerable populations, it is indispensable to engage these groups in a structured dialogue. In this respect, I welcome the growing tendency of the Security Council to address all parties to armed conflicts (see resolution 1261 (1999)). It is important that aid agencies reaffirm the fundamental principles of international humanitarian and human rights law in their codes of conduct and in any agreements they conclude with actors on the ground. Contacts with armed groups should be neutral and should not affect their legitimacy or the legitimacy of their claims. [...]

## **Recommendations**

9. **In its resolutions the Security Council should emphasize the direct responsibility of armed groups under international humanitarian law. Given the nature of contemporary armed conflict, protecting civilians requires the engagement of armed groups in a dialogue aimed at facilitating the provision of humanitarian assistance and protection.**
10. **Many armed groups have neither developed a military doctrine nor otherwise incorporated the recognized principles of international humanitarian law in their mode of operation. I therefore urge Member States and donors to support efforts to disseminate information on international humanitarian and human rights law to armed groups and initiatives to enhance their practical understanding of the implications of those rules.**

## **B. Complementarity of other entities**

51. While the primary responsibility for the protection of civilians rests with Governments, in places where the Government is unable or unwilling to fulfil its obligations the international community is coming to accept its own responsibilities. The United Nations, including in particular the Security Council, needs to strengthen its role in this regard by more actively engaging a range of relevant actors. [...]

### **Recommendation**

- 11. I recommend that the Security Council develop a regular exchange with the General Assembly and other organs of the United Nations on issues pertaining to the protection of civilians in armed conflict. I suggest that the President of the General Assembly use the monthly meeting with the President of the Security Council to alert the Council to situations in which action might be required.**

#### **1. Civil society**

##### **(a) Non-governmental organizations**

53. Recent years have seen a considerable growth in the number and influence of national and transnational non-governmental organizations. Thanks to the global reach of the media and the possibilities of information technology, above all the Internet, non-governmental organizations are now better placed to form coalitions, organize and mobilize cohesive support on a global scale. In particular, non-governmental organizations have proved that they can make a significant impact on public policy and international law. In many conflicts non-governmental organizations are among the first to bear witness to violations of international humanitarian and human rights law, to conduct rigorous assessments of the humanitarian situation on the ground, and to solicit a coherent international response. By doing so, they often succeed in raising public awareness of a conflict, and thereby make political leaders act decisively in the face of crisis.
54. On the ground, non-governmental organizations are the daily and indispensable partners of the United Nations in providing humanitarian relief and assistance to vulnerable people. Their presence among the local population often imparts a measure of protection, not least in areas where minorities are living. Just like United Nations personnel, however, their national and international staff have more and more become the target of attack. [...] Finally, non-governmental organizations play an important and active role in negotiating humanitarian corridors and access to distressed populations, and, in some cases, in bringing warring parties to the negotiation table.
55. It is essential that Member States, the United Nations and other international organizations and non-governmental organizations, better understand each other's comparative advantages as a first step towards working more effectively together. [...]

56. The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, of 1997, and the Rome Statute establishing an International Criminal Court a year later are examples of the power of international civil society to work with Governments to achieve a legislative goal which can help to protect civilians in armed conflict.

**(b) Domestic civil society**

57. Domestic civil society represents the basic source of protection, especially when all other layers of protection fail. Civil society in this context refers not only to local non-governmental organizations and human rights groups, but also to religious congregations, charities, universities, trade unions, legal associations, independent activists and human rights defenders, families, clans and more. We must continue to reach out and build partnerships with these actors, and employ their knowledge of the local context, their skill at operating in conflict zones, and their sensitivity to the needs of local populations and to local cultural norms. The funding and training of these actors is therefore an important investment. In particular, partnerships between international and domestic civil society must be strengthened in negotiating access, monitoring abuse, especially where international monitoring is not possible, and facilitating dialogue with political actors on the ground. Finally, domestic civil society actors are often best equipped to promote awareness of and respect for international law within the conflict zone.
58. International actors must make sure that displaced communities are given a say in decisions that affect them. Displaced communities are not passive. [...]

**(c) Women, children and youth**

59. Tragically, women and children are the principal victims of armed conflict. Women are vulnerable to sexual violence, trafficking and mutilation, whether at home, in flight or in camps for displaced populations. Yet women also play a prominent role in rebuilding war-torn societies. Women's roles as mediators and as a primary force of economic activity during armed conflict are still underexamined and underutilized. [...]
60. Children too, besides being victimized as child soldiers and in many other ways during armed conflict, have a role to play in building a more stable future for war-torn countries. [...] Both UNICEF and my Special Representative for Children and Armed Conflict have spoken repeatedly of the need to ensure the participation of adolescents in humanitarian responses and peace-building activities. [...]

**(d) Private sector**

61. With almost 96 per cent of the private sector engaged in the manufacturing of civilian goods and services, the private sector has a vested interest in peace-building and economic stability, and in complementing rather than obstructing humanitarian efforts. Not all businesses, however, seek to be helpful or socially responsible. The negative role of foreign businesses in the diamond industry in Angola and Sierra

Leone demonstrates this fact. The impact of the pursuit of economic interests in conflict areas has come under increasingly critical scrutiny. Corporations have been accused of complicity with human rights abuses, and corporate royalties have continued to fuel wars. It has become common knowledge that by selling diamonds and other valuable minerals, belligerents can supply themselves with small arms and light weapons, thereby prolonging and intensifying the fighting and the suffering of civilians. It is therefore of critical importance that the United Nations continues to promote the exercise of responsible investment in crisis areas, by building upon and expanding its partnership with the private sector.

### **Recommendations**

- 12. I encourage the Security Council to continue investigating the linkages between illicit trade in natural resources and the conduct of war and to urge Member States and regional organizations to take appropriate measures against corporate actors, individuals and entities involved in illicit trafficking in natural resources and small arms that may further fuel conflicts.**
- 13. I urge Member States to adopt and enforce executive and legislative measures to prevent private sector actors within their jurisdiction from engaging in commercial activities with parties to armed conflict that might result in or contribute to systematic violations of international humanitarian and human rights law.**

### **2. Regional organizations**

62. In recent years, the United Nations has increasingly been engaged in building partnerships, on issues pertaining to the protection of civilians, with regional and intergovernmental organizations, including the Council of Europe, the Organization for Security and Cooperation in Europe, the Organization of African Unity, the Economic Community of West African States, the Southern African Development Community, the Association of Southeast Asian Nations, the League of Arab States, the Organization of the Islamic Conference, and the Inter-American Commission on Human Rights. [...]

### **Recommendation**

- 14. I encourage the Security Council to establish a more regular cooperation with regional organizations and arrangements to ensure informed decision-making, the integration of additional resources, and the use of their comparative advantages. Such cooperation should include the establishment of a regular regional reporting mechanism, and briefings, for the Security Council. Future high-level consultations between the United Nations and regional organizations will provide a welcome opportunity to further develop cooperation on strengthening the protection of civilians in armed conflict.**

## V. Final observations

64. The instruments, political and legal, now available for the protection of civilians in armed conflict are in urgent need of updating. They were developed in a world where State actors were overwhelmingly dominant, and they reflect that fact. Similarly, the practice of the United Nations was, at its inception, almost exclusively focused on the interaction of Member States.
65. New mechanisms and strategies are required to deal with changed circumstances. The forms of conflict most prevalent in the world today are internal – communal violence, ethnic cleansing, terrorism, private wars financed by the international trade in diamonds or oil – and involve a proliferation of armed groups. These circumstances reflect, to varying degrees, the erosion of the central role of the State in world affairs. While civilians have been the principal victims of these changes, it is wrong to say that the new order is entirely hostile to the protection of civilians. There are opportunities which can be seized, such as the global reach of the media and of new information technologies; the growing influence of civil society organizations and non-governmental organizations; the interdependence of the global economy; and the reach of international commerce.
66. Whether we are able to establish the culture of protection to which I referred at the beginning of this report will largely depend on the extent to which the United Nations, and the international community at large, are able to engage with the changed world. Is there enough will to strengthen the criminal justice system – both internationally and within national jurisdictions? Is there willingness to engage with armed groups, as the majority of armed conflicts occur within the borders of States? Will we be able to harness the potential of the media and the Internet? Will we build effective partnerships with civil society, non-governmental and regional organizations, and the private sector? These are not abstract questions; they are questions which emerge daily in the struggle to reduce the suffering of civilians in conflict and which, if they are to be answered in the affirmative, will at a minimum require Member States to take the specific steps enumerated in this and my previous report.
67. To this end, I would like to draw the Council's attention to a matter of particular concern. The present report is the second in a series. Some 18 months have passed since I submitted my first report on the protection of civilians in armed conflict. I regret to note that only a few of its 40 recommendations are so far being implemented. Nevertheless, the present report adds a further set of 14 recommendations whose implementation I consider essential if a real improvement in protection is to be achieved. Reports and recommendations are no substitute for effective action. The primary responsibility for the protection of civilians falls on Governments and armed groups involved in conflict situations. Where they do not honour these responsibilities, it is up to the Security Council to take action. [...] I urge the members of the Security Council to review progress in implementing the recommendations made in this and the previous report. Further reports can have meaning when there is clear evidence that their recommendations are effecting real progress towards their goal. By shifting the focus to implementation

of recommendations already agreed upon, it should be possible to ensure that future efforts will be more effective in bringing genuine relief and protection to civilians in armed conflict. [...]

## **B. 2009 Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict**

[Source: United Nations, S/2009/277, 29 May 2009; available on [www.un.org](http://www.un.org)]

### **REPORT OF THE SECRETARY-GENERAL ON THE PROTECTION OF CIVILIANS IN ARMED CONFLICT**

[...]

#### **III. The five core challenges**

26. Ultimately, the enduring need to strengthen the protection of civilians stems from the fundamental, and equally enduring, failure of parties to conflict to comply fully with their legal obligations to protect civilians. It is a failure that demands reinvigorated commitment and determined action so as to meet the following core challenges: enhancing compliance with international law; enhancing compliance by non-State armed groups; enhancing protection through more effective and better resourced United Nations peacekeeping and other relevant missions; enhancing humanitarian access; and enhancing accountability for violations.

#### **A. Enhancing compliance**

27. A defining feature of most, if not all, contemporary conflicts is the failure of the parties to respect and ensure respect for their legal obligations to protect civilians and spare them from the effects of hostilities. [...]
28. Constant care must be taken to spare the civilian population from the effects of hostilities. This requires, *inter alia*, strict compliance by parties to conflict with international humanitarian law and, in particular, the principles of distinction and proportionality, and the requirement to take all feasible precautions in attack and defence. Under no circumstances do violations of these rules by one party to a conflict justify violations by others.

[...]

33. I would remind all parties to conflict of their obligations scrupulously to respect and ensure respect for the relevant rules. I would also urge them to consider practical steps that could be taken to spare civilians from the effects of hostilities, a process that may in some situations benefit from more discussion with local populations and their leaders, civilian authorities, civil society or humanitarian actors.

[...]



37. The Security Council also has a critical role in promoting systematic compliance with the law. In particular, the Council should:
- (a) Use all available opportunities to condemn violations, without exception, and remind parties of, and demand compliance with, their obligations;
  - (b) Publicly threaten and, if necessary, apply targeted measures against the leadership of parties that consistently defy the demands of the Security Council and routinely violate their obligations to respect civilians;
  - (c) Systematically request reports on violations and consider mandating commissions of inquiry to examine situations where concerns exist regarding serious violations of international humanitarian law and human rights law, including with a view to identifying those responsible and prosecuting them at the national level, or referring the situation to the International Criminal Court.

## **B. Enhancing compliance by non-State armed groups**

[See also **Part I, Chapter 12**, The Law of Non-International Armed Conflicts, VIII. Who Is Bound by the Law of Non-International Armed Conflicts?]

38. Together with the increased prevalence of non-international armed conflicts, pitting States against non-State armed groups, or two or more such groups against each other, a common feature of contemporary conflicts is the proliferation and fragmentation of such groups. They encompass a range of identities, motivations and varying degrees of willingness to observe international humanitarian law and human rights standards.
39. Armed groups are bound by international humanitarian law and must refrain from committing acts that would impair the enjoyment of human rights. For some groups, attacks and the commission of other violations against civilians are deliberate strategies, intended to maximize casualties and destabilize societies. Others may be less inclined to attack civilians deliberately, but their actions still have an adverse impact on the safety and security of civilians. We need urgently to develop a comprehensive approach towards improving compliance by all these groups with the law, encompassing actions that range from engagement to enforcement.
40. As stated in common article 3 of the Geneva Conventions and in Additional Protocol II thereto, the application of international humanitarian law does not affect the legal status of non-State parties to a conflict. In order to spare civilians the effects of hostilities, obtain access to those in need and ensure that aid workers can operate safely, humanitarian actors must have consistent and sustained dialogue with all parties to conflict, State and non-State. Moreover, while engagement with non-State armed groups will not always result in improved protection, the absence of systematic engagement will almost certainly mean more, not fewer, civilian casualties in current conflicts.
41. The extensive experience of ICRC in working with armed groups, as well as that of United Nations actors and various non-governmental organizations, has

demonstrated the possible benefits of dialogue on protection. Engagement can take the form of dissemination and training on international humanitarian law and human rights law standards. The incentives for armed groups to comply with the law should be emphasized, including increased likelihood of reciprocal respect for the law by opposing parties.

42. Bearing in mind that armed groups have legal obligations, engagement may be based around the conclusion of codes of conduct, unilateral declarations and special agreements, as envisaged under international humanitarian law, through which groups expressly commit themselves to comply with their obligations or undertake commitments that go above and beyond what are required by the law. Such instruments have been concluded in a number of contexts, including in Colombia, Liberia, Nepal, the Philippines, Sierra Leone, Sri Lanka, the Sudan and the former Yugoslavia. Their conclusion can send a clear signal to the groups' members and lead to the establishment of appropriate internal disciplinary measures. They also provide an important basis for follow-up interventions. It is, however, critically important that such tools and the commitments and principles therein are incorporated into instructions and communicated to the groups' members.
43. Other initiatives include those of my Special Representative on Children and Armed Conflict with respect to ending the recruitment and use of children by armed groups. Another specific and successful example is the Geneva Call Deed of Commitment, which seeks to end the use of anti-personnel mines by armed groups [See Case No. 202, Geneva Call, Puntland State of Somalia adhering to a total ban on anti-personnel mines]. To date, 38 groups have signed the Deed and have, for the most part, refrained from using anti-personnel mines, cooperated in mine action in areas under their control and destroyed stockpiles.
44. Member States can themselves promote compliance by armed groups. Members of such groups have little legal incentive to comply with international humanitarian law if they are likely to face domestic criminal prosecution for their mere participation in a non-international armed conflict, regardless of whether they respect the law or not. Granting amnesty for merely participating in hostilities, though not in respect of any war crimes and serious violations of human rights law which may have been committed, as envisaged in Additional Protocol II to the Geneva Conventions, may in some circumstances help provide the necessary incentive.
45. At the absolute minimum, it is critical that Member States support, or at least do not impede, efforts by humanitarian organizations to engage armed groups in order to seek improved protection for civilians – even those groups that are proscribed in some national legislation. Engagement through training or the conclusion of special agreements can provide entry points for dialogue on more specific concerns, such as humanitarian access, protection of humanitarian workers and sexual violence. Of particular relevance to the Security Council, such dialogue can also in some instances contribute to confidence-building between parties which can lead, in time, to the cessation of hostilities and the restoration of peace and security.

46. There will be times when engagement proves futile. However, it should not be dismissed out of hand. Armed groups are not monoliths. They have entry points, such as through the local population, and members who may be more predisposed to engagement. However, when such efforts fail, alternatives must be considered, including the application of the measures outlined in paragraph 37 above, namely systematic condemnation of violations committed by armed groups and demands for compliance together with the application of targeted measures.
47. As a first step towards developing a more comprehensive approach to armed groups, it may be useful to convene an Arria formula meeting to discuss the experience of United Nations and non-governmental actors in working with armed groups and to identify additional measures that the Security Council and Member States could take to improve compliance.

### **C. Protection of civilians and United Nations peacekeeping and other relevant missions**

[...]

52. [...] [T]he “protection of civilians” mandate in peacekeeping missions remains largely undefined as both a military task and as a mission-wide task. Each mission interprets its protection mandate as best it can in its specific context. Some missions, such as the African Union-United Nations Hybrid Operation in Darfur (UNAMID) and MONUC, have developed force directives or mission-wide guidance to this end. Of course, heads of missions and force commanders must have latitude to interpret the mandate in light of their specific circumstances. However, this should take place within a broader policy framework that includes clear direction as to possible courses of action, including in situations where the armed forces of the host State are themselves perpetrating violations against civilians, as well as indicative tasks and the necessary capabilities for their implementation.
53. Protection of civilians is not a military task alone. All components of a mission, including police, humanitarian affairs, human rights, child protection, mine action, gender, political and civil affairs, public information, rule of law and security sector reform, can and must contribute to discharging the mission’s protection mandate. To this end, more missions are beginning to develop inclusive mission-specific protection strategies and plans of action, in consultation with Special Representatives of the Secretary-General, Force Commanders, humanitarian country teams, the host Government and communities. This is a welcome development and all missions should be encouraged to develop such inclusive strategies, establishing priorities, actions and clear roles and responsibilities.

[...]

**D. Humanitarian access**

58. Access is the fundamental prerequisite for humanitarian action [...]. Under international humanitarian law, parties to conflict must protect and meet the basic needs of persons within their control. In situations where they are unwilling or unable to do so, humanitarian actors have an important subsidiary role to play. In such circumstances, parties should agree to relief operations that are humanitarian and impartial in character and conducted without any adverse distinction, and must allow and facilitate rapid and unimpeded passage of relief consignments, equipment and personnel. [...]
59. [...] Constraints on access should have consequences for those who impose them, not merely for those who suffer from them. The Council has an important role to play in ensuring an environment that is conducive to facilitating access to those in need. More specifically, key findings suggest that the Council should:
- (a) Consistently condemn and call for the immediate removal of impediments to humanitarian access that violate international humanitarian law;
  - (b) Call for strict compliance by parties to conflict and third States with their obligations to allow and facilitate the rapid and unimpeded passage of relief consignments, equipment and personnel, and encourage States to promote respect for humanitarian principles;
  - (c) Call upon parties to conflict to allow safe passage for civilians seeking to flee zones of fighting;
  - (d) Call upon parties to conflict to agree to the temporary suspension of hostilities and implement days of tranquillity in order to enable relief actions by humanitarian actors;
  - (e) Call upon parties to conflict to cooperate with humanitarian organizations in the establishment of de-conflicting arrangements in order to facilitate the delivery of assistance during hostilities;
  - (f) Call upon relevant parties to conclude and implement agreements so as to expedite the deployment of humanitarian personnel and assets. Negotiations could be assisted by the development of a standard moratorium on visa requirements, work and travel permits, and on customs duties and import restrictions on humanitarian goods and equipment;
  - (g) Mandate United Nations peacekeeping and other relevant missions, where appropriate and as requested, to assist in creating conditions conducive to safe, timely and unimpeded humanitarian action;
  - (h) Apply targeted measures against individuals obstructing access to, or the distribution of, humanitarian assistance;
  - (i) Refer grave and prolonged instances of the wilful impediment of relief supplies to the International Criminal Court.

60. Considering the frequency and gravity of attacks and other violations against humanitarian workers, as detailed in the annex, the Security Council is urged to:
- (a) Consistently condemn and call for the immediate cessation of all acts of violence and other forms of harassment deliberately targeting humanitarian workers;
  - (b) Call for strict compliance by parties to conflict with international humanitarian law, including the duty to respect and protect relief personnel and installations, material, units and vehicles involved in humanitarian assistance;
  - (c) Call upon States affected by armed conflict to assist in creating conditions conducive to safe, timely and unimpeded humanitarian action;
  - (d) Call upon Member States that have not done so to ratify and implement the Convention on the Safety of United Nations and Associated Personnel and its Optional Protocol;
  - (e) Apply targeted measures against individuals responsible for attacks against humanitarian workers and assets;
  - (f) Refer grave instances of attacks against humanitarian workers to the International Criminal Court.

#### **E. Enhancing accountability**

61. Integral to the foregoing challenges is the need to ensure accountability for violations of international humanitarian law and human rights law, both for individual perpetrators and for parties to conflict. [...]
63. [...] [E]nsuring accountability at the national level, rather than resorting to [...] international mechanisms as the International Criminal Court, would help to alleviate some of the tensions that are perceived to exist between the pursuit of justice, on the one hand, and the pursuit of peace, on the other.
64. In terms of steps at the national level, the removal in October 2008 of 25 members of the Colombian armed forces for failures relating to alleged enforced disappearances, as well as prosecutions this year in the United States of America of military personnel accused of war crimes in Iraq, are instructive of the type of national-level actions that need to be pursued. It is imperative that we move beyond such isolated examples and take concrete steps at the national level to instil, in particular among combatants, a genuine expectation of accountability in war.
65. In particular, Member States, as well as non-State parties to conflict, as appropriate, should:
- (a) Provide training to combatants on international humanitarian law and human rights law, including refresher training;

- (b) Issue manuals, orders and instructions setting out their obligations and ensure the availability of legal advisers to inform commanders on the application of the law;
  - (c) Ensure that orders and instructions are observed by establishing effective disciplinary procedures, central to which must be strict adherence to the principle of command responsibility.
66. If it is not already the case, Member States should, in addition:
- (a) Adopt national legislation for the prosecution of persons suspected of genocide, crimes against humanity, war crimes and other serious violations of human rights law;
  - (b) Search for and, on the basis of universal jurisdiction, prosecute persons suspected of grave breaches of international humanitarian law and serious violations of human rights law, or extradite them;
  - (c) Ratify the statute of the International Criminal Court without delay;
  - (d) Cooperate fully with the International Criminal Court and similar mechanisms.
67. For its part, the Security Council is urged to:
- (a) Insist that Member States cooperate fully with the International Criminal Court and similar mechanisms;
  - (b) Enforce such cooperation, as necessary, through targeted measures;
  - (c) Systematically request reports on violations and consider mandating commissions of inquiry to examine situations where concerns exist about serious violations of international humanitarian law and human rights law, including with a view to identifying those responsible and their being held accountable at the national level, or subjected to targeted measures and/or the situation referred to the International Criminal Court.

[...]

## DISCUSSION

[Though some references to the Geneva Conventions and Additional Protocols are mentioned below, you may also find information to answer these questions in, *inter alia*, the Statute of the International Criminal Court [see **Case No. 23**, The International Criminal Court], the 1951 Convention relating to the Status of Refugees and its 1967 Protocol [available at [www.unhcr.org](http://www.unhcr.org)], and the Optional Protocol on the Involvement of Children in Armed Conflict [see **Document No. 24**, Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict]

1. (2001 Report, para. 2) How would you describe “today’s conflicts” mentioned by the Secretary-General? Are today’s conflicts more deadly than conflicts of the past? Or more unacceptable because of the increasing proportion of civilian casualties? Does this unacceptable proportion of civilian casualties only concern internal and/or ethnic-oriented conflicts?

2. (2009 Report, paras 27-37) What can be done to incite States to comply more fully with their obligation to respect and ensure respect for IHL? Are armed groups also bound by this obligation?

### **I. Enhancing compliance by armed groups**

3. (2001 Report, paras 19-20, 48-49 and Recommendations 9-10; 2009 Report, paras 38-47)
  - a. From the point of view of international law, what is the status of armed groups? Are they subjects of international law? Are they at least subjects of IHL? Does such status confer any legitimacy upon them? Do negotiations or talks with armed groups confer on them a specific legal status or provide them with some kind of legitimacy? What does IHL say about the legal status of armed groups? (GC I-IV, common Art. 3; P II, Art. 3)
  - b. Can armed groups be subjects of international law, and thus parties to treaties (peace treaties, IHL treaties, etc.)? How can they be bound by rules of international law? Does IHL explicitly contain rules directly applicable to armed groups? Which IHL obligations are binding for armed groups in non-international armed conflicts? What is the importance of customary IHL in terms of the law of non-international armed conflicts? Is the customary IHL of non-international armed conflicts the same for armed groups and for States? Are all rules of the IHL of non-international armed conflicts realistic for armed groups? If they control territory? If they do not control territory?
  - c. Why are armed groups bound by the IHL of non-international armed conflicts? How can an armed group express its intention to comply with the rules of IHL in international or non-international armed conflicts? For them to be bound, is an expression of their willingness to that effect necessary? If not, why would it nevertheless be useful to obtain their commitment? (GC I-IV, common Art. 3; P I, Art. 96(3))
  - d. Why do you think States are reluctant to allow humanitarian organizations to engage with armed groups? May the initiatives referred to in the 2009 Report (such as that of the Secretary-General's Special Representative on Children and Armed Conflict, and that of Geneva Call) change the status of armed groups under IHL? Do these initiatives give armed groups legitimacy? Do they legitimize the use of force against government soldiers and military objectives? (2009 Report, para. 43)

### **II. Access to humanitarian assistance**

4. (2001 Report, paras 14-18, 25 and Recommendations 4-5; 2009 Report, paras 58-60)
  - a. What are the rules of IHL concerning the civilian population's right to receive humanitarian assistance? What are the specific rules concerning the access of humanitarian organizations to vulnerable populations? The protection of humanitarian staff and vehicles? In international armed conflict? In non-international armed conflict? (GC I, Arts 19-26, 33-37, 39-43 and 53-54; GC II, Arts 22-27, 34 and 36-43; GC IV, Arts 18, 21-23, 55-56 and 59; P I, Arts 12-16, 18, 21-23 and 69-70; P II, Arts 9-12 and 18(2))
  - b. What is the importance of neutrality for a humanitarian organization? Is the ICRC the only neutral and independent organization? What are the differences between the ICRC and other international or non-governmental humanitarian organizations? What are the advantages and shortcomings of the multiplication of humanitarian organizations, at the international and national or local levels?
  - c. What do you think of the complexities of humanitarian operations on the ground as described in the 2001 Report (para. 17)? Should humanitarian organizations accept conditions such as giving a certain proportion of the aid to a warring party? If yes, isn't this behaviour fuelling

the conflict and a breach of neutrality? If no, isn't this behaviour equivalent to abandoning the starving population?

- d. Is the deliberate starving of civilians forbidden by IHL? In international armed conflicts? In non-international armed conflicts? Is it a war crime? A crime against humanity? (P I, Art. 54; P II, Art. 14)
- e. Do the demands listed in para. 59 of the 2009 Report have their equivalent under IHL? For instance, is there an obligation under IHL for parties to agree to the temporary suspension of hostilities in order to enable relief actions by aid agencies?

### **III. Internally displaced persons and refugees**

- 5. (*2001 Report, paras 22-23, 28-36 and Recommendations 6-7*)
  - a. How does IHL protect internally displaced persons (IDPs) and refugees? Are the rules the same for international and non-international armed conflicts? Can a fighter be granted refugee status? A fighter who has never committed violations of IHL? Who is responsible for granting refugee status? (GC IV, Arts 23 and 35-46; P I, Arts 70 and 73)
  - b. Who is responsible for keeping civilians separate from armed elements in refugee camps? In IDP camps? The UNHCR, the international community (peacekeeping forces, etc.), the country of origin, the country of asylum, the ICRC, other organizations? Is this separation a rule of international law? Of refugee law? Of IHL?
  - c. Is there an obligation for a third country to grant asylum to civilians fleeing a conflict in their country of origin? Might it not be a threat to that neighbouring country's security to do so? Is there an obligation for the international community and/or the UNHCR to help the country of asylum to cope with the arrival of refugees?

### **IV. Media**

- 6. (*2001 Report, paras 38-45 and Recommendation 8*) Taking into account the important role of certain media in warfare, would you consider media infrastructures as legitimate military targets? Only if that media organization is spreading hate and inciting violence? Who can decide if a media organization is "hate media"? What about the staff working in "hate media" inciting the commission of acts of violence? Are they legitimate targets? What about genuine journalists who are doing their job in a conflict situation? What is the status of those journalists, in general, under IHL? Is their protection under IHL sufficient? (GC III, Art. 4(A)(4); P I, Arts 52 and 79)

### **V. Women and children**

- 7. (*2001 Report, paras 59-60*) What protection does IHL provide for women and children? In international and non-international armed conflict? What are the specific rules concerning child recruitment and child soldiers? What kind of rules could increase their protection? (GC I, Art. 12; GC II, Art. 12; GC III, Arts 14, 25, 88, 97 and 108; GC IV, Arts 14, 16-17, 21-27, 38, 50, 76, 82, 85, 89, 91, 94, 97, 124, 127 and 132; P I, Arts 70 and 75-78; P II, Arts 4, 5(2) and 6(4))

### **VI. Other actors**

- 8. a. What is the responsibility of private companies which finance the conflict either indirectly, for instance through the trade of diamonds, or directly by providing weapons to warring parties? Which commercial activities with parties to armed conflict result in or contribute to violations of IHL? Every activity facilitating the continuation of the conflict? At least if the company concerned knows that violations of IHL are committed in that conflict? Or must the commercial



activity itself be related to violations of IHL? Must the company know about the violations and have intent to contribute to them?

- b. Could the personnel of such companies be held individually accountable and be prosecuted for war crimes committed by armed groups they are supporting?
- c. Is a mining company extracting raw materials in an area controlled by an armed group, while authorized by that group but not by the government, violating the prohibition of pillage?

## VII. Enhancing accountability

9. (2001 Report, paras 9-13 and Recommendations 1-3; 2009 Report, paras 61-67)

- a. Do you agree with the Secretary-General that the prosecution of war criminals is a good method to protect the civilian population? Do you believe that especially during non-international armed conflicts, people responsible for serious violations of IHL think of and/or fear potential future judicial consequences of their acts? Is prosecution in post-conflict situations a good method to prevent future violations of IHL during a conflict? To promote reconciliation?
- b. Whose primary responsibility is it to prosecute violations of IHL? Why should accountability be promoted at the national level, rather than accountability before international jurisdictions? (2009 Report, para. 63)
- c. Do armed groups have any responsibility for enhancing accountability for violations of IHL? May they prosecute their members who have committed violations? Or may they only take disciplinary measures? Is it realistic to require them to hand their members suspected of war crimes over to the national justice system or to international tribunals?
- d. Does IHL provide for amnesty? In what circumstances? Is amnesty acceptable for grave breaches of IHL? If not, then for what type of crimes? How would you classify illegal behaviour for which amnesty can be granted, and for which it cannot? (P II, Art. 6(5))
- e. Isn't it contradictory to set up, within one post-conflict situation, both a judicial prosecution system and a truth and reconciliation commission? How should the two institutions interact? How do you determine who should be prosecuted, and who should be heard before the truth and reconciliation commission? What is the best system for the protection of civilians? For conflict prevention? For the status of the victims, their interests and their rights?

**Case No. 62, ICJ, Nuclear Weapons Advisory Opinion**

[Source: Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, ICJ Rep. 1996, p. 226; available on <http://www.icj-cij.org>]

**“THE COURT [...]”  
gives the following Advisory Opinion:**

1. The question upon which the advisory opinion of the Court has been requested is set forth in resolution 49/75 K adopted by the General Assembly of the United Nations [...] on December 15, 1994. [...], the English text of which [...] reads as follows:

*“The General Assembly, [...]*

*Decides, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render its advisory opinion on the following question: ‘Is the threat or use of nuclear weapons in any circumstance permitted under international law?’” [...]*

13. The Court must furthermore satisfy itself that the advisory opinion requested does indeed relate to a “legal question” within the meaning of its Statute and the United Nations Charter.

The Court has already had occasion to indicate that questions

*“framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law . . . [and] appear . . . to be questions of a legal character” (Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 18, para. 15).*

The question put to the Court by the General Assembly is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law.

The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a “legal question” and to “deprive the Court of a competence expressly conferred on it by its Statute” (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 172, para. 14*). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law. [...]

15. [...] Certain States have however expressed the fear that the abstract nature of the question might lead the Court to make hypothetical or speculative declarations

outside the scope of its judicial function. The Court does not consider that, in giving an advisory opinion in the present case, it would necessarily have to write “scenarios”, to study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information. The Court will simply address the issues arising in all their aspects by applying the legal rules relevant to the situation. [...]

\*\*\*

24. Some of the proponents of the illegality of the use of nuclear weapons have argued that such use would violate the right to life as guaranteed in Article 6 of the International Covenant on Civil and Political Rights. [...]

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” [...]

25. The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself. [...]

27. [...] [S]ome States furthermore argued that any use of nuclear weapons would be unlawful by reference to existing norms relating to the safeguarding and protection of the environment, in view of their essential importance.

Specific references were made to various existing international treaties and instruments. These included Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 35, paragraph 3, of which prohibits the employment of “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”; and the Convention of May 18, 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which prohibits the use of weapons which have “widespread, long-lasting or severe effects” on the environment (Art. 1). [...]

28. Other States questioned the binding legal quality of these precepts of environmental law; or, in the context of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, denied that it was concerned at all with the use of nuclear weapons in hostilities; or, in the case of Additional Protocol I, denied that they were generally bound by its terms, or recalled that they had reserved their position in respect of Article 35, paragraph 3, thereof.

It was also argued by some States that the principal purpose of environmental treaties and norms was the protection of the environment in time of peace. It was said that those treaties made no mention of nuclear weapons. It was also pointed out that warfare in general, and nuclear warfare in particular, were not mentioned in their texts and that it would be destabilizing to the rule of law and to confidence in international negotiations if those treaties were now interpreted in such a way as to prohibit the use of nuclear weapons.

29. [...] The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.
30. However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:

“Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.”

31. The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.

These are powerful constraints for all the States having subscribed to these provisions.

32. General Assembly resolution 47/37 of 25 November 1992 on the Protection of the Environment in Times of Armed Conflict, is also of interest in this context. It affirms the general view according to which environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict: it states that “destruction of the environment,

not justified by military necessity and carried out wantonly, is clearly contrary to existing international law". Addressing the reality that certain instruments are not yet binding on all States, the General Assembly in this resolution "[a]ppeals to all States that have not yet done so to consider becoming parties to the relevant international conventions." [...]

33. The Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.

\*

34. In the light of the foregoing the Court concludes that the most directly relevant applicable law governing the question of which it was seized, is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant.

\*\*

35. In applying this law to the present case, the Court cannot however fail to take into account certain unique characteristics of nuclear weapons.

The Court has noted the definitions of nuclear weapons contained in various treaties and accords. It also notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

36. In consequence, in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.

\*\*\*

37. The Court will now address the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter relating to the threat or use of force.
38. The Charter contains several provisions relating to the threat and use of force. [...]
39. [...] A weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.
40. The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self defence. Other requirements are specified in Article 51.
41. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (I.C.J. Reports 1986, p. 94, para. 176): “there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law”. [...]
42. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.
43. Certain States [...] contend that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality. [...]
51. Having dealt with the Charter provisions relating to the threat or use of force, the Court will now turn to the law applicable in situations of armed conflict. It will first address the question whether there are specific rules in international law regulating the legality or illegality of recourse to nuclear weapons *per se*; it will then examine the question put to it in the light of the law applicable in armed conflict proper, i.e. the principles and rules of humanitarian law applicable in armed conflict, and the law of neutrality.

52. [...] State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.

\*

53. The Court must therefore now examine whether there is any prohibition of recourse to nuclear weapons as such; it will first ascertain whether there is a conventional prescription to this effect.

54. In this regard, the argument has been advanced that nuclear weapons should be treated in the same way as poisoned weapons. In that case, they would be prohibited under:

- (a) the Second Hague Declaration of July 29, 1899, which prohibits "the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases";
- (b) Article 23 (a) of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of October 18, 1907, whereby "it is especially forbidden: ...to employ poison or poisoned weapons"; and
- (c) The Geneva Protocol of June 17, 1925 which prohibits "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices".

55. The Court will observe that the Regulations annexed to the Hague Convention IV do not define what is to be understood by "poison or poisoned weapons" and that different interpretations exist on the issue. Nor does the 1925 Protocol specify the meaning to be given to the term "analogous materials or devices". The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.

56. In view of this, it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the above-mentioned provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Protocol (see paragraph 54 above).

57. The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. [...] Each of these instruments has been negotiated and adopted in its own context and for its own reasons. The Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction. [...]

62. The Court notes that the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing of nuclear weapons, without specifically addressing their threat or use, certainly point to an increasing concern in the international community with these weapons; the Court concludes from this that these treaties could therefore be seen as foreshadowing a future general

prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves. As to the treaties of Tlatelolco and Rarotonga and their Protocols, and also the declarations made in connection with the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons, it emerges from these instruments that:

- (a) a number of States have undertaken not to use nuclear weapons in specific zones (Latin America; the South Pacific) or against certain other States (non-nuclear-weapon States which are parties to the Treaty on the Non-Proliferation of Nuclear Weapons);
  - (b) nevertheless, even within this framework, the nuclear-weapon States have reserved the right to use nuclear weapons in certain circumstances; and
  - (c) these reservations met with no objection from the parties to the Tlatelolco or Rarotonga Treaties or from the Security Council.
63. These two treaties, the security assurances given in 1995 by the nuclear-weapon States and the fact that the Security Council took note of them with satisfaction, testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons. The Court moreover notes the signing, even more recently, on December 15, 1995, at Bangkok, of a Treaty on the Southeast Asia Nuclear-Weapon-Free Zone, and on April 11, 1996, at Cairo, of a treaty on the creation of a nuclear-weapons-free zone in Africa. It does not, however, view these elements as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such.

\*

64. The Court will now turn to an examination of customary international law to determine whether a prohibition of the threat or use of nuclear weapons as such flows from that source of law. As the Court has stated, the substance of that law must be “looked for primarily in the actual practice and *opinio juris* of States” (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgement*, I.C.J. Reports 1985, p. 29, para. 27).
65. States which hold the view that the use of nuclear weapons is illegal have endeavoured to demonstrate the existence of a customary rule prohibiting this use. They refer to a consistent practice of non-utilization of nuclear weapons by States since 1945 and they would see in that practice the expression of an *opinio juris* on the part of those who possess such weapons.
66. Some other States, which assert the legality of the threat and use of nuclear weapons in certain circumstances, invoked the doctrine and practice of deterrence in support of their argument. They recall that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests. In their view, if nuclear weapons have not been used since 1945, it is not



on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.

67. [...] [T]he Members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past fifty years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*.
68. According to certain States, the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of November 24, 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons. [...]
70. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.
71. Examined in their totality, [...] several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; [...] they [...] fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons. [...]
73. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.

\*\*

74. The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality.
75. A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The "laws and customs of war" – as they were traditionally called – were the subject

of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This “Hague Law” and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the “Geneva Law” (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.

76. Since the turn of the century, the appearance of new means of combat has – without calling into question the longstanding principles and rules of international law – rendered necessary some specific prohibitions of the use of certain weapons, such as explosive projectiles under 400 grammes, dum-dum bullets and asphyxiating gases. Chemical and bacteriological weapons were then prohibited by the 1925 Geneva Protocol. More recently, the use of weapons producing “non-detectable fragments”, of other types of “mines, booby traps and other devices”, and of “incendiary weapons”, was either prohibited or limited, depending on the case, by the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. The provisions of the Convention on “mines, booby traps and other devices” have just been amended, on 3 May 1996, and now regulate in greater detail, for example, the use of anti-personnel land mines.
77. All this shows that the conduct of military operations is governed by a body of legal prescriptions. This is so because “the right of belligerents to adopt means of injuring the enemy is not unlimited” as stated in Article 22 of the 1907 Hague Regulations relating to the laws and customs of war on land. The St. Petersburg Declaration had already condemned the use of weapons “which uselessly aggravate the suffering of disabled men or make their death inevitable”. The aforementioned Regulations relating to the laws and customs of war on land, annexed to the Hague Convention IV of 1907, prohibit the use of “arms, projectiles, or material calculated to cause unnecessary suffering” (Art. 23).
78. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering.

In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

The Court would likewise refer, in relation to these principles, to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:

*"In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."*

In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.

79. It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgement of April 9, 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.
80. The Nuremberg International Military Tribunal had already found in 1945 that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 "were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war" (International Military Tribunal, *Trial of the Major War Criminals*, November 14, 1945–October 1, 1946, Nuremberg, 1947, Vol. 1, p. 254).
81. The Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), with which he introduced the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and which was unanimously approved by the Security Council (resolution 827 (1993)), stated: [...]

The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of August 12, 1949

for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of October 18, 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948; and the Charter of the International Military Tribunal of August 8, 1945.

82. The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States. [...]
84. Nor is there any need for the Court to elaborate on the question of the applicability of Additional Protocol I of 1977 to nuclear weapons. It need only observe that while, at the Diplomatic Conference of 1974-1977, there was no substantive debate on the nuclear issue and no specific solution concerning this question was put forward, Additional Protocol I in no way replaced the general customary rules applicable to all means and methods of combat including nuclear weapons. In particular, the Court recalls that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I. The fact that certain types of weapons were not specifically dealt with by the 1974-1977 Conference does not permit the drawing of any legal conclusions relating to the substantive issues which the use of such weapons would raise. [...]
86. [...] [N]uclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. [...]

None of the statements made before the Court in any way advocated a freedom to use nuclear weapons without regard to humanitarian constraints. Quite the reverse; it has been explicitly stated,

“Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons” (Russian Federation, CR 95/29, p. 52);

“So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the *jus in bello*” (United Kingdom, CR 95/34, p. 45); and

“The United States has long shared the view that the law of armed conflict governs the use of nuclear weapons – just as it governs the use of conventional weapons” (United States of America, CR 95/34, p. 85.)

87. Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons. [...]
90. Although the applicability of the principles and rules of humanitarian law and of the principle of neutrality to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial. [...]
94. The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the “clean” use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.
95. Nor can the Court make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.
96. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.

Nor can it ignore the practice referred to as “policy of deterrence”, to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain nuclear-weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons.

97. Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

[...]

105. For these reasons,

## THE COURT,

(1) By thirteen votes to one,

*Decides* to comply with the request for an advisory opinion; [...]

(2) *Replies* in the following manner to the question put by the General Assembly:

### A. Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

### B. By eleven votes to three,

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: *Judges* Shahabuddeen, Weeramantry, Koroma.

### C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

### D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

### **E. By seven votes to seven, by the President's casting vote,**

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;

IN FAVOUR: *President* Bedjaoui; *Judges* Ranjeva, Herczegh, Shi, Fleischhauer, Vereschetin, Ferrari Bravo;

AGAINST: *Vice-President* Schwebel; *Judges* Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins.

### **F. Unanimously,**

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

## **DISCUSSION**

1. (*Paras 74-87*) Is IHL applicable to the use of nuclear weapons? Are there any exceptions?
  - a. Do the rules of customary IHL simply "indicate the normal conduct and behaviour expected from States" (*para. 82*) or are they binding on States? Even for the use of nuclear weapons?
  - b. Are the Geneva and Hague Conventions applicable to the use of nuclear weapons only insofar as they are customary law?
  - c. Can you imagine a specific use of nuclear weapons not prohibited by the principles referred to in *para. 78* or by the treaties qualified as customary in *para. 79*, but which becomes unlawful because of the Martens Clause? Is it because of the Martens Clause that IHL covers the use of nuclear weapons, although no specific provision on those weapons exists?
  - d. Is Protocol I applicable to the use of nuclear weapons? Why should it not be? Are only the customary law rules of Protocol I applicable to the use of nuclear weapons? Only the rules which were already customary in 1977, when Protocol I was adopted? Or also those which have become customary in the meantime? Has customary IHL developed since 1977? Are those new rules of customary IHL applicable to the use of nuclear weapons? Even the rules which became customary under the influence of Protocol I?
2. (*Paras 94-97, 105(2)E*) Does IHL prohibit the use of nuclear weapons in every circumstance? Does the Court answer this question?
  - a. Is the Court unable to conclude definitively due to doubts about the law or doubts about the facts (i.e. because it cannot exclude the possibility of a situation arising in which nuclear weapons are so clearly targeted at a military objective and their effects limited to that objective – or in which the civilian collateral damage is not disproportionate – that their use conforms to all rules of IHL)?

- b. Does the Court consider that nuclear weapons may be used “in an extreme circumstance of self-defence, in which the very survival of a State is at stake”?
  - aa. Has the Court doubts as to whether they may be used in that circumstance? If the Court holds that the use of nuclear weapons “would generally be contrary to” IHL, but that it cannot exclude its legality in that extreme circumstance, is not the court, in fact, admitting that violations of IHL may be lawful in that extreme circumstance? Do such acts in that extreme circumstance become lawful under IHL or does *jus ad bellum* then override *jus in bello*?
  - bb. May a belligerent torture prisoners of war, execute wounded on the battlefield or transport weapons in ambulances marked with the red cross emblem “in an extreme circumstance of self-defence, in which the very survival of a State is at stake”? Does IHL have to be respected when engaging in self-defence? Does IHL have to be respected even “in an extreme circumstance of self-defence, in which the very survival of a State is at stake”? Has the International Court of Justice doubts whether the answer is affirmative? What would the consequences of a negative answer be for IHL?
  - cc. Who decides whether there is “an extreme circumstance of self-defence, in which the very survival of a State is at stake”? If a State is violating IHL in that extreme circumstance, what is the likely reaction of its adversary?
- c. How do you explain the Court’s division in answering the core question in para. 105(2)E, and that in its answer it seems to confuse *jus ad bellum* and *jus in bello*? What would the consequences for the Court and for IHL have been if the Court had given a positive or a negative answer? Would it have been better for IHL if the Court had concluded that the use of nuclear weapons may be lawful under IHL, rather than concluding that it is generally unlawful but may be justified “in an extreme circumstance of self-defence, in which the very survival of a State is at stake”?
- 3. (Para. 25) Is the right to life protected in armed conflicts only by IHL or also by international human rights law? Is not the right to life non-derogable under international human rights law, while IHL admits “the right to kill” combatants on the battlefield? Can the right to life be invoked against a specific belligerent act in an armed conflict before the UN Human Rights Committee (whose task is to monitor implementation of the UN Covenant on Civil and Political Rights) (See the Commission on Human Rights website: <http://www.ohchr.org>)?
- 4. (Paras 27-33) Is international environmental law applicable in armed conflicts?
  - a. Are the general treaties and customary rules on the protection of the environment applicable in armed conflicts?
  - b. Is the prohibition contained in Art. 35(3) of Protocol I simply “properly to be taken into account” when “assessing whether an action is in conformity with the principles of necessity and proportionality”, or must it be respected in all circumstances? Even when exercising the right of self-defence?
  - c. Are the principles of necessity and proportionality mentioned in para. 30 those of IHL? Or does this paragraph only concern *jus ad bellum*? Or does it mix up *jus ad bellum* and *jus in bello*?
- 5. (Para. 43) Is the principle of proportionality referred to in para. 43 (and the values to be taken into account) the same as in Art. 51(5)(b) of Protocol I?
- 6. (Para. 55) Why are nuclear weapons not poisonous within the meaning of the prohibition of poisonous weapons in IHL? Because poison operates through a chemical process and radioactivity is a physical process?



7. (*Paras 64-73*) Is the fact that nuclear weapons have never been used since 1945 proof of a customary law prohibition of the use of nuclear weapons, particularly considering that many armed conflicts have been fought since then – including those in the exercise of the right to self-defence – and that some of them were lost by States possessing nuclear weapons?
8. Which aspects of this Advisory Opinion are helpful or harmful to IHL or to the victims of armed conflicts? Would it have been preferable if this opinion had never been requested? Does this opinion show a general direction in which contemporary international law is developing, and if so, what does this direction mean for IHL?

**Case No. 63, Switzerland, Military Penal Code**

**A. The Code**

[Source: *Recueil systématique du droit fédéral*, 321.0; available at [www.admin.ch](http://www.admin.ch). Unofficial translation. Footnotes omitted.]

**MILITARY PENAL CODE**  
**Federal Law of 13 June 1927 (as of March 1, 2009)**

[...]

**Book 1 – Military penal law**

**Part 1 – General provisions**

**Section 1: Field of application**

[...]

**3. Personal conditions**

**Article 3**

The following shall be subject to military penal law:

1. Persons required to perform military service; [...]
9. Foreign civilians or members of the military forces who, during an armed conflict, are guilty of having violated the law of nations (Art. 108 to 114).

[...]

**Article 4**

**Extension in case of active service**

In the case of active service, the following shall also be subject to military penal law by decision of the Federal Council and to the extent determined by the latter:

[...]

4. Military internees of belligerent States who belong to the latter's armed forces, militias or volunteer corps, including members of organized resistance movements, civilian internees and refugees under the army's responsibility;

[...]

**Article 5**

**Extension in wartime**

In wartime, the following shall be subject to military penal law in addition to the persons referred to in Articles 3 and 4:

1. Civilians who are guilty of the following violations:

- treason [...],
  - military espionage against a foreign State [...],
  - pillaging or wartime looting [...],
  - arson, explosion, the use of explosives, flooding or collapse, insofar as the violation affects items used by the army [...];
2. Prisoners of war, for violations provided for under this Code, including those committed, in Switzerland or in another country in wartime and before the start of their captivity, against the Swiss State or army or against members of the Swiss army;
  3. Enemy negotiators and persons who accompany them, where they abuse their position in order to commit an offence;
  4. Civilian internees in war zones or occupied territory.
- [...]

**Article 7**  
**Participation by civilians**

1. Any persons who have taken part, with persons subject to military penal law, in a purely military violation [...], in a violation of the national defence, of the country's defensive power [...], or of the law of nations in case of armed conflict [...] shall also be punishable under this Code.
- [...]

**5. Conditions of place**

**Article 10**

1. If the personal conditions are fulfilled, this Code shall apply equally to violations committed in Switzerland and those committed in other countries.
- 1.bis* It shall apply to the persons referred to in Article 3, paragraph 9, who are aliens and who have committed violations of international law (Articles 108 to 114) abroad, in the course of an armed conflict, when they:
- (a) Are present in Switzerland;
  - (b) Have a close connection with Switzerland;
  - (c) Cannot be extradited or handed over to an international criminal tribunal.
- [...]

**Part 2 – On various crimes and offences**

[...]

**Chapter VI: Violations of international law committed  
in the event of armed conflict**

**Article 108**

**Scope**

1. The provisions of this Chapter shall apply in situations of declared war or other armed conflicts between two or more States; these shall include violations of neutrality and the use of force to counter such violations.
2. Violations of international agreements shall also be punishable where said agreements provide for a more extensive field of application.

**Article 109**

**Violation of the laws of war**

1. Any person who contravenes the stipulations of international treaties on the conduct of hostilities and on the protection of persons and property,  
any person who violates other recognized laws and customs of war,  
shall be punished, unless more severe provisions are applicable, by a period imprisonment of up to three years or a fine and, in serious cases, by imprisonment of at least one year.
2. Lesser offences shall be punished by disciplinary measures.

**Article 110**

**Misuse of an international emblem**

Any person who misuses the emblem of the red cross, the red crescent or the red lion and sun, the emblem in the third Protocol additional to the Geneva Conventions or the shield marking cultural property, or who wrongfully avails himself of the protection afforded by said emblem or shield, in order to prepare or commit hostile acts shall be punished by imprisonment of up to three years or by a fine and, in serious cases, by imprisonment of at least one year.

**Article 111**

**Hostile acts against persons and objects protected  
by an international organization**

1. Any person who engages in hostile acts against persons placed under the protection of the red cross, the red crescent, the red lion and sun, the emblem of the third Protocol additional to the Geneva Conventions or the shield marking cultural property, or who has prevented them from carrying out their functions,  
any person who destroys or damages objects placed under the protection of the red cross, the red crescent, the red lion and sun or the emblem of the third Protocol additional to the Geneva Conventions, and  
any person who unlawfully destroys or damages cultural property or objects placed under the protection of the shield marking cultural property,

shall be punished by imprisonment of up to three years or a fine and, in serious cases, of imprisonment of at least one year.

2. Lesser offences shall be punished by disciplinary measures.

#### **Article 112**

##### **Failure to discharge duties towards enemies**

Any person who kills or injures an enemy who has surrendered or otherwise ceased to defend himself,

any person who mutilates the dead body of an enemy,

shall be punished by imprisonment of up to three years or a fine and, in serious cases, of imprisonment of at least one year.

[...]

#### **Article 114**

##### **Offences committed against a *parlementaire* [negotiator]**

Any person who ill-treats, abuses or holds without due cause an enemy *parlementaire* or a person accompanying the latter shall be punished by imprisonment of up to three years or a fine.

[...]

[N.B.: The Federal Assembly of the Swiss Confederation is currently working on new legislation that will modify several federal laws, including the Military Penal Code, in view of the implementation of the Rome Statute of the International Criminal Court. The draft legislation is available online at <http://www.admin.ch/ch/f/ff/2008/3565.pdf>]

## **B. Explanations given to the National Council by Samuel Schmid, Minister of Defence, on 15 December 2003**

[Source: *Bulletin officiel*, Conseil National (National Council), 2003, pp. 1987-1988; unofficial translation.]

What I am describing in more substantial detail and what has already been discussed in particular in the Commission, are some examples of what is understood by this [term]. First, any person who is resident in, or whose life centres on, Switzerland has a close connection with Switzerland. That much is clear. These people include *inter alia* asylum-seekers, asylum-seekers whose application has been rejected and refugees. These persons have intentionally entered Switzerland in order to seek refuge here. They ought to be covered by the scope of the law. Likewise, persons whose close relatives, such as parents, partners or children, live in Switzerland and who have regular contact with these relatives, have a sufficiently close connection. This is also true, for example, of people who are staying in Switzerland for the purpose of medical in-patient treatment. People who, for example, possess real estate in Switzerland, even if they have no other relationship with Switzerland, have a close connection with Switzerland within the meaning of the proposed provisions. A bit of Switzerland belongs to them and this provides the requisite connection.

Persons who have an account with a Swiss bank do not have a sufficiently close connection, for they can run such an account from anywhere in the world. Similarly,

persons who are only traveling through our country, or staying in it for a fairly short time and who intend to leave it, or to continue their journey forthwith, do not have a close connection in this sense.

### DISCUSSION

1. a. Do the aforementioned provisions fulfil Switzerland's obligations to establish its (universal) jurisdiction over persons alleged to have committed grave breaches? Are there gaps? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85)
- b. Does Switzerland also establish its (universal) jurisdiction over violations of IHL not qualified as grave breaches? (GC I-IV, Arts 50/51/130/147 respectively; P I, Arts 11 and 85)
2. a. Is Art. 10(1bis) compatible with the obligation laid down in Arts 49/50/129/146, respectively, of the four Geneva Conventions? Do those provisions oblige Switzerland to establish jurisdiction even over persons who are not on its territory? Over persons who are on its territory, but have no close connection with Switzerland? Over persons who could be transferred to the ICC? Is Art. 10(1bis)(c) compatible with the complementarity of the ICC to national criminal jurisdictions [See **Case No. 23**, The International Criminal Court, Preamble, para. 10; Arts 1 and 17]?
- b. Can you explain, based upon Document B., why Switzerland introduced Art. 10(1bis)?
3. Do Arts 108-114 of the Code cover all grave breaches mentioned by IHL? Where do they go further? Do they permit punishment of violations of customary IHL? Do they permit punishment of violations of the law of non-international armed conflicts?
4. What are the advantages and disadvantages of such a generic clause as Art. 109 of the Code? Does a punishment for a grave breach of Protocol I under Art. 109, which was adopted in 1968, violate the principle of *nullum crimen sine lege*?

**Case No. 64, Germany, International Criminal Code**

[Source: Germany, Act to Introduce the Code of Crimes against International Law of 26 June 2002; available in German on <http://bundesrecht.juris.de/bundesrecht/vstgb/index.html>; also available on <http://www.icrc.org/ihl>; footnotes partially reproduced.]

**Act to Introduce the Code of Crimes against International Law  
of 26 June 2002**

The Federal Parliament has passed the following Act:

**ARTICLE 1: CODE OF CRIMES AGAINST INTERNATIONAL LAW (CCAIL)****PART 1: GENERAL PROVISIONS****Section 1: Scope of application**

This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany. [...]

**Section 3: Acting upon orders**

Whoever commits an offence pursuant to Sections 8 to 14 in execution of a military order or of an order comparable in its actual binding effect shall have acted without guilt so far as the perpetrator does not realise that the order is unlawful and so far as it is also not manifestly unlawful.

**Section 4: Responsibility of military commanders and other superiors**

- (1) A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the same way as a perpetrator of the offence committed by that subordinate. [...]

**Section 5: Non-applicability of statute of limitations**

The prosecution of serious criminal offences pursuant to this Act and the execution of sentences imposed on their account shall not be subject to any statute of limitations.

**PART 2: CRIMES AGAINST INTERNATIONAL LAW****Chapter 1: Genocide and crimes against humanity****Section 6: Genocide**

- (1) Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group
  1. kills a member of the group,

2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the Criminal Code, [Footnote 4: paragraph 226 of the German Code of Crimes addresses grave injury that causes the following damage: loss of sight in one or both eyes, of hearing, speech or the capacity to reproduce; loss of an important limb and definitive loss of its use or definitive disfigurement, becoming disabled, paralysed, psychically ill or handicapped. (unofficial translation)]
  3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part,
  4. imposes measures intended to prevent births within the group,
  5. forcibly transfers a child of the group to another group
- shall be punished with imprisonment for life. [...]

### **Section 7: Crimes against humanity**

- (1) Whoever, as part of a widespread or systematic attack directed against any civilian population,
  1. kills a person,
  2. inflicts, with the intent of destroying a population in whole or in part, conditions of life on that population or on parts thereof, being conditions calculated to bring about its physical destruction in whole or in part,
  3. traffics in persons, particularly in women or children, or whoever enslaves a person in another way and in doing so arrogates to himself a right of ownership over that person,
  4. deports or forcibly transfers, by expulsion or other coercive acts, a person lawfully present in an area to another State or another area in contravention of a general rule of international law,
  5. tortures a person in his or her custody or otherwise under his or her control by causing that person substantial physical or mental harm or suffering where such harm or suffering does not arise only from sanctions that are compatible with international law,
  6. sexually coerces, rapes, forces into prostitution or deprives a person of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
  7. causes a person's enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time,
    - (a) by abducting that person on behalf of or with the approval of a State or a political organisation, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person's fate and whereabouts, or



- (b) by refusing, on behalf of a State or of a political organisation or in contravention of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon,
8. causes another person severe physical or mental harm, especially of the kind referred to in section 226 of the Criminal Code,
  9. severely deprives, in contravention of a general rule of international law, a person of his or her physical liberty, or
  10. persecutes an identifiable group or collectivity by depriving such group or collectivity of fundamental human rights, or by substantially restricting the same, on political, racial, national, ethnic, cultural or religious, gender or other grounds that are recognised as impermissible under the general rules of international law

shall be punished, in the cases referred to under numbers 1 and 2, with imprisonment for life, in the cases referred to under numbers 3 to 7, with imprisonment for not less than five years, and, in the cases referred to under numbers 9 to 10, with imprisonment for not less than three years. [...]

## **Chapter 2: War crimes**

### **Section 8: War crimes against persons**

- (1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
  1. kills a person who is to be protected under international humanitarian law,
  2. takes hostage a person who is to be protected under international humanitarian law,
  3. treats a person who is to be protected under international humanitarian law cruelly or inhumanly by causing him or her substantial physical or mental harm or suffering, especially by torturing or mutilating that person,
  4. sexually coerces, rapes, forces into prostitution or deprives a person who is to be protected under international humanitarian law of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
  5. conscripts children under the age of fifteen years into the armed forces, or enlists them in the armed forces or in armed groups, or uses them to participate actively in hostilities,
  6. deports or forcibly transfers, by expulsion or other coercive acts, a person who is to be protected under international humanitarian law and lawfully present in an area to another State or another area in contravention of a general rule of international law,

7. imposes on, or executes a substantial sentence in respect of a person who is to be protected under international humanitarian law, in particular the death penalty or imprisonment, without that person having been sentenced in a fair and regular trial affording the legal guarantees required by international law,
8. exposes a person who is to be protected under international humanitarian law to the risk of death or of serious injury to health
  - (a) by carrying out experiments on such a person, being a person who has not previously given his or her voluntary and express consent, or where the experiments concerned are neither medically necessary nor carried out in his or her interest,
  - (b) by taking body tissue or organs from such a person for transplantation purposes so far as it does not constitute removal of blood or skin for therapeutic purposes in conformity with generally recognised medical principles and the person concerned has previously not given his or her voluntary and express consent, or
  - (c) by using treatment methods that are not medically recognised on such person, without this being necessary from a medical point of view and without the person concerned having previously given his or her voluntary and express consent, or
9. treats a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner

shall be punished, in the cases referred to under number 1, with imprisonment for life, in the cases referred to under number 2, with imprisonment for not less than five years, in the cases referred to under numbers 3 to 5, with imprisonment for not less than three years, in the cases referred to under numbers 6 to 8, with imprisonment for not less than two years, and, in the cases referred to under number 9, with imprisonment for not less than one year.

- (2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character, wounds a member of the adverse armed forces or a combatant of the adverse party after the latter has surrendered unconditionally or is otherwise placed *hors de combat* shall be punished with imprisonment for not less than three years.
- (3) Whoever in connection with an international armed conflict
  1. unlawfully holds as a prisoner or unjustifiably delays the return home of a protected person within the meaning of subsection (6), number 1,
  2. transfers, as a member of an Occupying Power, parts of its own civilian population into the occupied territory,
  3. compels a protected person within the meaning of subsection (6), number 1, by force or threat of appreciable harm to serve in the forces of a hostile Power or

4. compels a national of the adverse party by force or threat of appreciable harm to take part in the operations of war directed against his or her own country shall be punished with imprisonment for not less than two years. [...]
- (6) Persons who are to be protected under international humanitarian law shall be
  1. in an international armed conflict: persons protected for the purposes of the Geneva Conventions and of the Protocol Additional to the Geneva Conventions [...], namely the wounded, the sick, the shipwrecked, prisoners of war and civilians;
  2. in an armed conflict not of an international character: the wounded, the sick, the shipwrecked as well as persons taking no active part in the hostilities who are in the power of the adverse party;
  3. in an international armed conflict and in an armed conflict not of an international character: members of armed forces and combatants of the adverse party, both of whom have laid down their arms or have no other means of defence.

#### **Section 9: War crimes against property and other rights**

- (1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character pillages or, unless this is imperatively demanded by the necessities of the armed conflict, otherwise extensively destroys, appropriates or seizes property of the adverse party contrary to international law, such property being in the power of the perpetrator's party, shall be punished with imprisonment from one to ten years.
- (2) Whoever in connection with an international armed conflict and contrary to international law declares the rights and actions of all, or of a substantial proportion of, the nationals of the hostile party abolished, suspended or inadmissible in a court of law shall be punished with imprisonment from one to ten years.

#### **Section 10: War crimes against humanitarian operations and emblems**

- (1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
  1. directs an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law, or
  2. directs an attack against personnel, buildings, material, medical units and transport, using the distinctive emblems of the Geneva Conventions in conformity with international humanitarian law

shall be punished with imprisonment for not less than three years. In less serious cases, particularly where the attack does not take place by military means, the punishment shall be imprisonment for not less than one year.

- (2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character makes improper use of the distinctive emblems of the Geneva Conventions, of the flag of truce, of the flag or of the military insignia or of the uniform of the enemy or of the United Nations, thereby causing a person's death or serious personal injury (section 226 of the Criminal Code) shall be punished with imprisonment for not less than five years.

**Section 11: War crimes consisting in the use of prohibited methods of warfare**

- (1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
1. directs an attack by military means against the civilian population as such or against individual civilians not taking direct part in hostilities,
  2. directs an attack by military means against civilian objects, so long as these objects are protected as such by international humanitarian law, namely buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, or against undefended towns, villages, dwellings or buildings, or against demilitarised zones, or against works and installations containing dangerous forces,
  3. carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated,
  4. uses a person who is to be protected under international humanitarian law as a shield to restrain a hostile party from undertaking operations of war against certain targets,
  5. uses starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival or impedes relief supplies in contravention of international humanitarian law,
  6. orders or threatens, as a commander, that no quarter will be given, or
  7. treacherously kills or wounds a member of the hostile armed forces or a combatant of the adverse party

shall be punished with imprisonment for not less than three years. In less serious cases under number 2 the punishment shall be imprisonment for not less than one year. [...]

- (3) Whoever in connection with an international armed conflict carries out an attack by military means and definitely anticipates that the attack will cause widespread, long-term and severe damage to the natural environment on a scale out of

proportion to the concrete and direct overall military advantage anticipated shall be punished with imprisonment for not less than three years.

#### **Section 12: War crimes consisting in employment of prohibited means of warfare**

- (1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character
  1. employs poison or poisoned weapons,
  2. employs biological or chemical weapons or
  3. employs bullets which expand or flatten easily in the human body, in particular bullets with a hard envelope which does not entirely cover the core or is pierced with incisions

shall be punished with imprisonment for not less than three years. [...]

### **Chapter 3: Other crimes**

#### **Section 13: Violation of the duty of supervision**

- (1) A military commander who intentionally or negligently omits properly to supervise a subordinate under his or her command or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the commander and he or she could have prevented it.
- (2) A civilian superior who intentionally or negligently omits properly to supervise a subordinate under his or her authority or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the superior without more and he or she could have prevented it. [...]

#### **Section 14: Omission to report a crime**

- (1) A military commander or a civilian superior who omits immediately to draw the attention of the agency responsible for the investigation or prosecution of any offence pursuant to this Act, to such an offence committed by a subordinate, shall be punished with imprisonment for not more than five years. [...]

### **ARTICLE 3: AMENDMENT TO THE CODE OF CRIMINAL PROCEDURE**

The Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette I page 1074, 1319), as last amended by Article 3 of the Act of 21 June 2002 (Federal Law Gazette I page 2144), shall be amended as follows: [...]

5. The following section 153f shall be inserted after section 153e:

### Section 153 f

- (1) In the cases referred to under Section 153c subsection (1), numbers 1 and 2, [footnote 9: paragraph 153c (1) of the code of criminal procedure looks at the exceptions to the principal of legality of prosecution applied in Germany.] the public prosecution office may dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if the accused is not present in Germany and such presence is not to be anticipated. If in the cases referred to under Section 153c subsection (1), number 1, the accused is a German, this shall however apply only where the offence is being prosecuted before an international court or by a state on whose territory the offence was committed or whose national was harmed by the offence.
- (2) In the cases referred to under Section 153c subsection (1), numbers 1 and 2, the public prosecution office can, in particular, dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if
  1. there is no suspicion of a German having committed such offence,
  2. such offence was not committed against a German,
  3. no suspect in respect of such offence is present in Germany and such presence is not to be anticipated and
  4. the offence is being prosecuted before an international court or by a state on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.

The same shall apply if a foreigner accused of an offence committed abroad is residing in Germany but the requirements pursuant to the first sentence, numbers 2 and 4, have been fulfilled and transfered to an international court or extradition to the prosecuting state is permissible and is intended.
- (3) If in the cases referred to under subsection (1) or (2) public charges have already been preferred, the public prosecution office may withdraw the charges at any stage of the proceedings and terminate the proceedings. [...]

### DISCUSSION

1. a. Is this Code of Crimes against International Law (CCAIL) an application of the so-called principle of “universal jurisdiction”, or of the obligation to prosecute international crimes? Is such a law consistent with international humanitarian law (IHL)? Are States obliged to enact “universal jurisdiction” laws to prosecute war criminals under IHL? Are such laws subject to the requirement of precision in criminal law? Are the provisions of IHL not sufficiently precise? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85) [See also Chapter 13.X. Violations by Individuals]
- b. Compare the German CCAIL and the Belgian law (BL) of universal jurisdiction (in particular, CCAIL, Arts 1.1 and 3, and BL, Art. 7; CCAIL, Art. 1.3, and BL, Art. 5; CCAIL, Arts 1.4 and 1.13-14, and BL, Arts 4 and 5.3; CCAIL, Art. 1.5, and BL, Art. 8; CCAIL, Art. 1.6, and BL, Art. 1.1; CCAIL,

Art. 1.7, and BL, Art. 1.2; CCAIL, Arts 1.8-12, and BL, Art. 1.3). What are the differences between the two laws, and their respective strengths and weaknesses? [See **Case No. 68**, Belgium, Law on Universal Jurisdiction]

- c. Is there a law similar to the German CCAIL in your State? Why is such legislation relatively rare, even today?
2. How do you interpret the first paragraph of the CCAIL, in particular the reference to the “relation to Germany,” in view of the modification of paragraph 153f of the German Code of Criminal Procedure?
3.
  - a. To what extent does the CCAIL draw its inspiration from the Statute of the International Criminal Court (ICC)? Does it go further than the ICC Statute, or is it more cautious? In terms of excluding criminal responsibility? In the definition of crimes? (ICC Statute, Arts 5-8 and 30-33, see **Case No. 23**, The International Criminal Court [A. The Statute])
  - b. With regard to crimes against humanity – and to persecution in particular – what differences are there between the CCAIL and the ICC Statute? Given that certain acts defined as crimes against humanity in Art. 7 of the ICC Statute are not listed as such in the CCAIL and *vice versa*, what are the consequences in terms of prosecutions? Especially concerning persecution?
4. What is the legal basis for the non-applicability of statutory limitations in IHL? What link is there between the non-applicability of statutory limitations and the fact that crimes under IHL are not subject to amnesty? Is this a customary rule of IHL? (See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968 (online at: <http://www.icrc.org/ihl>); ICC Statute, Art. 29)
5. What is your opinion concerning the possibility that “International Criminal Code” laws will increase in number around the world? Do you think they are indispensable to end the impunity of war criminals?

**Case No. 65, Canada, Crimes Against Humanity and War Crimes Act**

[Source: "Crimes Against Humanity and War Crimes Act," in *Annual Statutes of Canada 2000*, Chapter 24, <http://laws.justice.gc.ca/en/2000/24/6002.html>.]

[...] An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts [*Assented to 29<sup>th</sup> June, 2000*] [...]

**INTERPRETATION**

2. (1) The definitions in this subsection apply in this Act. [...] "conventional international law" means any convention, treaty or other international agreement
  - (a) that is in force and to which Canada is a party; or
  - (b) that is in force and the provisions of which Canada has agreed to accept and apply in an armed conflict in which it is involved. [...]
- (2) Unless otherwise provided, words and expressions used in this Act have the same meaning as in the *Criminal Code*.

**HER MAJESTY**

3. This Act is binding on Her Majesty in right of Canada or a province.

**OFFENCES WITHIN CANADA**

4. (1) Every person is guilty of an indictable offence who commits
  - (a) genocide;
  - (b) a crime against humanity; or
  - (c) a war crime.
- (1.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence.
- (2) Every person who commits an offence under subsection (1) or (1.1)
  - (a) shall be sentenced to imprisonment for life, if an intentional killing forms the basis of the offence; and
  - (b) is liable to imprisonment for life, in any other case.
- (3) The definitions in this subsection apply in this section.

"crime against humanity" [...]

"genocide" [...]

"war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime



according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

- (4) For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.

5. (1) A military commander commits an indictable offence if

- (a) the military commander
  - (i) fails to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 4, or
  - (ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 6;
- (b) the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and
- (c) the military commander subsequently
  - (i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
  - (ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

(2) A superior commits an indictable offence if

[identical to section 5(1)(a) and (b)]

- (c) the offence relates to activities for which the superior has effective authority and control; and

(d) [identical to section 5(1)(c)]

- (2.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) or (2) is guilty of an indictable offence.

- (3) Every person who commits an offence under subsection (1), (2) or (2.1) is liable to imprisonment for life.

- (4) The definitions in this subsection apply in this section.

“military commander” includes a person effectively acting as a military commander and a person who commands police with a degree of authority and control comparable to a military commander.

“superior” means a person in authority, other than a military commander.

### OFFENCES OUTSIDE CANADA

6. (1) Every person who, either before or after the coming into force of this section, commits outside Canada
- (a) genocide,
  - (b) a crime against humanity, or
  - (c) a war crime,

is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.

[sections 6(1.1)-6(4) are identical to sections 4(1.1)-4(4)]

- (5) For greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either of the following:
- (a) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945; and
  - (b) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946.
7. (1) A military commander commits an indictable offence if [identical to section 5(1)]
- (2) A superior commits an indictable offence if [identical to section 5(2)]
- (2.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) or (2) is guilty of an indictable offence.
- (3) A person who is alleged to have committed an offence under subsection (1), (2) or (2.1) may be prosecuted for that offence in accordance with section 8.
- (4) Every person who commits an offence under subsection (1), (2) or (2.1) is liable to imprisonment for life.
- (5) Where an act or omission constituting an offence under this section occurred before the coming into force of this section, subparagraphs (1)(a)(ii) and (2)(a)(ii) apply to the extent that, at the time and in the place of the act or omission, the act or omission constituted a contravention of customary international law or conventional international law or was criminal according to the general principles of law recognized by the community of nations, whether or not it constituted a contravention of the law in force at the time and in the place of its commission. [...]
8. A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if

- (a) at the time the offence is alleged to have been committed,
  - (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,
  - (ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,
  - (iii) the victim of the alleged offence was a Canadian citizen, or
  - (iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or
- (b) after the time the offence is alleged to have been committed, the person is present in Canada.

## **PROCEDURE AND DEFENCES**

- 9. (1) Proceedings for an offence under this Act alleged to have been committed outside Canada for which a person may be prosecuted under this Act may, whether or not the person is in Canada, be commenced in any territorial division in Canada and the person may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.
  - (2) For greater certainty, in a proceeding commenced in any territorial division under subsection (1), the provisions of the *Criminal Code* relating to requirements that an accused appear at and be present during proceedings and any exceptions to those requirements apply.
  - (3) No proceedings for an offence under any of sections 4 to 7, 27 and 28 may be commenced without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, [...]
  - (4) No proceedings for an offence under section 18 may be commenced without the consent of the Attorney General of Canada.
- 10. Proceedings for an offence alleged to have been committed before the coming into force of this section shall be conducted in accordance with the laws of evidence and procedure in force at the time of the proceedings.

## **DEFENCES**

- 11. In proceedings for an offence under any of sections 4 to 7, the accused may, subject to sections 12 to 14 and to subsection 607(6) of the *Criminal Code*, rely on any justification, excuse or defence available under the laws of Canada or under international law at the time of the alleged offence or at the time of the proceedings.
- 12. (1) If a person is alleged to have committed an act or omission that is an offence under this Act, and the person has been tried and dealt with outside Canada

in respect of the offence in such a manner that, had they been tried and dealt with in Canada, they would be able to plead *autrefois acquit*, *autrefois convict* or pardon, the person is deemed to have been so tried and dealt with in Canada.

- (2) Despite subsection (1), a person may not plead *autrefois acquit*, *autrefois convict* or pardon in respect of an offence under any of sections 4 to 7 if the person was tried in a court of a foreign state or territory and the proceedings in that court
  - (a) were for the purpose of shielding the person from criminal responsibility; or
  - (b) were not otherwise conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice.

13. Despite section 15 of the *Criminal Code*, [N.B.: Section 15 of the Criminal Code states: "No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs."] it is not a justification, excuse or defence with respect to an offence under any of sections 4 to 7 that the offence was committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

14. (1) In proceedings for an offence under any of sections 4 to 7, it is not a defence that the accused was ordered by a government or a superior – whether military or civilian – to perform the act or omission that forms the subject-matter of the offence, unless
  - (a) the accused was under a legal obligation to obey orders of the government or superior;
  - (b) the accused did not know that the order was unlawful; and
  - (c) the order was not manifestly unlawful.
- (2) For the purpose of paragraph (1)(c), orders to commit genocide or crimes against humanity are manifestly unlawful.
- (3) An accused cannot base their defence under subsection (1) on a belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group. [...]

## PROCEEDS OF CRIME

27. (1) No person shall possess any property or any proceeds of property knowing that all or part of the property or proceeds was obtained or derived directly or indirectly as a result of
  - (a) an act or omission in Canada that constituted genocide, a crime against humanity or a war crime, as defined in section 4;

- (b) an act or omission outside Canada that constituted genocide, a crime against humanity or a war crime, as defined in section 6; [...]
- (2) Every person who contravenes subsection (1)
  - (a) is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years; or
  - (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term of not more than two years.
- (3) A peace officer or a person acting under the direction of a peace officer is not guilty of an offence under this section by reason only that they possess property or the proceeds of property mentioned in subsection (1) for the purpose of an investigation or otherwise in the execution of the peace officer's duties. [...]

## COMING INTO FORCE

[Law in force the 23 October 2000, see Order of the Governor in Council Nr. TR/2000-95]

## DISCUSSION

1. What relationship is there between this law and the Statute of the International Criminal Court (ICC)?
2. Does the Act meet the requirements of the Geneva Conventions and Protocol I? Does it allow the prosecution of any grave breach of IHL? Of any war crime? (GC I-IV, Arts 49/50/129/146 respectively; P I, Arts 11(4) and 85)
3. Does the Act apply to violations of IHL occurring in non-international armed conflicts?
4. On issues relating to jurisdiction:
  - a. Does Canada's jurisdiction as laid down in Art. 8 of the Act meet the requirements of IHL? Does it go further than required by IHL? Does it go further than allowed by public international law? (GC I-IV, Arts 49/50/129/146 respectively)
  - b. Before this Act was adopted, the Canadian Criminal Code laid down that any crime which may constitute a war crime or a crime against humanity committed abroad must also constitute, in Canada, an infringement of Canadian law. This was a condition for the Canadian courts to have the jurisdiction to try the crime. How does the Act improve the prospects of having a case heard by the Canadian courts? Consider the question from the standpoint of cases involving the use of chemical weapons, perfidy, or the misuse of the red cross or red crescent emblems (Art. 6 of this law).
5. Does a person charged with an offence necessarily have to be in Canada to be prosecuted? In what cases is this presence necessary? Is this compatible with the obligation to prosecute on the basis of the principle of universal jurisdiction, as laid down in IHL? (GC I-IV, Arts 49(2)/50(2)/129(2)/146(2) respectively)
6. a. Does the command responsibility provided for in Arts 5.1-2 and 7.1-2 of the Act correspond to the command responsibility stipulated by IHL? By the ICC Statute? Does it go further? (P I, Art. 86(2); CIHL, Rule 153; ICC Statute, Art. 28 [See **Case No. 23**, The International Criminal Court [A. The Statute]])

- b. Are the limitations provided for under Art. 7(5) compatible with IHL? Are they required by public international law?
- 7. a. Is the stipulation that no proceedings may be commenced without the consent of Canada's Attorney General, as provided for under Art. 9(3)-(4), compatible with IHL? Why do you think these provisions have been included? Are there similar provisions in your country's law? (GC I-IV, Arts 49(2)/50(2)/129(2)/146(2) respectively)
- b. In what circumstances could Canada's Attorney General, without any violation of IHL by Canada, deny his consent to proceedings against a person accused of war crimes? (GC I-IV, Arts 49(2)/50(2)/129(2)/146(2) respectively)
- 8. a. Does Art. 14(1) lay down cumulative or alternative conditions? Does this provision correspond to the IHL rule? To that of the ICC Statute? (ICC Statute, Art. 33 [See **Case No. 23**, The International Criminal Court [A. The Statute]])
- b. Why did Canada feel itself obliged to withdraw from the accused the right to a "mistake of law" defence when his belief is based on hate propaganda? Does this rule correspond to that of the ICC Statute? (ICC Statute, Art. 32 [See **Case No. 23**, The International Criminal Court [A. The Statute]])
- 9. Does Art. 27 go beyond the provisions of Chapter VII of the ICC Statute [See **Case No. 23**, The International Criminal Court [A. The Statute]] which concern confiscation of the proceeds of crime?

**Case No. 66, Cameroon, Law on the Protection of the Emblem and the Name “Red Cross”**

[Source: Law No. 97-2 of 10 January 1997 on the protection of the red cross emblem and name; *Official Gazette of the Republic of Cameroon*, 1<sup>st</sup> February 1997, pp.63-66; available on <http://www.icrc.org/ihl-nat>]

**Law No. 97-2 of 10 January 1997  
on the protection of the red cross emblem and name**

The National Assembly deliberated and adopted,

The President of the Republic promulgates the law that holds as follows:

**PART I: GENERAL PROVISIONS****Section 1**

Without prejudice to the relevant provisions of the conventions relating to the application of international humanitarian law duly ratified by the Republic of Cameroon, particularly the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 8 June 1977, this law shall govern the use and protection of the Red Cross emblem and name.

**Section 2**

- (1) The Red Cross emblem shall be a red cross with four arms of equal length on a white background. The cross shall have an upright and a transverse shaft intersecting at their middles. The cross shall not reach the edge of the flag or escutcheon.
- (2) The red cross shall be the dominant element of the emblem. No inscription or pattern may appear on the cross or white background.
- (3) In time of conflict, the emblem for purposes of protection shall be a red cross on a white background as defined in (1) and (2) above. It shall be as large as possible to afford the greatest visibility.
- (4) The emblem used for purposes of identification purposes shall be in miniature. It may be used solely to identify the Cameroon Red Cross.

**PART II: USE OF THE RED CROSS EMBLEM AND NAME****Section 3**

The Red Cross emblem may be used for two purposes: identification and protection

**Chapter I: Use of the Emblem for Identification Purposes****Section 4**

- (1) The emblem identifying the Cameroon Red Cross shall be used together with the name “Cameroon Red Cross” or the initials “CRC”.

- (2) The emblem shall be in miniature and shall show that the person or the property displaying it is linked to the Cameroon Red Cross.
- (3) In time of conflict, the emblem must not be displayed on armbands or rooftops to avoid confusion with the emblem used for protection purposes.
- (4) Persons or property displaying the emblem of the Cameroon Red Cross for identification purposes may not, in time of conflict, benefit from the special protection conferred by international humanitarian law.

#### **Section 5**

- (1) The identification emblem of the Cameroon Red Cross shall be its exclusive property.
- (2) It may be in the form of medallions, badges, stickers, scarfs, flags, standards, gadgets or any sign or medium used for the promotion of the Cameroon Red Cross.

#### **Section 6**

- (1) The president of the Cameroon Red Cross alone shall be empowered to authorize any person to wear the identification emblem of the said Red Cross.
- (2) He shall inform the competent authorities thereon.

### **Chapter II: Use of the Emblem for Purposes of Protection**

#### **Section 7**

- (1) The protective Red Cross emblem shall be the symbol of the protection conferred by international humanitarian law to persons and property, particularly buildings, means of transportation by land, sea or air, in time of international conflict.
- (2) However, the protective emblem may be used in peacetime to identify first-aid workers at events attended by large crowds.

#### **Section 8**

The following persons may use the protective emblem in time of international or internal armed conflict:

- medical personnel of the Cameroon Red Cross made available to the army medical services;
- civilian medical personnel involved in relief and medical assistance operations;
- civilian medical personnel and national and international workers of humanitarian organizations involved in relief and medical assistance operations;
- personnel of the army medical services.

#### **Section 9**

The following medical units, establishments and means of transportation may display the protective Red Cross emblem:



- medical units, establishments and means of transportation of the Cameroon Red Cross, particularly: hospitals, ambulances, ship-borne hospitals, ordinary or motorized boats, aircraft and warehouses;
- civilian medical units involved in search, evacuation, diagnosis or treatment, first-aid and disease prevention operations;
- medical units and transportation equipment of army medical services.

### **PART III: PROTECTION OF THE RED CROSS EMBLEM AND NAME**

#### **Section 10**

The Red Cross emblem and name shall be protected by the instruments in force relating to registered trademarks and patterns.

#### **Section 11**

- (1) The Cameroon Red Cross shall have the exclusive right to use the Red Cross identification emblem and name throughout the national territory.
- (2) It shall be the sole institution empowered to:
  - order the printing or production of the Red Cross emblem;
  - issue diplomas, certificates, cards and attestations bearing the Red Cross emblem.

#### **Section 12**

In the event of internal armed conflict or strife, the President of the Cameroon Red Cross and the competent authorities shall jointly define the conditions for using the protective emblem and supervise compliance therewith.

#### **Section 13**

- (1) The use of the emblem for protective and identification purposes by the members and first-aid workers of the Cameroon Red Cross shall be subject to a membership identity card and a first-aid worker's identity card bearing the signature of the National President of the Cameroon Red Cross or of any other person duly empowered to that end by the said National President.
- (2) The membership or first-aid worker's identity card of the Cameroon Red Cross must be presented upon request. It shall be strictly personal and may not be transferred or lent. It may neither be used as a pass in peacetime or in time of internal strife or conflict, nor as an access card for public events.

#### **Section 14**

- (1) It shall be strictly forbidden for any natural person or corporate body other than those upon whom such right is conferred by virtue of the Geneva Conventions of 12 August 1949, their Additional Protocols I and II of 8 June 1977 and the present law to use the Red Cross emblem and name.

- (2) It shall equally be forbidden to use a sign or an appellation constituting an imitation of the Red Cross emblem and name.

## PART IV: MISCELLANEOUS AND FINAL PROVISIONS

### Section 15

Delegates of the international bodies of the International Red Crescent Movement may use the Red Cross emblem at all times, within the limits fixed by the Geneva Conventions of 12 August 1949.

### Section 16

Offences established in relation to the use of the Red Cross emblem and name shall be punished in accordance with Section 330 of the Penal Code.

### Section 17

This law shall be registered, published according to the procedure of urgency and inserted in the *Official Gazette* in English and French.

Yaoundé, 10 January 1997

*The President of the Republic*  
Paul Biya

## DISCUSSION

1. Who may use the emblem of the red cross or red crescent? In what circumstances? (HR, Art. 23(1)(f); GC I, Arts 38-44 and 53; GC II, Arts 41-43; GC IV, Art. 18; P I, Arts 8 and 18; P II, Art. 12)
2. Why do the Geneva Conventions contain detailed provisions concerning the use of the emblem? What problems are these Conventions attempting to resolve?
3. What issues is Art. 44 of Geneva Convention I attempting to clarify?
4. What is the difference between the protective and indicative uses of the emblem? Are authorized uses of the emblem different in time of armed conflict and in time of peace? (GC I, Art. 44)
5. Why does Geneva Convention I largely clarify the use of the emblem by National Red Cross and Red Crescent Societies?
6. Under what conditions may a National Society use the emblem? When may it use the emblem as a protective device? And as an indicative device?
7. When may the ICRC and the International Federation of Red Cross and Red Crescent Societies use the emblem? Are they, too, obliged to abide by the provisions governing the protective and indicative uses of the emblem? (GC I, Art. 44)
8. Why must States (in this case, Cameroon) adopt legislation on the use of the emblem? Is this necessary even where international treaties are considered part of national law under a country's constitutional system? In your opinion, is Cameroonian law totally in line with international humanitarian law? (GC I, Arts 44 and 54)
9. Does this law provide additional guarantees against any misuse of the emblem in time of armed conflict? Or is it limited to specifying the property and persons that may display and use the emblem in time of peace and in time of armed conflict?

10. How does Protocol I clarify Arts 39, 42 and 44 of Geneva Convention I and Art. 18 of Geneva Convention IV? Why is this clarification given? (P I, Arts 8, 18, 37, 38 and 85; P II, Art. 18)
11. Will Cameroon need to amend this law if it becomes party to Protocol III additional to the Geneva Conventions?

**Case No. 67, Ghana, National Legislation Concerning the Emblem**

[Source: N.R.C.D. Red Cross Emblem (Control) Decree (1973), p.216]

**RED CROSS EMBLEM (CONTROL) DECREE, 1973**

**Whereas** the Geneva Conventions of the 12<sup>th</sup> day of August 1949, contain some provisions which seek to confer protection on certain persons, organisations and agencies by the use of the Red Cross Emblem and other similar emblems:

**And whereas** the Government of Ghana acceded to the said Conventions on the 2<sup>nd</sup> day of August, 1958:

**And whereas** all parties to the said Conventions are obliged to make appropriate laws prohibiting the abuse of the Red Cross Emblem, similar emblems and the arms of Switzerland:

**And whereas** it is decided to give effect to the said Conventions so far as they relate to the protection of the Red Cross Emblem, similar emblems and the arms of Switzerland, to provide so far as necessary that the appropriate provisions of the said Conventions shall have the force of law in Ghana, and to make provisions prohibiting the abuse or misuse of the Red Cross Emblem, similar emblems and the arms of Switzerland:

**Now, therefore**, in pursuance of the National Redemption Council (Establishment) Proclamation, 1972 this Decree is hereby made: [...]

2. The emblem may, in time of war and in the field of operations, be used by the parties to the armed conflict, to designate establishments, units, personnel (including chaplains), materials, vehicles, hospitals, ships and other craft, of the medical services of the respective parties, and those of the Ghana Red Cross and other relief societies authorised by the National Redemption Council to aid military medical services.
3. The National Redemption Council, may in time of war, authorise by writing or by a notice published in the *Gazette*, the use of the emblem to designate the establishments and employees of civilian hospitals, hospital zones, and localities reserved for the wounded and the sick; and trains, ambulances and other vehicles, vessels or aircraft used for the transport of wounded, sick and infirm civilians, and maternity cases.
4. The National Redemption Council may, in peace time, authorise by writing or by a notice published in the *Gazette*, the use of the emblem on vehicles in use as ambulances, and on relief posts whose sole object is to give first aid free of charge to injured or sick persons.
5. (1) The International Red Cross agencies and their authorised personnel are entitled, at all times, to use the emblem.  
(2) The Ghana Red Cross Society may, subject to any law for the time being in force, at all times, use the emblem in its activities which conform to the

principles prescribed by the International Red Cross Conferences, and its own statutes.

- (3) The Ghana Red Cross Society may, with the prior approval of the Commissioner responsible for Internal Affairs, make bye-laws regulating its own use of the emblem.
6. Any person, who, before the commencement of this Decree, has acquired any right under any enactment to the use of the emblem generally or for a particular purpose, shall not use the emblem after the expiry of three years from such commencement for any purpose whatsoever.
7. (1) Any person who contravenes any of the provisions of this Decree, shall be guilty of an offence, and shall on summary conviction, be liable to a term of imprisonment not exceeding 3 months or to a fine not exceeding ₵100 or to both.
- (2) Where the offence is committed by a body of persons then
  - (a) in the case of a body corporate (other than a partnership) every director or officer of that body corporate shall be deemed to be guilty of that offence; and
  - (b) in the case of a firm or partnership, every partner shall be deemed to be guilty of that offence;

Provided that no such person shall be deemed to be guilty of the offence if he proves that the offence was committed without his knowledge or that he exercised due diligence to prevent the commission of the offence. [...]

10. In this Decree unless the context otherwise requires

“Red Cross Emblem” includes the arms of the Federation of Switzerland [*sic*], the red cross, the red crescent, or the red lion and sun emblem, or the words “Red Cross” or “Geneva Cross” or any designation, sign or mark constituting an imitation or likely to be confused with any of the said emblems or words describing any of the said emblems.

11. This Decree shall come into force on the 1<sup>st</sup> day of October, 1973.

## DISCUSSION

1. Who may use the red cross and red crescent emblems? In what circumstances? (HR, Art. 23(f); GC I, Arts 38-44 and 53; GC II, Arts 41-43; GC IV, Art. 18; P I, Arts 8(1) and 18; P II, Art. 12)
2. Why have the Geneva Conventions laid down detailed provisions on the use of the emblem? Which problems did these Conventions try to overcome?
3. Which issues has Art. 44 of Geneva Convention I sought to clarify?
4. What is the difference between the protective and indicative uses of the emblem? Does the use of the emblem differ in time of armed conflict and in peacetime? (GC I, Art. 44)

5. Why has Geneva Convention I extensively clarified the use of the emblem by National Red Cross and Red Crescent Societies?
6. Under which conditions may National Societies use the emblem? When are they entitled to use the emblem for protection? And for indicative purposes?
7. When may the ICRC and the International Federation of Red Cross and Red Crescent Societies use the emblem? Do they also have to comply with the provisions on the protective and indicative uses of the emblem? (GC I, Art. 44)
8. Why does a country, in this case Ghana, have to adopt legislation on the use of the emblem? If a country's constitutional system makes international treaties part of the law of the land, is legislation on the emblem nevertheless necessary? Are there any points in the Ghanaian legislation which may be perceived as incompatible with IHL? (GC I, Art. 44)
9. Does this legislation provide another safeguard against abuse of the emblem in time of armed conflict? Or does it limit in precise terms the objects and persons entitled to display and use the emblem in time of peace or armed conflict?
10. Why and on which points has Protocol I clarified Arts 39, 42 and 44 of Geneva Convention I and Art. 18 of Geneva Convention IV? (P I, Arts 8, 18, 37, 38 and 85; P II, Art. 12)
11. On which aspects should Ghana have modified its legislation after it became party to the Protocols? (P I, Arts 8, 18, 37, 38 and 85; P II, Art. 12)

**Case No. 68, Belgium, Law on Universal Jurisdiction****A. 2003 Criminal Code**

[Source: Available in French on <http://www.moniteur.be>, unofficial translation.]

New section I (a) of the Criminal Code (L. 5 August 2003, Article 5)

**Article 136 (a)**

(L. 5 August 2003, Article 6)

The crime of genocide, as defined below, whether it is committed in time of peace or of war, constitutes a crime under international law and shall be punished in accordance with the provisions of this Act. In accordance with the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and without prejudice to the penal rules applicable to breaches committed by negligence, the crime of genocide shall mean any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

1. Killing members of the group;
2. Causing serious bodily or mental harm to members of the group;
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. Imposing measures intended to prevent births within the group;
5. Forcibly transferring children of the group to another group.

**Article 136 (b)**

(L. 5 August 2003, Article 7)

Crimes against humanity, as defined below, whether committed in time of peace or of war, constitute a crime under international law and shall be punished in accordance with the provisions of this Act. In accordance with the Statute of the International Criminal Court, a crime against humanity shall mean any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

1. Murder;
2. Extermination;
3. Enslavement;
4. Deportation or forcible transfer of population;

5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
6. Torture;
7. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or any other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in Articles 136 (a), 136 (b) and 136 (c);
9. Enforced disappearance of persons;
10. The crime of apartheid;
11. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

### **Article 136 (c)**

(L.5 August 2003, Article 8)

- (1) War crimes referred to in the Conventions adopted in Geneva on 12 August 1949 and in Protocols I and II additional to those Conventions, adopted in Geneva on 8 June 1977, by the laws and customs applicable to armed conflicts, as defined in Article 2 of the Conventions adopted in Geneva on 12 August 1949, in Article 1 of Protocols I and II adopted in Geneva on 8 June 1977 additional to those Conventions, and in Article 8(2)(f) of the Statute of the International Criminal Court, and listed below constitute crimes under international law and shall be punished in accordance with the provisions of this section, when the crimes undermine, by act or omission, the protection of persons and property that is guaranteed by the Geneva Conventions, the Additional Protocols, laws and customs, without prejudice to the penal rules applicable to breaches caused by negligence:
  1. Wilful killing;
  2. Torture or other inhuman treatment, including biological experiments;
  3. Wilfully causing great suffering or serious injury to body or health;
  4. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence constituting a grave breach of the Geneva Conventions or a serious violation of Article 3 common to those Conventions;
  5. Other outrages upon personal dignity, in particular humiliating and degrading treatment;
  6. Compelling prisoners of war, civilians protected by the Convention on the Protection of Civilian Persons in Time of War or other persons protected by Protocols I and II additional to the Geneva Conventions of 12 August 1949 to



- serve in the armed forces or armed groups of the enemy power or the hostile party;
7. Conscripting or enlisting children under the age of fifteen years into armed forces or armed groups or using them to participate actively in hostilities;
  8. Depriving prisoners of war, civilians protected by the Convention on the Protection of Civilian Persons in Time of War or persons likewise protected by Protocols I and II additional to the Geneva Conventions of 12 August 1949 of the right to a fair and regular trial, in accordance with the stipulations of those instruments;
  9. Unlawful deportation, transfer or displacement, unlawful confinement of civilians protected by the Convention relative to the Protection of Civilian Persons in Time of War or persons likewise protected by Protocols I and II additional to the Geneva Conventions of 12 August 1949;
  10. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
  11. The taking of hostages;
  12. Destroying or seizing the enemy's property, in the case of an international armed conflict, or that of an adversary, in the case of a non-international armed conflict, unless such destruction or seizure be imperatively demanded by the necessities of war;
  13. Extensive destruction and appropriation of property, not justified by military necessity as defined under human rights and carried out unlawfully and wantonly;
  14. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
  15. Intentionally directing attacks against buildings, material, medical units or vehicles and staff using, in accordance with international law, the distinctive signs provided for under international humanitarian law;
  16. Utilizing the presence of a civilian or another person protected by international humanitarian law to render certain points, areas or military forces immune from military operations;
  17. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
  18. Acts and omissions for which there is no legal justification and which are likely to compromise the health of and cause bodily or mental harm to persons protected under international humanitarian law, particularly any medical

treatment which is not justified by the state of health of those persons or which would not be in keeping with the generally acknowledged rules of the medical profession;

19. Unless it is justified by the conditions provided for under No. 18, treatment which subjects the persons stipulated under No. 18, even with their consent, to physical mutilation, medical or scientific experiments or the removal of tissue or organs for the use in transplant operations, except in the case of blood being donated for transfusions or skin for grafts, provided that those donations are voluntary, willingly given and intended for therapeutic purposes;
20. Intentionally attacking the civilian population or civilians not taking direct part in hostilities;
21. Intentionally launching attacks against places where the sick and wounded are gathered, unless those places are military objectives;
22. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct overall military advantage anticipated, without prejudice to the criminal nature of the attack of which the harmful effects, even if they are proportionate to the military advantage anticipated, would be incompatible with the principles of the law of nations, as they result from the usages established, from the laws of humanity, and the dictates of the public conscience;
23. Launching an attack against buildings or installations containing dangerous forces in the knowledge that such attack will cause loss of human life, injury to civilian persons or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to criminal nature of an attack of which the harmful effects, even if they are proportionate to the military advantage anticipated, would be incompatible with the principles of the law of nations, as they result from the usages established, from the laws of humanity, and the dictates of the public conscience;
24. Attacking or bombarding, by whatever means, demilitarized zones, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
25. Pillaging a town or place, even when taken by assault;
26. Attacking a person in the knowledge that such person is no longer involved in the fighting, provided that that attack leads to death or injury;
27. Treacherously killing or wounding members of the enemy nation or army or an enemy combatant;
28. Declaring that no quarter will be given;

29. Making improper use of the distinctive emblem of the red cross or red crescent or other protective signs recognized by international humanitarian law, resulting in death or serious personal injury;
  30. Making inappropriate use of the flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, resulting in the loss of human life and serious personal injury;
  31. The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies;
  32. Delaying without justification the repatriation of prisoners of war or civilians;
  33. Indulging in apartheid or other inhumane and degrading treatment based on racial discrimination and resulting in outrages upon personal dignity;
  34. Directing attacks against historic monuments, works of art or clearly recognized places of worship which constitute a national cultural and spiritual heritage and which have been granted special protection by virtue of a special arrangement even though there is no evidence of the enemy violating the prohibition of utilizing such objects to support the military effort and those objects are not located in the immediate vicinity of military objectives;
  35. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments and hospitals, provided they are not military objectives;
  36. Employing poison or poisoned weapons;
  37. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
  38. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
  39. Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
  40. Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to the Statute of the International Criminal Court.
- (2) Serious violations of Article 3 common to the Conventions signed in Geneva on 12 August 1949, in the case of armed conflict defined by common Article 3, and listed below, constitute crimes under international law and shall be punished in accordance with the provisions of this Act, when such violations undermine, by act or omission, the protection of persons that is guaranteed by those Conventions,

without prejudice to the penal provisions applicable to breaches committed out of negligence:

1. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
  2. Outrages upon personal dignity, in particular humiliating and degrading treatment;
  3. Taking of hostages;
  4. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (3) The serious violations defined in Article 15 of Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted in The Hague on 26 March 1999, committed during armed conflict, as defined in Article 18, paragraphs 1 and 2, of the Hague Convention of 1954 and in Article 22 of the aforementioned Second Protocol, and listed below, constitute crimes under international law and shall be punished in accordance with the provisions of this Act when such breaches undermine, by act or omission, the protection of property guaranteed by those Conventions and the Protocol, without prejudice to the penal provisions applicable to breaches committed out of negligence:
1. Making cultural property under enhanced protection the object of attack;
  2. Using cultural property under enhanced protection or its immediate surroundings in support of military action;
  3. Extensive destruction or appropriation of cultural property protected under the Convention and the Second Protocol.

### **Article 136 (d)**

(L. 5 August 2003, Article 9)

The breaches listed in Articles 136 (a) and 136 (b) shall be punished by life imprisonment.

The breaches listed under Nos. 1, 2, 15, 17, 20 to 24 and 26 to 28 of paragraph 1 of Article 136 (c) shall be punished by life imprisonment.

The breaches listed under Nos. 3, 4, 10, 16, 19, 36 to 38 and 40 of the same paragraph of the same Article shall be punished by prison sentences of 20 to 30 years. They shall be punished by life imprisonment if they resulted in the death of one or more persons.

The breaches listed under Nos. 12 to 14 and 25 of the same paragraph of the same Article shall be punished by prison sentences of 15 to 20 years. The same breach and that referred to in Nos. 29 and 30 of the same paragraph of the same Article shall be punished by prison sentences of 20 to 30 years if they resulted in an apparently incurable illness, the permanent incapacity to work or the loss of use of an organ or

serious mutilation. They shall be punished by life imprisonment if they resulted in the death of one or more persons.

The breaches listed under Nos. 6 to 9, 11 and 31 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years. In the case of aggravating circumstances stipulated in the preceding paragraph, they shall be punished by the sentences provided for in that paragraph, as is appropriate to the case in question.

The breaches listed under Nos. 5 and 32 to 35 shall be punished by prison sentences of 10 to 15 years, without prejudice to the application of the more severe penal provisions repressing outrages upon human dignity.

The breach stipulated in No. 18 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years. It shall be punished by prison sentence of 15 to 20 years when it resulted in serious consequences for public health.

The breach listed under No. 39 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years.

The breach listed under No. 1 of paragraph 2 of Article 136 (c) shall be punished by life imprisonment.

The breaches listed under Nos. 2 and 4 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years, without prejudice to the application of the severer penal provisions repressing outrages upon human dignity.

The breach listed under No. 3 of the same paragraph of the same Article shall be punished by prison sentences of 10 to 15 years. The same breach shall be punished by prison sentences of 20 to 30 years if it resulted in an apparently incurable illness, permanent incapacity to work, the loss of use of an organ, or serious mutilation. It shall be punished by life imprisonment if it resulted in the death of one or more persons.

The breaches listed under Nos. 1 to 3 of paragraph 3 of Article 136 (c) shall be punished by prison sentences of 15 to 20 years.

### **Article 136 (e)**

(L.5 August 2003, Article 10)

Anyone making, being in possession of or transporting any kind of instrument, device or object, erecting a construction or converting an existing construction in the knowledge that such instrument, device, or object, such construction or conversion is intended to commit one of the breaches provided for in Articles 136 (a), 136 (b) and 136 (c) or to facilitate the perpetration of such breaches shall be punished by the sentence stipulated for the breach which they have allowed or facilitated.

### **Article 136 (f)**

(L. 5 August 2003, Article 11)

The sentence stipulated for a breach that has been committed shall be applied to the following:

1. Orders, even if they are without effect, to commit one of the breaches stipulated in Articles 136 (a), 136 (b) and 136 (c);
2. Proposing or offering to commit such a breach and the acceptance of such proposal or offer;
3. Incitement to commit such a breach, even if it does not actually take place;
4. Participating, within the meaning of Articles 66 and 67, in such a breach, even if it does not actually take place;
5. Failure to do what could have been possible on the part of people who were aware of orders given with a view to committing such a breach or of acts beginning its perpetration, and who could have prevented its being carried out or have stopped it;
6. Attempting, within the meaning of Articles 51 to 53, to commit such a breach.

### **Article 136 (g)**

(L. 5 August 2003, Article 12)

Paragraph 1. Without prejudice to the exceptions listed under Nos. 18, 22 and 23 of Article 136 (c), paragraph 1, no interest, no political, military or national necessity can justify the breaches defined in Articles 136 (a), 136 (b), 136 (c), 136 (e) and 136 (f), even if they were committed as reprisals.

Paragraph 2. The fact that the accused acted on the orders of his government or a superior does not free him from his responsibility if, in the given circumstances, the order could clearly have led to one of the breaches targeted in Articles 136 (a), 136 (b) and 136 (c) being committed.

## **B. 2003 Code of Criminal Procedure**

[Source: Available in French on <http://www.moniteur.be>; unofficial translation.]

New provisions in the first section of the Code of Criminal Procedure

### **Article 1 (a)**

(L. 5 August 2003, Article 13)

- (1) In accordance with international law, legal action shall not be taken against:
  - Foreign heads of State, heads of government and foreign ministers, during their term of office, as well as other persons whose immunity is recognized by international law;
  - Persons with a total or partial immunity based on a treaty that is binding on Belgium.
- (2) In accordance with international law, for the duration of their stay no pressure to initiate legal action may be exerted with regard to anyone who has been officially

invited to reside in the territory of the Kingdom by the Belgian authorities or by an international organization established in Belgium and with which Belgium has concluded a headquarters agreement. [...]

### **Article 10, 1 (a)**

(L. 5 August 2003, Article 16 (2))

- (1) Except for [certain cases], a foreigner may be tried in Belgium who, outside the Kingdom of Belgium, has committed: [...]
- (1bis) A serious violation of international humanitarian law as stipulated in Part II, section I (a) of the Criminal Code, [...] against a person who, at the time of the occurrence, is a Belgian national or a person whose actual place of normal and legal residence has been in Belgium for at least three years.

Legal action, including the investigation, may be initiated only at the request of the federal prosecutor who assesses any charges that may have been brought. There is no channel through which to appeal against that decision. [N.B.: On 23 March 2005, the Belgian Constitutional Court ("Cour d'arbitrage") held that the preceding paragraph is unconstitutional and ceases to be in force on 31 March 2006 (See the decision in French, online: <http://www.const-court.be>).]

If a charge has been submitted to the federal prosecutor in application of the preceding paragraphs, he must instruct the examining magistrate to investigate that charge unless:

1. The charge is manifestly unfounded; or
2. The facts cited in the charge cannot be deemed to be one of the breaches stipulated in Part II, section I (a), of the Criminal Code; or
3. That charge cannot lead to an admissible public action; or
4. The actual circumstances of the case show that, in the interest of justice being fairly administered and respecting Belgium's international obligations, that case should be brought either before international courts or before the courts in the place where the acts were committed, or before the courts of the State of which the perpetrator is a national or those of the place where he may be found, provided that those courts demonstrate independence, impartiality and equity, as may arise, in particular, from the relevant international commitments between Belgium and that State.

If the federal prosecutor deems a case to be closed, he shall notify the Minister of Justice, indicating the points which are listed in the previous paragraph and on which he bases that classification. [N.B.: On 23 March 2005, the Belgian Constitutional Court ("Cour d'arbitrage") held that the preceding paragraph is unconstitutional and ceases to be in force on 31 March 2006 (See the decision in French, online: <http://www.const-court.be>).]

If a case is classified as closed solely on the basis of points No. 3 and No. 4 above or solely on the basis of point No. 4 above and when those acts were committed after

30 June 2002, the Minister of Justice shall inform the International Criminal Court accordingly. [...]

### **Article 12 (a) new**

(L. 5 August 2003, Article 18)

Apart from the cases referred to in Articles 6 to 11, the Belgian courts are also authorized to take cognisance of breaches committed outside the territory of the Kingdom and stipulated in international treaty or customary law which is binding on Belgium, when that rule requires it, in whatever manner, to submit the matter to its competent authorities to take legal action.

Legal action, including the investigation, may be initiated only if requested by the federal prosecutor who assesses any charges that may have been brought. There is no channel through which to appeal against that decision. [N.B.: On 23 March 2005, the Belgian Constitutional Court ("Cour d'arbitrage") held that the preceding paragraph is unconstitutional and ceases to be in force on 31 March 2006 (See the decision in French, online: <http://www.arbitrage.be>).]

If a charge has been submitted to the federal prosecutor in application of the preceding paragraphs, he must instruct the examining magistrate to investigate that charge unless:

1. The charge is manifestly unfounded; or
2. The facts cited in the charge cannot be deemed to be one of the breaches stipulated in Part II, section I (a), of the Criminal Code; or
3. That charge cannot lead to an admissible public action; or
4. The actual circumstances of the case show that, in the interest of justice being fairly administered and respecting Belgium's international obligations, that case should be brought either before international courts or before the courts in the place where the acts were committed, or before the courts of the State of which the perpetrator is a national or those of the place where he may be found, provided that those courts demonstrate independence, impartiality and equity, as may arise, in particular, from the relevant international commitments between Belgium and that State.

If the federal prosecutor deems the case to be closed, he shall notify the Minister of Justice to that effect, referring to the points listed in the preceding paragraph on which that classification is based.

If a case is classified as closed solely on the basis of points 3 and 4 above or solely on the basis of point 4 above and when those acts were committed after 30 June 2002, the Minister of Justice shall inform the International Criminal Court accordingly.



## C. Evolution of the Belgian Law on Universal Jurisdiction

[Source: Université Libre de Bruxelles, Centre de Droit International, Dossier d'Actualité sur la compétence universelle en droit belge, <http://www.ulb.ac.be/droit/cdi>, unofficial translation.]

### Legislation

The Law on “universal jurisdiction”, as it is called, was adopted on 16 June 1993 and addressed the repression of grave breaches of the Geneva Conventions of 12 August 1949 and the Additional Protocols I and II of 8 June 1977. Its scope of application was limited to war crimes, whether they are committed during an international or non-international conflict. To that extent, the Law broke new ground, in particular with regard to the international instruments that it set out to implement. It will be recalled that the notion of war crimes was restricted in the Geneva Conventions and the Additional Protocols to international armed conflicts.

That Law is also an innovation under Belgian law in that it enables legal action to be taken against an accused party regardless of whether the latter is on Belgian territory or not. This possibility is not referred to explicitly in the Law but appears in the parliamentary proceedings of the Senate on 30 April 1991.

On the basis of that Law, an investigation concerning Augusto Pinochet was initiated on 1 November 1998 [available in French on [http://www.ulb.ac.be/droit/cdi/Site/Competence\\_universelle.html](http://www.ulb.ac.be/droit/cdi/Site/Competence_universelle.html)].

The Law was submitted to an initial revision on 10 February 1999. That revision made two important amendments: on the one hand, the universal jurisdiction of Belgian judges was extended to the crime of genocide and to crimes against humanity and, on the other hand, the perpetrators of criminal breaches were to cease to be able to plead any kind of immunity.

There were few lawsuits based on that Law at first. The trial at the crown court in Brussels in April 2001 of four persons accused of having taken part in the Rwandan genocide and their conviction led to an increase in the number of lawsuits [details on this process available on <http://trial-ch.org/>]. These were aimed at, among others, Fidel Castro, Saddam Hussein, Laurent Gbagbo, Hisséne Habré and Ariel Sharon. The charges proffered against Ariel Sharon on 1 and 18 June 2001 gave rise to strong criticism from the Israeli authorities.

The Law, as amended in 1999, was again amended four years later. On 14 February 2002 Belgium was ordered by the International Court of Justice to annul the international warrant for the arrest of Abdoulaye Yerodia when he was the Minister for Foreign Affairs of the Democratic Republic of Congo on the grounds that the warrant for arrest took no account of the immunity granted to heads of State and to the Foreign Affairs Ministers in office. [See Case No. 242, ICJ, *Democratic Republic of the Congo v. Belgium*] Following that ruling, a bill which took account of the adoption of the Statute of the International Criminal Court and which provided for bringing the Law into line with the existing rules of international law, was presented to the Senate on 18 July 2002. The text was approved by the Senate on 30 January 2003 and forwarded to the Chamber on 5 February 2003.

However, bringing charges against US political and military leaders, particularly after the intervention of the United States in Iraq, was to trigger increasingly harsh reactions by those leaders, which culminated in threats to move NATO headquarters and finally led to the 1993 Act being repealed. The first charge, relating to acts committed during the first Gulf War, was brought against George Bush Senior and former members of his team in March 2003. Colin Powell, who was targeted by that charge, considered that the Belgian Act presented a “serious problem”, particularly given the fact that NATO headquarters was in Brussels and issued a warning to Belgium.

Consequently, the bill was amended and stipulated that, in situations that are not linked to Belgium, the public prosecutor could refuse to instruct the examining magistrate in certain cases. Moreover, the bill also stipulated that the Justice Minister had the authority to issue a negative injunction, which in explicit terms meant the possibility of referring the charge back to the State on whose territory the breach was committed or of which the perpetrator is a national. The Law was passed on 23 April 2003.

Moreover, following the two rulings by the Chamber of Indictment in Brussels which deemed the lawsuits against Abdulaye Yerodia and against Ariel Sharon and Amos Yaron to be inadmissible on the grounds that those persons were not present on Belgian territory, a second bill interpreting the 1993 Law, according to which legal proceedings could be instituted regardless of the location of the accused, was also presented. That second bill was never adopted because the rulings were subsequently nullified by the Court of Cassation.

It was not to prevent a charge being lodged against US General Tommy Franks on 14 May 2003. On 13 May 2003, at a press conference at NATO headquarters, General Richard Myers, who had been informed by a journalist that the charge was about to be lodged, said that he considered the situation “very serious” and that it could have a significant bearing on where NATO held its meetings.

At the meeting of NATO defence ministers one month later, and despite the lawsuit filed against General Franks having been referred back to the United States in accordance with the new procedure, Donald Rumsfeld, after having called the lawsuit “absurd” and refusing to recognize Belgium’s authority to try American leaders, confronted it with its responsibilities as the country in which NATO has its headquarters and made the American contribution to the building of a new headquarters subject to assurance that Belgium would again be a “hospitable place for NATO to conduct its business”, while at the same time acknowledging that Belgium’s sovereignty had to be respected. [Speech available on <http://www.nato.int/docu/speech/2003/s030612g.htm>].

At the end of June 2003, the Belgium Minister for Foreign Affairs announced his intention to amend the Law again as soon as the new government had been formed.

The Law of 16 June 1993 was repealed on 5 August 2003. The Criminal Code, the Act of 17 April 1878 containing the first part of the Code of Criminal Procedure and the Code of Criminal Procedure were thus amended to allow serious breaches of international humanitarian law to be prosecuted. However, in the absence of connections authorizing the Belgian courts to take cognizance of it, the charge is upheld only if

a rule of international law, deriving from treaty or customary law which is binding on Belgium, requires it to prosecute perpetrators of the breaches specified therein.

If universal jurisdiction really does subsist under Belgium law, its bearing is far more restricted (given that in the current state of international law, universal jurisdiction in absentia can no longer be exercised) and with an extensive system for filtering the charges (provided that the system set up at the time of the previous amendment of the law is upheld). According to several hypotheses, the federal prosecutor may thus close the case without further action, particularly if he considers that an international court or another national court has “more justified” competence. The only requirements are the competence and “guarantees of impartiality and independence” of the court. Consequently, the closure of the case is not conditional upon the existence of effective proceedings before that court. It should be noted that the legislator has chosen vague terms to define the qualities to be demonstrated by a court whose competence would take precedence over Belgian universal competence.

That sovereign assessment by the federal prosecutor is evidently a political safeguard to prevent Belgium from finding itself in another a difficult diplomatic situation.

### DISCUSSION

1. Do the Criminal Code and the Code of Criminal Procedure fulfil Belgium's obligations to establish its (universal) jurisdiction over persons alleged to have committed grave breaches? Did the former 1993 law (amended in 1999) exceed treaty-based obligations? If so, was it a violation of international law? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85)
2.
  - a. Are the definitions of genocide and crimes against humanity, taken from the 1948 Convention on Genocide and the Statute of the International Criminal Court, part of customary law? Could this national legislation create definitions other than those of the said Conventions? More restrictive or broader definitions?
  - b. Can genocide be committed in peacetime? Can a crime against humanity? Is armed conflict not a necessary condition for the commission of those crimes? How do you reconcile the definition of the crime against humanity, which has to be committed “as part of a widespread or systematic attack” with the fact that this crime can be committed in peacetime?
3.
  - a. Does Art. 136(c) of the Criminal Code cover all grave breaches mentioned by IHL? Does it permit punishment of violations of customary IHL? Does Belgium also establish its universal jurisdiction over violations of IHL not qualified as grave breaches? (GC I-IV, Arts 50/51/130/147 respectively; P I, Arts 11 and 85) Does that violate IHL or general international law in the case of persons who were not otherwise under Belgian jurisdiction when they committed their crime?
  - b. Is it appropriate for the Criminal Code to extend the notion of grave breaches to non-international conflicts? Is the prosecution of serious violations of IHL of non-international armed conflicts prescribed by IHL? Is it compatible with IHL?
4. When the Criminal Code addresses international and non-international armed conflicts together, for which crimes listed does this present no difficulty from the point of view of substantive IHL? For which crimes are there only terminological problems? For which crimes are there substantive problems because the criminalized acts are not prohibited by the IHL of non-international armed conflicts? Which crimes at least do not fall under a prohibition contained in Protocol II? Does

the Belgian Law criminalize acts committed in a non-international armed conflict which are not prohibited by the applicable substantive IHL? Under IHL, may a State punish behaviour in armed conflict which is not prohibited by IHL? May universal jurisdiction be established for such crimes?

5.
  - a. Can Art. 136(f) be inferred from the pertinent provisions of the Conventions and Protocol I? Does it correspond to a rule of customary IHL? Could it conceivably be a rule introduced by the Criminal Code? What about Art. 136(e)? (GC I-IV, Arts 49/50/129/146 respectively; P I, Arts 85(1) and 86(2))
  - b. Is the provision in Art. 136(f) concerning failure to act different in substance from Art. 86(2) of Protocol I?
6.
  - a. When may a superior order be a defence against charges of a violation of IHL? When does a superior order prevent punishment for such a violation? When does it reduce punishment for such a violation? Is Art. 136(g)(2) consistent with IHL?
  - b. Is there no possible defence for having committed any grave breach? For some breaches? Are the limitations to defences designated in Art. 136(g)(1) prescribed by IHL?
7. Do you think that the provisions of the former 1993 law stipulating that immunity did not prevent its application (and which have been removed from the present Belgian law), combined with the interpretation of that law to the effect that the accused did not have to be present in Belgium, were excessive? Why? What do you think of the limitations included in the Code of Criminal Procedure? Do they eliminate Belgian universal jurisdiction? Or do they adapt that universal jurisdiction to make it consistent with international law?

**Case No. 69, Ivory Coast, National Interministerial Commission**

[Source: *Journal Officiel de la République de Côte d'Ivoire*, November 14, 1996, p. 1042; original in French, unofficial translation; available on <http://www.icrc.org/ihl-nat>]

**DECREE No. 96-853 of 25 October 1996 setting up  
the National Interministerial Commission for the implementation  
of international humanitarian law.**

**THE PRESIDENT OF THE REPUBLIC,**

[...]

DECREES:

**Article 1: Establishment**

A National Interministerial Commission responsible for the implementation of international humanitarian law is hereby established.

**Article 2: Attributions**

The Interministerial Commission shall:

- ensure respect for international humanitarian law and effective implementation thereof;
- study and prepare laws and implementation regulations in areas in which additions or amendments to national legislation may be required, and submit them to the Government;
- ensure the application of humanitarian law in Côte d'Ivoire;
- encourage the promotion, dissemination and teaching of this law.

**Article 3: Organization**

The Commission shall be presided over by the Minister of Justice and Public Freedoms. The Vice-Presidency shall be filled by the National Red Cross Society, and the secretariat by the Ministry of Foreign Affairs.

**Article 4: Composition**

The Commission shall comprise:

- two representatives of each of the following ministries: Foreign Affairs, Justice and Public Freedoms, Defence, Interior and National Integration, Public Health, Economy and Finance, and Higher Education;
- two representatives of the Bar;
- the regional representative of the International Committee of the Red Cross;
- the representative of the National Red Cross Society.

### **Article 5: Assistance**

The assistance of the International Committee of the Red Cross (ICRC) may be sought to ensure the accomplishment of the tasks assigned to the Commission under the terms of Article 2 above.

### **Article 6: Operating procedures**

A joint decree by the Ministry of Foreign Affairs and the Minister of Justice and Public Liberty shall set out the Commission's operating procedures and may set up subcommittees as necessary.

### **Article 7: Final provisions**

The Ministers of Foreign Affairs, Justice and Public Liberty, Economy and Finance, Defence, Higher Education, Research and Technological Innovation, Interior and National Integration, and Public Health shall be responsible – in their respective areas of competence – for the execution of the present decree, which will be published in the Official Gazette of the Republic of Côte d'Ivoire.

Done in Abidjan, on October 25, 1996

Henri Konan Bédié

## **DISCUSSION**

1. Why is a National Interministerial Commission on the implementation of IHL necessary or useful? Is the establishment of such a commission prescribed by IHL?
2. Need States only concern themselves with IHL during times of armed conflict? If not, why not? What measures concerning IHL are most effectively implemented in peacetime? (GC I-IV, Arts 47-49/48-50/127-129/144-146, respectively) Does this explain the variety of government ministers designated in Art. 7 above to execute the decree of the Ivory Coast Republic?
3. If a State has agreed to be bound by a treaty, what need is there for national implementation measures? Are national measures a requirement under the Geneva Conventions? Does the extent of obligations as regards implementation measures change if the State is also party to one or both of the Protocols? (GC I-IV, common Art. 1; P I, Art. 1(1); *see also* GC I, Arts 45 and 48; GC II, Arts 46 and 49; GC III, Art. 128; GC IV, Art. 145; P I, Art. 80)
4. Do the Geneva Conventions mandate the performance of all tasks listed in Art. 2 and assigned to the Ivory Coast Republic's National Interministerial Commission? Do the Geneva Conventions specify the manner in which these tasks are to be accomplished?
5.
  - a. If national legislation is necessary, does this mean that no provisions of the Conventions are self-executing? What about the applicability of those provisions considered customary?
  - b. Which provisions in the Conventions specifically call upon States Parties to implement legislation? What particular legislation do the Conventions oblige a State Party to provide? (GC I-IV, Arts 49/50/129/146, respectively; 1954 Hague Convention on Cultural Property, Art. 28 [*See Document No. 10*, Conventions on the Protection of Cultural Property]) How specific are the demands of the Conventions? On which points do States Parties have broad discretion? May a State Party enact legislation extending beyond what the Conventions stipulate?

6. Will all national measures enacted to enforce the treaty be the same for every State Party? If not, why not?
7. Have most States Parties enacted national legislation or created national commissions like that of the Ivory Coast Republic? If many States Parties have not taken such action, what impact does this have on the practical application and effectiveness of IHL?
8. Are the role given to the ICRC in Art. 5 of the Ivory Coast Republic's decree and the National Red Cross Society's participation in the Commission consistent with the Statutes and Fundamental Principles of the Movement? What are the advantages and disadvantages of such participation? (GC I-III, Art. 9; GC IV, Art. 10; Statutes of the International Red Cross and Red Crescent Movement, Preamble and Arts 3 and 5; [See **Document No. 31**, Statutes of the International Red Cross and Red Crescent Movement])

**Case No. 70, United States, War Crimes Act**

[See also **Case No. 265**, United States, Military Commissions]

**A. War Crimes Act of 1996**

[**Source:** Title 18, Crimes and Criminal Procedure Part I, Crimes Chapter [116] 118, War Crimes, 18 USCS, §2401 (1996); available on <http://uscode.house.gov>]

**Sec. 2401. War crimes**

- “(a) OFFENSE: Whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
- “(b) CIRCUMSTANCES: The circumstances referred to in subsection (a) are that the person committing such breach or the victim of such breach is a member of the armed forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).
- “(c) DEFINITIONS: As used in this section, the term ‘grave breach of the Geneva Conventions means conduct defined as a grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to any such convention, to which the United States is a party.”

[...]

**B. 1997 Amendment to the War Crimes Act of 1996**

[**Source:** This Amendment was contained in the Foreign Operations Appropriations Act approved by the Senate on November 9, 1997 and the House of Representatives on November 12, 1997; available on <http://thomas.loc.gov/home/c105query.html>]

[**N.B.:** Section 2401 of the United States Code has since been re-numbered Section 2441.]

**War Crimes Prosecution**

SEC. 583. Section 2401 of title 18, United States Code (Public Law 104-192; The War Crimes Act of 1996) is amended as follows:

- (1) in subsection (a), by striking “grave breach of the Geneva Conventions” and inserting “war crime”;
- (2) in subsection (b), by striking “breach” each place it appears and inserting “war crime”;

and

- (3) so that subsection (c) reads as follows:



“(c) Definition: As used in this section the term ‘war crime’ means any conduct:

- “(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
- “(2) prohibited by Articles 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
- “(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or
- “(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, wilfully kills or causes serious injury to civilians.”

## DISCUSSION

1. a. How has the 1997 amendment to the War Crimes Act of 1996 enlarged the range of offences covered? Which further acts are now prohibited? (HR, Arts 23, 25, 27 and 29; GC I-IV, common Art. 3; Amended Protocol II to the 1980 Conventional Weapons Convention [See **Document No. 16**, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention)])
- b. Is the choice of provisions of the Hague Regulations referred to in the amendment appropriate? Would you have referred to additional provisions or excluded some of them? Does Art. 25 of the Hague Regulations provide an appropriate formulation to determine which attacks are prohibited in contemporary IHL? Can an undefended dwelling ever be a legitimate military objective? Under Art. 52(2) of Protocol I? Under contemporary customary IHL?
- c. Are violations of Protocol II within the range of offences covered by the amended Act?
2. Does the War Crimes Act as amended fulfil the US obligation under IHL to enact the necessary legislation for providing “effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.”? (GC I-IV, Arts 49/50/129/146 respectively)
3. a. What is the jurisdictional scope of the War Crimes Act of 1996? Did the 1997 amendment alter this?
- b. Does the amended War Crimes Act provide for universal jurisdiction? Is the United States, as a State Party, not required to provide for universal jurisdiction under the Conventions? (GC I-V, Arts 49/50/129/146 respectively)
- c. Why do you think that the proposed version of the amendment to the Act, which would have provided for universal jurisdiction, did not prevail?
- d. Does the absence of universal jurisdiction in the US Act create a US “safe haven” from prosecution for certain war criminals? Are extradition or deportation options available to the United States in such cases for it to respect its obligations under IHL? Are these always satisfactory options? (GC I-V, Arts 49/50/129/146 respectively)

**Case No. 71, Russian Federation,  
Succession to International Humanitarian Law Treaties**

[Source: Note from the Permanent Mission of the Russian Federation in Geneva transmitted to the ICRC on January 15, 1992]

**Note of the Ministry for Foreign Affairs of the Russian Federation:**

“... The Russian Federation continues to exercise the rights and carry out the obligations resulting from the international agreements signed by the Union of Soviet Socialist Republics.

Accordingly the Government of the Russian Federation will carry out, instead of the Government of the USSR, functions of depositary of the corresponding multilateral treaties.

In this connection the Ministry asks to consider the Russian Federation as the Party to all international agreements in force, instead of the USSR...”

**DISCUSSION**

1. Was this note necessary? Does it change the legal status of the Russian Federation with regard to IHL treaties? Would the Russian Federation have been party to the IHL treaties without this note?
2. Are your answers to question 1 also valid for all other States of the former USSR? What would their legal status be if they had not made any such declaration?

**Case No. 72, USSR, Poland, Hungary, and the Democratic People's Republic of Korea, Reservations to Article 85 of Convention III****A. USSR**

[Source: *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. I, Federal Political Department, Berne, pp. 355-356; available on <http://www.icrc.org/ihl>]

Reservations made upon signature and maintained upon ratification [12.12.1949; 10.05.1954]:

General SLAVIN, Head of the Delegation of the Union of Soviet Socialist Republics: [...]

- (3) On signing the Convention relative to the Treatment of Prisoners of War, the Government of the Union of Soviet Socialist Republics makes the following reservations: [...]

**Article 85**

"The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment." [...]

**B. Poland**

[Source: *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. I, Federal Political Department, Berne, pp. 350-351; available on <http://www.icrc.org/ihl>]

Reservations made upon signature and maintained upon ratification [08.12.1949; 26.11.1954]:

Mr PRZYBOS, Polish Minister in Switzerland, made the following reservations concerning the four Geneva Conventions: [...]

- (3) "On signing the Geneva Convention relative to the Treatment of Prisoners of War, I declare that the Government of the Polish Republic adheres to the said Convention, with reservations in respect of Article [...] 85. [...]"

"In regard to Article 85, the Government of the Polish Republic will not consider it legal for prisoners of war convicted of war crimes and crimes against humanity in accordance with the principles set forth at the time of the Nuremberg trials, to continue to enjoy protection under the present Convention, it being understood that prisoners of war convicted of such crimes must be subject to the regulations for the execution of punishments, in force in the State concerned." [...]

## C. Hungary

[Source: *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. I, Federal Political Department, Berne, pp. 346-347; available on <http://www.icrc.org/ihl>]

Declarations and reservations made upon signature and maintained upon ratification [08.12.1949; 03.08.1954]: [...]

"The express reservations made by the Government of the Hungarian People's Republic on signing the Conventions, are as follows: [...]"

- (4) "The Delegation of the Hungarian People's Republic repeats the objection which it made, in the course of the meetings at which Article 85 of the Prisoners of War Convention was discussed, to the effect that prisoners of war convicted of war crimes and crimes against humanity in accordance with the principles of Nuremberg, must be subject to the same treatment as criminals convicted of other crimes. [...]"

## D. Democratic People's Republic of Korea

[Source: *UNTS*, vol. 276, 1957, pp. 263-264; available on <http://www.icrc.org/ihl>]

Reservations made upon accession [27.08.1957]: [...]

On Article 85 [...] [of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949]:

"The Government of the Democratic People's Republic of Korea will not be bound by Article 85, in regard to the treatment of the prisoners of war convicted under the laws of the Detaining Power of prisoners of war for having committed war crimes or inhumane offences, based on the principles of Nuremberg and the Tokyo Far East International Military Tribunal." [...]

## DISCUSSION

1. Why do you think so many States (Albania, Belarus, Bulgaria, Chinese People's Republic, Czechoslovakia, German Democratic Republic, Romania, Ukraine, People's Republic of Vietnam, and Angola, in addition to those above) made a similar reservation to Art. 85 of Geneva Convention III?  
[N.B.: Hungary, Belarus, Bulgaria and Romania have withdrawn their similar reservations.]
2. a. Should those prisoners of war, who violated the laws of war, still be permitted to claim that law's protection? Should the law of war be applicable to them at all? At least until *prima facie* evidence of guilt is established? Until a sentence has been pronounced against them? Are not prisoners of war extremely vulnerable in enemy hands and thus in greatest need of the legal safeguards provided for them under international law? According to Art. 85 of Geneva Convention III, until when are the benefits of that Convention applicable to prisoners of war who committed war crimes?
- b. Which safeguards does Geneva Convention III provide for prisoners of war? Are such safeguards less or more extensive than most national legislation? Should an alleged war criminal be deprived of safeguards which national legislation routinely provides for even the worst

criminals? Does Geneva Convention III raise any obstacle to the trial or sentencing of prisoners of war by the Detaining Power? Or to them serving a sentence as do criminals convicted of other crimes? Which provisions of Geneva Convention III on the treatment of prisoners of war go beyond what is guaranteed by international human rights law to any convicted prisoner?

3. a. What is meant by the “principles of the Nuremberg trial” referred to in various ways by the reservations above? Is it a reference to those principles of international law recognized in the Charter of the Nuremberg Tribunal as formulated by the UN International Law Commission and through the judgement of the Tribunal? Are war crimes and crimes against humanity thus to be understood as the International Law Commission defined them?
- b. Why is it important that the reservations do not include crimes against peace? If such crimes were included, what potential ramifications could that have for prisoners of war? Under IHL, for which offences committed prior to capture may a prisoner of war be punished?
- c. In the reservation of the USSR, is it clear when the benefits of the Convention would be withdrawn from prisoners of war? What recourse do States Parties have if a reservation is open to various interpretations? Are any and all reservations to a treaty permitted? If not, then which ones are not permitted?
- d. Do the three other reservations have the same effect as the reservation of the USSR?

## Document No. 73, France, Accession to Protocol I

**A. Statement at the Diplomatic Conference**

[Source: *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, Vol. VII, Federal Political Department, Bern, 1978, pp. 192-194]

**3. Mr Paolini (France) made the following statement:**

"[T]he French delegation wishes to note that Protocol I is not restricted to reaffirming and developing humanitarian law in armed conflicts; it also reaffirms and develops to a considerable extent the laws and customs of war established earlier in a number of international conventions adopted more than fifty years ago, particularly the Hague Convention No. IV of 18 October 1907 concerning the Laws and Customs of War on Land. Humanitarian law and the law of war are thus interlinked although hitherto these two fields of international law have remained separate. This is particularly clear in Part III, concerning the methods and means of warfare, and Part IV, concerning the general protection of the civilian population against effects of hostilities.

"This consolidation of humanitarian law and the law of war will no doubt enable humanitarian law to make progress in some cases. But it does have its dangers. Once an international instrument of humanitarian law also deals with the conduct of warfare, it is necessary to make sure that it maintains strict respect for the sovereignty of States and their inalienable right to provide for their peoples' self-defence against any aggression by foreign Powers.

"The French delegation therefore wishes to make it quite clear that its Government could not under any circumstances permit the provisions of Protocol I to jeopardize the 'inherent right of self-defence,' which France intends to exercise fully in accordance with Article 51 of the United Nations Charter, or to prohibit the use of any specific weapon which it considers necessary for its defence. [...]

"With regard to Protocol I itself, the French Government cannot accept that the provisions of paragraph 4 of Article 46 (Article 51 in the final numbering) and paragraph 2 of Article 50 (new Article 57), concerning indiscriminate attacks, could prohibit its own armed forces, in defending the national territory, from carrying out military operations against enemy forces attacking or occupying certain areas or places.

"Nor can it accept that the provisions of Article 47 (new Article 52), concerning the general protection of civilian objects, or those of sub-paragraph (b) of Article 51 (new Article 58), recommending the Parties to avoid locating military objectives within or near densely populated areas, could prohibit or irrevocably prejudice the defence by its own armies of certain parts of the national territory or of towns or villages attacked by enemy forces. [...]

"The French delegation considers it regrettable that, because of their ambiguous nature, Articles 46 (new Article 51), 47 (new Article 52), 50 (new Article 57) and 51 (new Article 58) are of a nature to have serious implications for France's defence policy, and it therefore wishes to express the most categorical reservations with regard to them..."

## **B. Reservations and interpretative declarations concerning accession by France to Protocol I**

[Source: "Accession by France to Protocol I of 8 June 1977," in *IRRC*, No. 842, June 2001, pp. 549-552, 2001, available on <http://www.icrc.org/eng/review>]

### **Accession by France to Protocol I of 8 June 1977**

France acceded on 11 April 2001 to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted in Geneva on 8 June 1977. That accession was accompanied by various declarations and reservations (see below).

Protocol I came into force for France on 11 October 2001. France was the 158th State to become party to that Protocol.

It should be recalled that France acceded on 24 February 1984 to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

Reservations and interpretive declarations concerning accession by France to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

1. The provisions of Protocol I of 1977 shall not prevent France from exercising its inherent right of self-defence, in accordance with Article 51 of the Charter of the United Nations.
2. With reference to the draft Protocol prepared by the International Committee of the Red Cross, which formed the basis for the work of the Diplomatic Conference of 1974-1977, the Government of the French Republic still considers that the provisions of the Protocol relate to conventional weapons only and that they do not regulate or prohibit recourse to nuclear weapons, nor can they undermine the other rules of international law applying to other weapons which France needs to exercise its inherent right of legitimate defence.
3. The Government of the French Republic considers that the expressions *possible* and *endeavour* to used in the Protocol mean what can be achieved or what is practicable, given the prevailing circumstances, including humanitarian and military considerations.
4. The Government of the French Republic considers that, of itself and in context, the expression "armed conflicts" employed in Article 1(4) refers to a situation of a

type that does not include committing ordinary crimes – including terrorist acts – irrespective of whether those crimes are collective or individual.

5. Given the practical need to use non-specific aircraft for the purpose of medical evacuation, the Government of the French Republic does not interpret Article 28 (2) as ruling out the presence on board of communication equipment and encoding material or the use of such equipment or material solely in order to facilitate navigation, identification or communication for the benefit of a medical transport mission, as defined in Article 8.
6. The Government of the French Republic considers, in relation to the provisions of Article 35 (2) and (3) and Article 55, that the risk of causing harm to the natural environment through the use of methods and means of warfare, must be analysed objectively on the basis of information available at the time of its assessment.
7. Taking account of the provisions of Article 43 (3) of the Protocol concerning armed law enforcement agencies, the Government of the French Republic informs the States party to the Protocol that its armed forces permanently include the gendarmerie nationale (national police force).
8. The Government of the French Republic considers that the situation referred to in the second sentence of Article 44 (3) can exist only if a territory is occupied or in the event of an armed conflict within the meaning of Article 1 (4). The term “deployment” used in paragraph 3 (b) of that same article means any movement towards a place from which an attack may be launched.
9. The Government of the French Republic considers that the rule stated in the second sentence of Article 50 (1) may not be interpreted as obliging commanding officers to take a decision which, depending on the circumstances and the information available to them, might be incompatible with their duty to ensure the safety of the troops under their responsibility or to maintain their military position, in accordance with the other provisions of the Protocol.
10. The Government of the French Republic considers that the expression “military advantage” used in Article 51 (5) (b), Article 52 (2) and Article 57 (2) (a) (iii) indicates the advantage expected to be gained from the attack as a whole and not from isolated or specific parts of the attack.
11. The Government of the French Republic declares that it will apply the provisions of Article 51 (8) to the extent that their interpretation does not impede the use, in accordance with international law, of the means that it may deem indispensable to protect its civilian population against obvious and deliberate serious violations of the Geneva Conventions and the Protocol by the enemy.
12. The Government of the French Republic considers that a specific area may be considered a military objective if, owing to its location or any other criterion listed in Article 52, its total or partial destruction, its capture or neutralization, taking account of the circumstances prevailing at the time, presents a decisive military advantage. The Government of the French Republic also considers that the first



sentence of Article 52 (2) does not tackle the issue of collateral damages resulting from attacks launched against military objectives.

13. The Government of the French Republic declares that if the objects protected under Article 53 are used for military purposes, they shall thereby lose the protection from which they might have benefited pursuant to the provisions of the Protocol.
14. The Government of the French Republic considers that Article 54 (2) does not prohibit attacks carried out with a specific goal, with the exception of those that aim to deprive the civilian population of objects indispensable to its survival and those that are directed against objects which, although they are used by the adverse party, do not serve to provide sustenance for its armed forces alone.
15. The Government of the French Republic cannot guarantee to provide absolute protection for works and installations containing dangerous forces, which may contribute to the war effort of the adverse party, or for the defenders of such installations but it will take every necessary precaution, pursuant to the provisions of Article 56, Article 57 (2) (a) (iii) and Article 85 (3) (c), to avoid severe collateral losses among the civilian populations, including in the event of any direct attacks.
16. The Government of the French Republic considers that the obligation to cancel or suspend an attack, pursuant to the provisions of Article 57 (2) (b), calls only for normal measures to be taken to cancel or suspend that attack, on the basis of information available to the party deciding to launch the attack.
17. The Government of the French Republic considers that Article 70 relating to relief actions is without implication for the existing rules applicable to war at sea with regard to maritime blockades, submarine warfare and mine warfare.
18. The Government of the French Republic does not deem itself bound by a declaration made in application of Article 96 (3) unless it has explicitly acknowledged that the declaration was made by an authoritative body that truly represents a people engaged in an armed conflict as defined in Article 1 (4).

**Case No. 74, United Kingdom and Australia, Applicability of Protocol I****A. Article 1 of Protocol I: Declaration by the Delegation of the United Kingdom**

[Source: VI Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH), Geneva, 1974-1977, Federal Political Dept., Bern, 1978, p.46]

[...]

82. Mr. FREELAND (*United Kingdom*) [...]

83. His delegation has abstained in the vote on Article 1 as a whole and would have abstained on paragraph 4 if a separate vote had been taken on it. At the first session of the Conference the United Kingdom delegation had voted against the amendment to include the paragraph now appearing as paragraph 4, partly because it had seen legal difficulty in the language used, which seemed to be cast in political rather than legal terms. The main reason for its opposition, however, was that the paragraph introduced the regrettable innovation of making the motives behind a conflict a criterion for the application of humanitarian law.

84. His delegation had nevertheless fully understood the wish of those who in 1974 had sponsored the amendment now appearing as paragraph 4 to classify as international armed conflicts various conflicts which by traditional criteria would have been considered internal but in which the international community was taking a keen interest. Those conflicts had been mentioned during the debates in 1974. They were conflicts which had been of major concern to the United Nations, all of them outside Europe; some of them had fortunately come to an end since 1974.

[N.B.: The United Kingdom ratified Protocol I, with reservations, on 28 January 1998. See [www.icrc.org](http://www.icrc.org)]

**B. Article 1 of Protocol I: Australia's Explanation of Vote on the Draft Article**

[Source: VI Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH), Geneva, 1974-1977, Federal Political Dept., Bern, 1978, Annex, pp. 59-60]

**Article 1 of draft Protocol I**

The Australian delegation voted in favour of Article 1 because it contains principles which are consistent with the purpose of this Protocol and because it extends international humanitarian law to armed conflicts which can no longer be considered as non-international in character. [...]

In applying Protocol I to armed conflicts involving national liberation movements, paragraph 4 is a significant development in international humanitarian law and

one which my delegation supported at the first session of the Conference. This development of humanitarian law is the result of various resolutions of the United Nations, particularly resolution 3103 (XXVIII), and echoes the deeply felt view of the international community that international law must take into account political realities which have developed since 1949. It is not the first time that the international community has decided to place in a special legal category matters which have a special significance.

In supporting paragraph 4, the Australian delegation should not be understood as expressing an opinion on the legitimacy of any particular national liberation movement.

In supporting Article 1 as a whole, Australia understands that Protocol I will apply in relation to armed conflicts which have a high level of intensity. Furthermore, Australia understands that the rights and obligations under the Protocol will apply equally to all parties to the armed conflict, impartially to all its victims.

### **C. Reservations to Protocol I by the United Kingdom**

[Source: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Reservation letter of 28 January 1998 sent to the Swiss Government by Christopher Hulse, HM Ambassador of the United Kingdom]

"(...) I also have the honour to lodge with the Government of the Swiss Federation, as the depositary of Additional Protocol I the following statements in respect of the ratification by the United Kingdom of that Protocol: [...]

"(d) Re: ARTICLE 1, paragraph 4 and ARTICLE 96, paragraph 3

It is the understanding of the United Kingdom that the term "armed conflict" of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation. (...)"

(m) Reservation: Articles 51-55

The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will

notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result". [...]

## DISCUSSION

### *Article 1 of Protocol I*

1. Do you agree with the United Kingdom delegation that Art. 1(4) of Protocol I uses political language rather than legal language? Does Art. 1(4) of Protocol I make "motives behind a conflict a criterion for application"? Are the criteria for applying it objective or subjective?
2.
  - a. To which conflicts is the United Kingdom delegation referring in para. 84 above? Is Australia referring to the same "political realities"? Does Art. 1(4) of Protocol I only apply to such conflicts? If only so intended, is it of the same significance today as in 1977?
  - b. Is the list of conflicts in Art. 1(4) of Protocol I exhaustive? Why were those conflicts listed? Does not the choice of listing these conflicts support the United Kingdom delegation's concerns about the use of political language and the use of motives behind a conflict as a criterion for application?
3. Why did the United Kingdom delegation stress that all conflicts which led to the introduction of Art. 1(4) of Protocol I were situated outside Europe?
4. Why do you think that the United Kingdom and Australian delegation hold contrary positions concerning Art. 1(4) of Protocol I?
5. Was the addition of Art. 1(4) of Protocol I even necessary for the Conventions to apply to such conflicts? Could not Art. 2 common to the Conventions be read as applying to wars of national liberation? Does the term "Power" only refer to a State?

### *Reservations to Protocol I*

6. Does reservation (d) mean the UK considers that the fight against terrorism never constitutes an armed conflict? That the UK could not detain terrorists as "enemy combatants", as the US does? [See **Case No. 261**, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base]
7. Is reservation (m) really a reservation or does it simply interpret the obligations under Arts 51 and 55? Which specific provision is not accepted by the UK?
8. Is reservation (m) directed against the prohibition of reprisals? Or does the UK reserve the right to suspend (contrary to Art. 60(5) of the Vienna Convention on the Law of Treaties [see **Quotation**, Part I, Chapter 13. IX. 2. c) dd)]) the applicability of Arts 51 and 55 in the event of a substantive breach by the enemy?
9. Does the reservation correctly restate the limits set by customary international law for reprisals? Or is it more restrictive than customary law? Which elements go beyond customary law?
10.
  - a. Is not reservation (m) largely without practical consequences as it contains an engagement not to violate the Conventions? And do not the Conventions prohibit reprisals against protected persons?
  - b. What do the Conventions state in relation to reprisals? (GC I-IV, Arts 46/47/13(3)/33(3) respectively) Do the Conventions protect in a sufficient manner the civilian population against reprisals? Does the prohibition contained in Art. 33(3) of GC IV prohibit reprisals against the civilian population in the conduct of hostilities?

- c. What does Art. 51 of Protocol I add to the Conventions in relation to reprisals against the civilian population? Was the clarification given in Art. 51(6) of Protocol I necessary?
- 11. Does Art. 51(6) reduce the scope for reprisals? What kind of reprisals is still lawful under Protocol I?
- 12. Does reservation (m) to Arts 51 and 55 undermine Protocol I in its entirety, in particular its provisions on the protection of the civilian population?
- 13. Does reservation (m) reflect a pragmatic compromise between the concept of military necessity and the protection of the civilian population? Does it actually protect the civilian population by dissuading an enemy from violating Protocol I?

**Case No. 75, Belgium and Brazil, Explanations of Vote on Protocol II**

[Source: VII Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH), Geneva, 1974-1977, Federal Political Dept., Bern, 1978, Annex, p. 76]

**A. Belgium****Article 1 of draft Protocol II**

This Article 1, concerning the field of application of Protocol II, gives a fairly specific description of a widely prevalent type of non-international armed conflict, without, however, covering all the forms which civil war may take. Indeed, the 1949 negotiators took care in laying down common Article 3 not to define its field of application.

Furthermore, while this Article 1, which develops and supplements common Article 3, does not cover all possible applications of Article 3, neither does it modify the conditions of application. These remain as they stand and are integrated into the Protocol, although the Conference seems to have decided not to try to reaffirm or to develop all the provisions of Article 3 in this instrument. In other words, the entire philosophy of the provisions of common Article 3, whether explicitly reaffirmed or not, is included in the Protocol.

It is implicit that the same applies to the basic sovereign principle that the obligations of the Protocol are equally binding on both Parties to the conflict, and particularly to the provision in Article 3 that an impartial humanitarian body, such as the ICRC, may offer its services to the Parties to the conflict.

The same is true of the obligation in both Parties to endeavour to bring into force, by means of special agreements, all or part of the other provisions of the four Conventions.

**B. Brazil****Article 1 of draft Protocol II**

When Article 1 was adopted by consensus in Committee I during the second session of the Conference, the Brazilian delegation stated that the conditions laid down in the article to define its material field of application could be recognized only by the Government of the State on whose territory the conflict was allegedly taking place. These were indeed distinctive factors the verification of which could not be a matter either for the dissident armed forces or for third States, in connection with which [...] Article 3 [...] point[s] out clearly the fundamental principle of non-intervention. These motives justified the Brazilian delegation's abstention when the article was voted upon in the plenary Conference.

**Discussion**

1.
  - a. In which situations does Art. 3 common to the Geneva Conventions apply? When does Protocol II become applicable? (P II, Art. 1) Is its field of application the same as common Art. 3?
  - b. Is Belgium's explanation concerning the field of application of common Art. 3 correct? If it was not explicitly reaffirmed, why is Belgium so sure?
  - c. Which aspects of common Art. 3 were neither developed nor reaffirmed by Protocol II? Can you imagine why? Are those parts of common Art. 3 still valid? Or have they become obsolete?
  - d. What does Belgium mean when it states that the right of the ICRC to offer its services is equally applicable to both sides in a non-international armed conflict? May the ICRC offer its services to only one side? If only one side accepts its services, may the ICRC deploy its activities only on that side? Even if it is the rebel side?
2.
  - a. Who normally determines whether an international treaty is applicable to a State Party? A judge? The State Party concerned?
  - b. Who determines the applicability of Protocol II? Do you agree with Brazil that only the government of the State on whose territory the conflict is allegedly taking place may recognize the applicability of Protocol II? Which concerns does such a manner of recognition raise? Does such a manner of recognition exist for the four Conventions or Protocol I? And more specifically for common Art. 3? Why would States find common Art. 3 and Protocol II to be more problematic?
  - c. If the decision were again left to the government alone, would this not undermine much of the purpose of Art. 1 of Protocol II, which is to define the elements of armed conflict in such a way that authorities can no longer deny the existence of a conflict?
3. Is Protocol II based on the principle of equality of the parties to the conflict, thus imposing the same duties and granting the same rights on both sides?
4. Does the applicability or application of the IHL of non-international armed conflicts have any effect on the legal status of the parties to the conflict? Has the application of either common Art. 3 or Protocol II been used for the purpose of claiming recognition?

**Case No. 76, Sweden, Report of the Swedish  
International Humanitarian Law Committee**

[Source: Report of the Swedish International Humanitarian Law Committee, Stockholm, 1984, Preliminary excerpt translation provided by the Swedish International Humanitarian Law Committee in 1986]

**INTERNATIONAL LAW IN ARMED CONFLICT**

[...]

**3.2 General international law**

As already stated, the system of rules of international law contains two components: the international agreements, or treaties, and international customary law, or general international law. Rules of customary law exist not infrequently in codified form in treaties. Here, the rules are to be considered not only as *jus inter partes*, but also as binding *erga omnes* (upon all states). From time to time regional customary law may develop, although this has not happened in the case of the laws of war.

**3.2.1. The practice of states as customary law**

General international law (customary law) normally arises from the current practice of states, that is, some regular practice viewed by the states themselves as juridically binding assumes the status of general international law. But this process, normal in peacetime, scarcely gives a complete description of the origin of customary law relating to war. War is despite everything such an irregular and brief occurrence that states during the actual conflict can seldom develop rules of law through their concrete actions. Such rules are more easily established through peacetime practice, that is, by allowing “abstract” state acts such as diplomatic statements, undertakings and declarations to influence development. It is no accident that those parts of international law that relate to war have been established through diplomatic conferences, where attempts have been made to codify or extend what has been regarded as customary law.

At the maritime law conference in London in 1909 ten states sought to identify and codify legal rules for naval war. Even though the rules brought together in the so-called Declaration of London corresponded essentially with established practice and the rulings of national prize courts, it was impossible to reach an agreement that the states could ratify. The declaration contained certain sections on the taking of prizes which, chiefly from the British side, were considered controversial; yet many of the rules reflected current customary law and were recognised as such during the first World War. In the chapters of the London Declaration relating to blockade, contraband, convoys etc. there are probably several rules that states could recognise as binding customary law even today. Unfortunately, current law in this area still lacks codification, something which is essential in the case of the laws of war.

The situation is somewhat similar in the area of aerial warfare. The rules for protection of civil populations in an air war, adopted by a commission of jurists at the Hague



in 1923, have never been ratified. In 1923 the time was not ripe for rules converging [*sic*] area bombing etc, but in 1977 it was possible to adopt a number of the items in these Hague Rules in a somewhat modified form within the framework of Additional Protocol I. Among these was in fact a rule on area bombing. In the opinion of several experts, this partially constituted a codification of general international law.

In summary it may be said that the part of customary law relating to war has not normally developed through repeated state acts (practice) in time of war but chiefly through the conclusion of agreements in peacetime, that is, through multilateral agreements which have gradually attracted more parties or won general recognition in other ways. These agreements, also a form of state practice, are treated below.

### 3.2.2. Customary law through international agreement

The fundamental declaration from St. Petersburg in 1868 stated that “the only legal aim states may adopt during war is impairment of the enemy’s military strength” and that “for the achievement of this aim it suffices to place the greatest possible number of men *hors de combat*”. The declaration was signed by seventeen states, representing the community of civilised states at that time.

There are few further parties to the declaration today, but its principles have won general recognition and are now considered an expression of general international law, binding upon all states.

The situation is comparable for the 1907 Hague Conventions. The IV<sup>th</sup> convention and its regulations for land warfare had their forerunners in the almost identical texts that were adopted by a limited number of states at the first Peace Conference at the Hague in 1899. When these rules on the prohibition of pillage, the taking of hostages, the poisoning of wells, poisoned weapons, arms and combat methods causing unnecessary suffering, and on the protection of enemies who had laid down their arms were confirmed at the second Peace Conference in 1907, they were probably already considered as binding under customary law. The thirteen conventions adopted in 1907, however, contained chiefly new rules, and the peace conference did not attempt to give these the status of general international law. On the contrary, as we have seen, the provisions were considered as a *jus inter partes* and each convention, moreover, provided that the provisions were applicable only “in the case where all the Belligerents are Parties to the Convention”. This limiting clause meant that the Hague conventions were not formally applicable during the Second World War, since belligerent states such as Bulgaria, Greece, Italy and Yugoslavia had not acceded. This absurd situation was, however, largely imaginary since by the outbreak of war in 1939 the Hague conventions had won such general recognition that they were in all essential respects binding as general international law. Large parts were in fact respected during the war.

A general principle which since 1907 has been considered to contain features of customary law is the thesis of the so-called Martens Clause. This clause in the Preamble to the IV<sup>th</sup> Hague Convention on Land Warfare, is named after the Russian professor of international law and conference delegate, Frederick de Martens. [...]

Even the 1949 Geneva conventions with over 150 accessories – e.g. practically the whole community of nations – consist predominantly of customary law. The first three of the 1949 conventions are based on earlier, less far-reaching conventions. The first Geneva convention relating to the wounded and the sick in land war came about on the initiative of Henry Dunant as early as 1864. Its successor of 1906 was replaced in 1929 by two new conventions, one on the wounded and the sick in land war and the other on prisoners of war. The II<sup>nd</sup> Geneva convention of 1949 concerning the protection of the wounded, the sick and those shipwrecked at sea is a replacement of the X<sup>th</sup> Hague Convention of 1907. Since these so-called Geneva rules were all the time limited to the protection of persons not participating in combat (being thus clearly delimited from the “combat law” of the Hague rules) a fixed core of humanitarian rules for protection as developed and acquired an increasingly solid status as international law. By the time the present Geneva conventions were adopted in 1949, the element of general international law was already appreciable.

### 3.2.3. Customary law in Additional Protocol I

When the 1949 Geneva conventions were to be supplemented with two Additional protocols, a diplomatic conference was convened. This was to meet in Geneva for four sessions during 1974-1977. Officially named “The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian law Applicable in Armed Conflict”, it was intended both to *confirm* and to *further develop* current law. Initially there were many who believed that the starting point would be the Geneva Rules alone, but the result became a reaffirmation and a reinforcement of both the Hague and the Geneva rules.

The first additional protocol (relating to international conflicts), accordingly contains items of customary law taken over from the 1949 rules and those of 1907. It is safe to assume that all the rules then considered worthy of confirmation possess the character of customary law.

In what follows an attempt will be made to list the rules in the protocol that have the status of customary law. The list may be of practical significance in a situation in which Sweden (which has ratified Additional Protocol I) is involved in conflict with an adversary who has not ratified. According to the chief rule in Article 96 the protocol applies only among states that have ratified it or acceded to it. It may not, however, be concluded from this that Sweden, in the above situation, can disregard the protocol in its entirety. Rules constituting general international law must always be respected, just as an adversary must respect the same rules. If an adversary fails to do so, Sweden may – if this is considered possible and appropriate – resort to whatever reprisals are still consonant with international law [...].

The following rules in Additional Protocol I would in the opinion of the Swedish International Humanitarian Law Committee have the status of customary law, at the times however only in their main outlines.

- general protection for the wounded, the sick and the shipwrecked, Art. 10;

- general protection for persons deprived of their liberty, Art. 11:1-3;
- protection of medical units, Art. 12 and of medical personnel, Art 15;
- recognition of the role of aid organisations, Art. 17;
- identification of medical personnel and medical units, Art. 18:1-3;
- protection of medical vehicles, Art. 21;
- general protection of medical aircraft, Art. 25-27;
- prohibition of methods or means of warfare which cause superfluous injury or unnecessary suffering, Art. 35:2;
- prohibition of perfidy, Art. 37;
- prohibition of improper use of recognised emblems and emblems of nationality, Art. 38-39;
- prohibition of orders of no quarter, Art. 40;
- safeguard of an enemy *hors de combat*, Art. 41;
- prisoner-of-war status for regular combatants, Art. 44:1;
- the principle of distinguishment, Art. 48;
- the principle of proportionality, Art. 51:5(b);
- prohibition of starvation of the civilian population if the intention is to kill and not primarily to force a capitulation: this prohibition is part of Art.54;
- the chief rule relating to non-defended localities, Art. 59;
- protection of personnel in relief actions, Art. 71:2;
- fundamental guarantees for persons in the power of one party to the conflict, Art. 75, and
- general protection of women and children, Art. 76:1 and 77:1. [...]

There are however no guarantees that other states share this Committee's opinion on which rules have the status of customary law, any more than it can be guaranteed that these rules will be respected by an adversary.

Apart from the articles listed above, Sweden has also reason to follow, in all circumstances, other articles in Additional Protocol I that are important in a humanitarian perspective, even where these have little or no connection with customary law. These articles concern protection of the sick, the wounded, medical transports, civil defence (Art. 61-67), basic needs in occupied territories (Art. 69), protection of refugees and stateless persons (Art. 73), reunion of families (Art. 74) and protection of journalists (Art. 79).

### 3.3 The situation where an adversary has not ratified Additional Protocol I

What is the scope of the rules of humanitarian law when a lack of agreement exists between the explicit undertaking of the parties? Sweden ratified Additional Protocol I (and II) on 31 August 1979. What applies in a conflict to which Sweden is a party and where the adversary has not ratified the protocol? This question has been touched upon in another connection: an opinion is here given in summary.

According to general international law and Article 96 of Additional Protocol I, the principle of reciprocity applies. Sweden shall not be required to abide by more comprehensive obligations than those applying to our adversary. From the point of view of humanitarian law that the Humanitarian Law Committee was instructed to consider, it is natural to imagine that Sweden in such a situation would do all in her power to ensure that Additional Protocol I were applied by all the parties to a conflict in which we were involved. This might take the form of an official declaration, addressed to the non-ratifying parties, stating that Sweden for its part would apply Additional Protocol I in its entirety as long as the adversary did not, through lack of respect for the rules of the protocol, make this impossible. Thereby, the presumption that Additional Protocol I is capable of application could be maintained, which is important not least because of the example it would set.

If however the adversary failed in his respect for the protocol, Sweden would in turn have to reserve the possibility of waiving full application of the protocol rules. The adversary should be made aware that Sweden in such a case was not considering herself able to follow the protocol's rules of warfare, i.e. the main parts of Articles 51-58. [...]

If during the conflict an adversary announced officially his intention of applying the rules of the Protocol and did so in practice, Sweden would be bound by the Protocol in the normal way (AP I, Art. 96:2). Since the condition is that the adversary really abides by the rules of the Protocol, Sweden would in this case have the right to reserve full application during a "trial period". The customary law parts of the Protocol must however, as already shown, be respected even in the case outlined. If the adversary were to commit only small infringements of the rules, Sweden could hardly motivate non-application: such would conflict with the spirit of the protocol. Above all, a state that has ratified the protocol should not too readily and categorically choose a line of non-application in relation to an adversary that has not ratified. The principle of reciprocity is intended to give reasonable protection against obvious military disadvantages (a "safety net"), not to be an unconditional mechanism for setting aside the provisions of the protocol.

### DISCUSSION

1. a. What kind of rules of customary IHL could be derived from the actual practice of belligerents? Can those contributing to the formation of customary law thus be confined to belligerents? How can such practice be established? Are reports of humanitarian organizations on "violations" useful? Does every act by a combatant constitute State practice? Is it at least State practice in cases where the combatant is not punished?

- b. Can customary IHL be derived only from “‘abstract’ State acts such as diplomatic statements, undertakings and declarations”? Acts by belligerents? Acts by non-belligerents? Acts by both? What if the belligerents’ actual behaviour is incompatible with their statements?
  - c. Do statements made at diplomatic conferences for the development and the reaffirmation of IHL count as State practice for the development of customary IHL? Which such statements have a greater weight than others?
  - d. Does widespread State participation in an IHL treaty make its rules customary law? Does such participation count as State practice?
2. How can a rule of the Geneva Conventions which was not yet customary in 1949 later become customary? Does the practice of States Parties also count as practice forming customary IHL, or only that of a State not party?
3. Does the list of the customary rules of Protocol I compiled in 1984 (section 3.2.3 above) constitute State practice that helps to make those rules customary? Is the list still valid in 2010? How can a rule have become customary since then? Does the practice of more than 160 States Parties also count as practice forming customary IHL or only that of the States not party?
4.
  - a. What consequences could the prospect that Sweden might be involved in an armed conflict with a State not party to Protocol I have for the peacetime training of Swedish troops?
  - b. Would Sweden, by not respecting non-customary parts of Arts 51-58 of Protocol I vis-à-vis an adversary that is neither bound by nor respecting Protocol I, violate the obligation laid down in Art. 1 thereof to respect that Protocol “in all circumstances”? Would it be violating the prohibition of reciprocity in the application of humanitarian treaties as laid down in Art. 60(5) of the Vienna Convention on the Law of Treaties? The prohibition of reprisals laid down in Protocol I, Art. 51(6)?

**Case No. 77, United States, President Rejects Protocol I**

[Source: *Message from the President of the United States*, US Government Printing Office, 100<sup>th</sup> Congress, 1<sup>st</sup> Session, Treaty doc. 100-2, Washington, 1987]

**A Message from the President of the United States regarding Protocol II  
Additional to the 1949 Geneva Conventions, and Relating to the Protection  
of Victims of Non-international Armed Conflicts**

[...]

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *January 29, 1987*

*To the Senate of the United States:*

I transmit herewith, for the advice and consent of the Senate to ratification, Protocol II Additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977. I also enclose for the information of the Senate the report of the Department of State on the Protocol.

The United States has traditionally been in the forefront of efforts to codify and improve the international rules of humanitarian law in armed conflict, with the objective of giving the greatest possible protection to victims of such conflicts, consistent with legitimate military requirements. The agreement that I am transmitting today is, with certain exceptions, a positive step toward this goal.

Its ratification by the United States will assist us in continuing to exercise leadership in the international community in these matters.

[...]

While I recommend that the Senate grant advice and consent to this agreement, I have at the same time concluded that the United States cannot ratify a second agreement on the law of armed conflict negotiated during the same period. I am referring to Protocol I additional to the 1949 Geneva Conventions, which would revise the rules applicable to international armed conflicts. [...]

RONALD REAGAN

## LETTER OF SUBMITTAL

DEPARTMENT OF STATE,  
*Washington, December 13, 1986*

*THE PRESIDENT,*  
The White House.

THE PRESIDENT:

I have the honor to submit to you, with a view to transmission to the Senate for its advice and consent to ratification, Protocol II Additional to the Geneva Conventions of August 12, 1949, concluded at Geneva on June 10, 1977.

**PROTOCOL II**

[...] This Protocol was designed to expand and refine the basic humanitarian provisions contained in Article 3 common to the four 1949 Geneva Conventions with respect to non-international conflicts. While the Protocol does not (and should not) attempt to apply to such conflicts all the protections prescribed by the Conventions for international armed conflicts, such as prisoner-of-war treatment for captured combatants, it does attempt to guarantee that certain fundamental protections be observed, including: (1) humane treatment for detained persons, such as protection from violence, torture, and collective punishment; (2) protection from intentional attack, hostage-taking and acts of terrorism of persons who take no part in hostilities; (3) special protection for children to provide for their safety and education and to preclude their participation in hostilities; (4) fundamental due process for persons against whom sentences are to be passed or penalties executed; (5) protection and appropriate care for the sick and wounded, and medical units which assist them; and (6) protection of the civilian population from military attack, acts of terror, deliberate starvation, and attacks against installations containing dangerous forces. In each case, Protocol II expands and makes more specific the basic guarantees of common Article 3 of the 1949 Conventions. [...]

The final text of Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations. This is a narrower scope than we would have desired, and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area. We are therefore recommending that U.S. ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts), which will include all non-international armed conflicts as traditionally defined (but not internal disturbances, riots and sporadic acts of violence). This understanding will also have the effect of treating as non-international these so-called "wars of national liberation" described in Article 1(4) of Protocol I which fail to meet the traditional test of an international conflict.

[...]

[T]he obligations contained in Protocol II are no more than a restatement of the rules of conduct with which U.S. military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency. These obligations are not uniformly observed by other States, however, and their universal observance would mitigate many of the worst human tragedies of the type that have occurred in internal conflicts of the present and recent past. I therefore strongly recommend that the United States ratify Protocol II and urge all other States to do likewise. With our support, I expect that in due course the Protocol will be ratified by the great majority of our friends, as well as a substantial preponderance of other States.

### **PROTOCOL I**

The Departments of State, Defense, and Justice have also conducted a thorough review of a second law of war agreement negotiated during the same period – Protocol I Additional to the Geneva Conventions of August 12, 1949. This Protocol was the main object of the work of the 1973-77 Geneva diplomatic conference, and represented an attempt to revise and update in a comprehensive manner the 1949 Geneva Conventions on the protection of war victims the 1907 Hague Conventions on means and methods of warfare, and customary international law on the same subjects.

Our extensive interagency review of the Protocol has, however, led us to conclude that Protocol I suffers from fundamental shortcomings that cannot be remedied through reservations or understandings. We therefore must recommend that Protocol I not be forwarded to the Senate. The following is a brief summary of the reasons for our conclusion.

In key respects Protocol I would undermine humanitarian law and endanger civilians in war. Certain provisions such as Article 1(4), which gives special status to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”, would inject subjective and politically controversial standards into the issue of the applicability of humanitarian law. Protocol I also elevates the international legal status of self-described “national liberation” groups that make a practice of terrorism. This would undermine the principle that the rights and duties of international law attach principally to entities that have those elements of sovereignty that allow them to be held accountable for their actions, and the resources to fulfill their obligations.

Equally troubling is the easily inferred political and philosophical intent of Protocol I, which aims to encourage and give legal sanction not only to “national liberation” movements in general, but in particular to the inhumane tactics of many of them. Article 44 (3), in a single subordinate clause, sweeps away years of law by “recognizing” that an armed irregular, “cannot” always distinguish himself from non-combatants; it would grant combatant status to such an irregular anyway. As the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of this Protocol with the United States announced policy of combatting *[sic]* terrorism.



The Joint Chiefs of Staff have conducted a detailed review of the Protocol, and have concluded that it is militarily unacceptable for many reasons. Among these are that the Protocol grants guerrillas a legal status that often is superior to that accorded to regular forces. It also unreasonably restricts attacks against certain objects that traditionally have been considered legitimate military targets. It fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions. Weighing all aspects of the Protocol, the Joint Chiefs of Staff found it to be too ambiguous and complicated to use as a practical guide for military operations, and recommended against ratification by the United States.

We recognize that certain provisions of Protocol I reflect customary international law, and other appear to be positive new developments. We therefore intend to consult with our allies to develop appropriate methods for incorporating these provisions into rules that govern our military operations, with the intention that they shall in time win recognition as customary international law separate from their presence in Protocol I. This measure would constitute an appropriate remedy for attempts by nations to impose unacceptable conditions on the acceptance of improvements in international humanitarian law. I will report the results of this effort to you as soon as possible, so that the Senate may be advised of our progress in this respect.

### **CONCLUSION**

I believe that U.S. ratification of the agreement which I am submitting to you for transmission to the Senate, Protocol II to the 1949 Geneva Conventions, will advance the development of reasonable standards of international humanitarian law that are consistent with essential military requirements. The same is not true with respect to Protocol I to the 1949 Geneva Conventions, and this agreement should not be transmitted to the Senate for advice and consent to ratification. We will attempt in our consultations with allies and through other means, however, to press forward with the improvement of the rules of international humanitarian law in international armed conflict, without accepting as the price for such improvements a debasement of our values and of humanitarian law itself.

The effort to politicize humanitarian law in support of terrorist organizations have [sic] been a sorry develo[p]ment. Our action in rejecting Protocol I should be recognized as a reaffirmation of individual rights in international law and a repudiation of the collectivist apology for attacks on non-combatants.

Taken as a whole, these actions will demonstrate that the United States strongly supports humanitarian principles, is eager to improve on existing international law consistent with those principles, and will reject revisions of international law that undermine those principles. The Departments of State and Justice support these recommendations.

Respectfully submitted.

George P. Shultz

## DISCUSSION

1.
  - a. Do you agree with the criticism that Art. 1(4) of Protocol I introduced political objectives into humanitarian law? Are the determinations necessary for application of Art. 1(4) really subjective? [See **Case No. 168**, South Africa, *S. v. Petane*]
  - b. Is Art. 1(4) a recognition of terrorists? Are groups fighting national liberation wars necessarily committing more terrorist acts than their opponents? Than those fighting in classic wars? Even if Protocol I “elevate[d] the international legal status” of such groups, is that equivalent to legitimizing any and all conduct during hostilities? If Protocol I applies to them, are they not also bound by the provisions of the Protocol, e.g. those laying down the protected status of civilians? Would they not also be accountable for their actions? Does Protocol I prohibit terrorist acts? (P I, Preamble, para. 5; Arts 1(4), 51(2) and 85(3))
  - c. If Protocol I had not “elevated” national liberation wars to international armed conflicts, how would such conflicts have been qualified? Would the applicable IHL then set stronger or weaker requirements in terms of the prohibition of terrorist acts and the obligation of combatants to distinguish themselves from the civilian population? (See P II)
  - d. Are “guerrillas” or “terrorists” truly granted a legal status often superior to that accorded to regular forces? Does Art. 1(4), in particular, lead to a situation where both sides of an armed conflict are not equal before IHL? Which protections does IHL grant guerrillas? Regular forces? Which obligations are imposed on each?
2. Which provisions in Protocol I reflect customary international law, and which are new developments? Is e.g. Art. 1(4) of Protocol I an innovative development in the law of war, or is it merely a reflection of existing international law? [See **Case No. 168**, South Africa, *S. v. Petane*]
3.
  - a. Can it really be said that Protocol I (Art. 44(3)) “sweeps away years of law”? Does Art. 44(3) grant combatant status to those who do not distinguish themselves from non-combatants? Does not this article specifically stipulate how they must distinguish themselves? Why do you think that the exception in the second sentence of Art. 44(3) was included in the Protocol? What kind of hostilities did the drafters of the Protocol have in mind? Would respect for IHL have improved in guerrilla wars if Art. 44(3) had not been included in Protocol I?
  - b. Why is the principle of distinction so important? Who does it protect? Does the exception in Art. 44(3) diminish this protection? [See **Case No. 114**, Malaysia, *Osman v. Prosecutor*]
  - c. Which consequences do combatants who fail to distinguish themselves face under IHL? How does the exception in Art. 44(3) alter these consequences for those, e.g. guerrilla fighters, who fail to comply with the obligation to distinguish themselves from the civilian population? When do guerrilla fighters lose combatant or prisoner-of-war status? Whether they retain or lose prisoner-of-war status, are they punishable for violations of the laws of war? In the exceptional situation referred to in Art. 44(3), what are the legal consequences if combatants fail to carry their arms openly or if they abusively assume the existence of an exceptional situation?
4. How does Protocol I further define legitimate objects of attack? And means and methods of warfare? Are these unreasonable restrictions? Is Protocol I really too ambiguous and simultaneously too complicated for practical military use, as the US letter of submittal claims?
5. Does Protocol I really not improve the compliance and verification mechanisms of Conventions? If so, is this alone a sufficient reason to reject it? Does Protocol I in fact increase protection for victims of conflicts, e.g. by expanding the acts regarded as grave breaches? Does Protocol I eliminate an important sanction against violations of the Conventions? To which important sanction is the US Department of State referring?

6.
  - a. Do Protocol II and common Art. 3 have the same material scope of application? Which situations does each of them cover?
  - b. Why did the drafters of Protocol II not extend its material scope of application to all non-international armed conflicts?
  - c. Is a non-State armed group without control over territory able to comply with all provisions of Protocol II?
  - d. Do you think that the US would be ready to apply Protocol II to all non-international armed conflicts today?

**Case No. 78, Iran, Renouncing Use of the Red Lion and Sun Emblem**

[Source: Schindler, D. & Toman, J. (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Dordrecht, Geneva, M. Nijhoff, Henry-Dunant Institute, 4<sup>th</sup> ed., 2004, p. 663]

**The Geneva Conventions of August 12, 1949****Iran (Islamic Rep. of)**

[...]

Declaration of September 4, 1980:

By a memorandum dated September 4, 1980, the Legal Department of the Ministry of Foreign Affairs of the Islamic Republic of Iran informed the Swiss Embassy in Tehran of the following:

"In order to avoid the proliferation of international emblems denoting charitable and assistance activities and to favour the unification of these emblems, the Government of the Islamic Republic of Iran deems it appropriate to renounce its right to use the "Red Lion and Sun" as an official emblem of the International Association [*sic*] of the Red Cross and will therefore use the "Red Crescent" accepted by all Islamic countries. This step is being taken in order that all countries be required to accept one of the two emblems, i.e. either the "Red Cross" or the "Red Crescent". However, should any flagrant violations of this international rule be noted, the Government of the Islamic Republic of Iran reserves the right to resume the use of its emblem on both national and international levels." [...]

**DISCUSSION**

1. Why does Iran make such a declaration? Is it only the desire to avoid the proliferation of protective emblems that motivates Iran to renounce its use of the "Red Lion and Sun"?
2. Why has the plurality of protective emblems given rise to problems for the International Red Cross and Red Crescent Movement? Are those problems related to an interpretation of the red cross emblem as a Christian symbol? Is it harder to claim the non-religious connotation of the red cross emblem since acceptance of the second emblem, the red crescent? How does this affect the principle of universality? [See **Case No. 44**, ICRC, *The Question of the Emblem*]
3. Which emblems does IHL protect? Who may use these emblems? In which circumstances and subject to what conditions? (HR, Art. 23(f); GC I, Arts 38-44 and 53; GC II, Arts 41-43; P I, Arts 8(1), 18, and Annex I, Arts 4-5; P II, Art. 12; P III)
4.
  - a. What does Iran mean by "flagrant violations"? Non-respect for personnel and units marked with the emblem? Frequent abuse of the emblem by those who are not entitled to use it? The use, by Israel, of an emblem other than the red cross and the red crescent to identify medical personnel and units?
  - b. Are States under an obligation to use the red cross or red crescent emblem? If a State does not use one of the protective emblems, what are the ramifications? Are there disadvantages? Are the medical personnel and units of such a State less protected in law? In fact?

**Document No. 79, Switzerland, Prohibition of the Use of Chemical Weapons**

[Source: "Le droit de la guerre" in *Annuaire Suisse de Droit International*, 1989, pp. 244-247; original in French, unofficial translation]

**10.1 Is the prohibition on the use of chemical weapons a principle of customary law? Treaty and custom. Reservations in international treaties. Reprisals: conditions governing the conduct thereof.**

In the note which is reproduced in part below the Directorate for Public International Law [of the Swiss Federal Department for Foreign Affairs] considers whether the prohibition on the use of chemical methods of warfare stipulated in the Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare [...] has acquired the force of custom.

[Opinion of the Directorate for Public International Law:]

1. The 1925 Protocol prohibits the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices. In other words, it bans the use of chemical weapons. The Protocol also extends that prohibition to the use of bacteriological and biological weapons.

Under the Protocol, the States Parties shall, in so far as they are not already party to treaties which prohibit the use of such weapons, accept that prohibition. That particular wording suggests that the 1925 Protocol confirms rather than stipulates the rule prohibiting the use of chemical weapons. Therefore, certain writers have described that instrument as declamatory.

The 1919 Treaty of Versailles, which appears indirectly to establish the existence of an international custom which prohibits gases in that it states at the beginning of Article 171 that "The use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices [shall be] prohibited," is among the treaties to which the 1925 Protocol implicitly refers.

Under Article 23(a) of the Regulations annexed to the 1899/1907 Convention Respecting the Laws and Customs of War, it is also prohibited to employ poison or poisoned weapons. Moreover, subparagraph (e) of that provision reiterates the general prohibition contained in the 1868 Declaration of St Petersburg and the 1880 Oxford Manual. Article 5 of the Treaty relating to the Use of Submarines and Noxious Gases in Warfare, signed at Washington in 1922, also reiterates that the use of chemical weapons is condemned by the general opinion of the civilized world. Thus, it is possible to state, as do the learned writers, that the 1925 Protocol declares a custom.

2. Many States have issued reservations when ratifying the Protocol. Those States essentially fall into one of two categories. First, there are those States making reservations which wished to make clear that they had an obligation solely towards the States Parties to the Protocol. Such reservations would appear to be superfluous since the Protocol contains a restriction to that effect. [...] Under

the reservations of a second type, various States have declared that they would not deem themselves bound by the Protocol with respect to a State if that State or its allies failed to comply with the prohibitions contained therein. In other words, the States making the reservations rely on their right to carry out reprisals in the event that one of the States Parties to the Protocol or one of their allies uses chemical weapons first. Incidentally, those reservations constitute a certain degree of progress in comparison with the *si omnes* clause contained in Article 2 of the above-mentioned 1899/1907 Hague Convention which releases the State Parties from any obligation towards another State Party on the sole pretext that that State has an ally which is not party to the Convention.

To be lawful reprisals must be of the same kind. Thus, a State against which chemical herbicide methods of warfare are used is not theoretically justified in responding by using anti-personnel agents, whether they be irritant, asphyxiating or lethal. Therefore, reprisals must be in kind to use the English terminology.

3. What are the effects of the reservations to the 1925 Protocol – those of the second type – which the vast majority of learned writers regard as an expression of customary law? Sandoz regards them as irrelevant. [However, it is possible to lean towards] a less black and white view where a reservation, which consists in declaring that the Protocol will cease to be applicable with respect to a hostile State whose armed forces or allies fail to comply with the prohibitions contained therein, goes further than the right of reprisal which itself enables the fundamental prohibition on the use of chemical weapons to be preserved.

In that context several situations may be envisaged. When all the belligerent States are party to the Protocol no chemical or bacteriological weapons may be lawfully used other than in the event of reprisals in kind. The same applies where States which are not party thereto take part in the conflict. However, in that case it is in accordance with custom that the States Parties are under an obligation with regard to them. Moreover, if any hostile State, whether or not party to the Protocol, uses prohibited methods of warfare, a State making a reservation will continue to be bound by the rule of custom only with regard to that and any other belligerent State. On the other hand, a State Party which has issued no reservation will only be able to exercise its right of reprisal with regard to a State Party which has infringed one of the rules of the Protocol. However, in practice the distinction is a fragile one. Whether or not party to the Protocol and, as far as the former are concerned, whether or not they have deposited a reservation, States are justified in using toxic agents only within the well defined framework of reprisals. Customary law and treaty law impose the same conditions on the conduct of reprisals, i.e. subsidiarity, proportionality and indeed humanity.

4. To sum up, the 1925 Protocol and custom prohibit the first use of chemical weapons and accept the lawfulness of second use only in the case of reprisals in kind.

Note of the Directorate for Public International Law of the Federal Department of Foreign Affairs dated 15 December 1988.

Unpublished document.

**Case No. 80, United States, Memorandum of Law:  
The Use of Lasers as Anti-Personnel Weapons**

[Source: Doswald-Beck, L. (ed.), *Blinding Weapons: Reports of the meetings of experts convened by the International Committee of the Red Cross on Battlefield Laser Weapons 1989-1991*, Geneva, International Committee of the Red Cross, Annex C, 1993, pp. 367-371]

[...]

September 29, 1988

**MEMORANDUM OF LAW****Subject: use of lasers as antipersonnel weapons**

1. *Summary.* This memorandum considers the legality of the use of a laser as an antipersonnel weapon. It concludes that such use would not cause unnecessary suffering when compared to other wounding mechanisms to which a soldier might be exposed on the modern battlefield, and hence would not violate any international law obligation of the United States. Accordingly, the use of antipersonnel laser weapons is lawful.
2. *Background.* Department of Defense Instruction 5500.15 requires that a weapon or munition undergo a legal review during its development and prior to acquisition to ensure that the weapon or munition in question complies with the international law obligations of the United States. This review is to be conducted by the Judge Advocate General of the Service sponsoring the weapon/munition. This memorandum does not constitute a review of a particular weapon, but addresses a basic question regarding the legality of the use of lasers for antipersonnel purposes. This memorandum has been coordinated with the International Law Divisions of the Offices of the Judge Advocates General of the Navy and Air Force, each of which concurs in its contents and conclusion.
3. *Previous Opinions.* Each of the Judge Advocates General has proffered opinions relating to the legality of lasers. Navy [...] opinions concluded that injury to combatants secondary or ancillary to the use of a laser for rangefinding, target acquisition, or other antimateriel purposes is lawful, and that blindness *per se* could not be a basis for concluding that a laser violates the law of war prohibition against weapons that may cause unnecessary suffering. Opinions by the Air Force [...] concluded that the use of lasers to produce flash effects (the temporary induction of a visual impairment) to combatants would not violate the law of war obligations of the United States. While they did not have a direct impact on the contents or conclusions of this memorandum, related legal opinions prepared by a close ally of the United States and another agency of the United States were considered, as were threat briefings regarding the actions, programs, and possible intent of potential opponents of the United States.

4. *Law of War.* No specific rule prohibits laser weapons. In fact, antipersonnel weapons are designed specifically to kill or disable enemy combatants and are not unlawful because they cause death, disability, pain or suffering. This principle is tempered by the law of war obligations of the United States relating to the legality of weapons or munitions, contained in the Annex to Hague Convention IV Respecting the Laws and Customs of War on Land of October 18, 1907 [...]. In particular, article 23(e) prohibits the employment of arms, projectiles, or material calculated to cause unnecessary suffering. There is no internationally accepted definition of unnecessary suffering. In fact, an anomaly exists in that while it is legally permissible to kill an enemy soldier, in theory any wounding should not be calculated or intended to cause unnecessary suffering. In endeavouring to reconcile the two, in considering the customary practice of nations during this century, and in acknowledging the lethality of the battlefield for more than a century, certain factors emerge that are germane to this opinion:
  - a) No legal obligation exists or can exist to limit wounding mechanisms in a way that permits lawful killing while requiring that wounds merely temporarily disable, that is, that the effects of wounds do not extend beyond the period of hostilities, and
  - b) In considering whether a weapon may cause unnecessary suffering, it must be viewed in light of comparable wounding mechanisms extant on the modern battlefield rather than viewing the weapon in isolation.
  - c) The term unnecessary suffering implies that there is such a thing as necessary suffering, i.e., that ordinary use of any militarily effective weapon will result in suffering on the part of those against whom it is employed.
  - d) The rule does prohibit deliberate design or alteration of a weapon solely for the purpose of increasing the suffering of those against whom it is used, including acts that will make their wounds more difficult to treat. This is the basis for rules against poisoned weapons and certain small calibre hollow point ammunition.
5. *Recent negotiations.* Law of war provisions to regulate or prohibit laser weapons have been considered over the past fifteen years; none have been accepted by the community of nations. Separate weapons discussions were held in conjunction with the 1974-1977 Diplomatic Conference on Humanitarian Law. Although the issue of laser weapons was raised by a small number of nations, all weapons questions were deferred save and except incorporation of article 23(e) of the Annex to Hague IV of 1907 into article 35 (2) of the 1977 Protocol I additional to the 1949 Geneva Conventions for the Protection of War Victims. At the subsequent United Nations Conference on Certain Conventional Weapons, held in Geneva from 1978 to 1980, the subject of regulation of laser weapons was again raised by a very small minority of nations but, owing to lack of support, was not actively pursued. In the course of the XXV International Conference of the Red Cross (Geneva, October 1986), Sweden and Switzerland offered a resolution condemning the blinding effect of laser weapons; that resolution enjoyed little support, was strongly



resisted by some nations, and was not adopted by the conference. In April 1988 Sweden again endeavoured to raise the issue, though in substantially modified form. It acknowledged the legality of the use of lasers to produce flash effects to combatants; accepted the lawfulness of the use of lasers for rangefinding, target acquisition, and similar military purpose; and also accepted the legality of blinding of enemy combatants incidental to the use of a laser for the above-cited purposes. Sweden's most recent effort proposed to prohibit use of lasers as antipersonnel weapons *per se*. This proposal, offered first on an informal basis to delegates to the United Nations Committee on Disarmament in Geneva on 18 April 1988, and subsequently to the United Nations Special Session on Disarmament III in New York in June, 1988, met with no success in either instance. This history not only indicates a lack of international support for any prohibition or regulation on the use of lasers as antipersonnel weapons, but simultaneously serves as an acknowledgement of the legality of such use under the current law of war ; were such use illegal *per se*, no further regulation would be necessary. That said, however, it is beneficial to consider laser weapons and their effects in the context of the current law of war to understand the basis for their legality.

6. *Lasers.* Lasers operate in a wide variety of wavelengths and exposure durations. The susceptibility of the human eye and skin is dependent on a number of physical and operational factors, including the output characteristics of the laser source and the conditions of the atmosphere between the laser and the target (rain, sleet, snow, fog, dust) [...] which can cause considerable attenuation or reduction of the light intensity at the target. If the target is the human eye or skin surface, the laser may produce minimal effect at low levels, from veiling glare or dazzle to the eye or the bare perception of warmth on the skin, to the most severe effects of severe eye and skin burns. At high levels of laser irradiation the damage mechanism which predominates is a thermal phenomenon, [...]. The human eye is particularly susceptible to laser light in the visible and near infrared portions of the electromagnetic spectrum [...]. Laser light incident on the cornea in this wavelength region (commonly referred to as in-band to the eye) is focused to a very small retinal spot increasing the energy per unit area on the retina by a factor of 100,000 times. At these levels the high concentration of light is sufficient to produce irreversible damage [...]. At these high levels of laser irradiation the effects on the human eye may be the appearance of a large retinal burn with accompanying haemorrhage into the portion of the eye behind the lens. As the incident laser energy is reduced, the haemorrhage is no longer a factor and the size of the retinal burn diminishes. As the laser exposure level falls below the threshold for retinal burn, the effect is one of bright light exposure producing a dazzle or glare phenomenon. In general the factors of importance in laser-induced trauma of the eye follow those of exposure to any intense light source, including the sun. [...] Lasers can produce corneal burns, retinal burns and flash effects. The degree of injury is related to the operation characteristics of the laser source and the condition of the atmosphere which determines the amount of energy reaching the eye and the eye itself. Eye factors may include the direction of the eye with reference to the laser, the age of the individual, and the degree of pupillary

dilatation or light collection and adaptation level (for lasers operating in the visible or near infrared). Not all individuals exposed to incident laser irradiation will be permanently blinded. Those lasers which produce wavelengths in the ultraviolet and the infrared are known as out-of-band and produce mainly surface effects to the eye (cornea and lens) and skin. These effects may vary from large corneal burns to deep, full thickness skin burns.

7. *Issue.* This memorandum is not concerned with skin burns. Incendiary weapons have been in use by most nations throughout the history of war. Attempts at prohibiting or regulating their use against enemy combatants were specifically rejected by national delegations attending the 1978-1980 United Nations Conference on Certain Conventional Weapons. Neither is it concerned with eye injury not of a permanent nature, as it would be compatible to and generally less damaging than other conventional wounding mechanisms. The fundamental issue with which this review is concerned is whether the use of a laser for the purpose of blinding an enemy soldier would constitute unnecessary suffering. The conclusion is that it would not.
8. *Rationale.* Blinding is no stranger to the battlefield. Records on eye injury to U.S. military personnel in World War I and II, Korea, and the Vietnam War reveal that permanently disabling eye wounds have resulted from bomb, shell, and hand grenade fragments, bullets, landmines, other mechanisms, poisonous gas, and battlefield debris such as dirt, rocks, and glass. Like lasers, eye injury caused by these mechanisms does not necessarily result in death or permanent blindness. Unlike lasers, however, injury from each of these mechanisms frequently results in death; therefore anti-personnel laser injury is more humane than injury caused by comparable weapons. While some laser injury can lead to permanent blindness, the extent of injury is subject to the myriad of factors previously listed. As with defense against chemical agents or conventional munitions, potential laser injuries can be minimized with the utilization of appropriate protective equipment and defensive actions. The weapons under consideration have not been designed with the sole purpose of producing permanent injury to combatants. As with other weapons, even were a laser developed that would, in most cases, cause a permanently disabling wound, it is lawful because its increased power has militarily useful effects, such as increased range against other sensors.

Some laser injury may lead to permanent blindness. The issues are whether the intentional use of a laser for the purpose of blinding necessarily should be considered as causing unnecessary suffering in that its effect, if permanent, outlasts the duration of the hostilities, and whether permanent blindness can or should be regarded as more severe than other forms of permanent disability. The following addresses these matters.

Permanent blinding, again, is not unique to lasers, nor is a permanently disabling wound a remote occurrence in modern war. Many wounds lead to permanently disabling effects. Modern weapons are not designed to temporarily incapacitate. Wounds that last beyond the duration of hostilities are commonplace, and there exists no law of war obligation to design weapons along lines to the contrary.

The prohibition contained in article 23(e) of the Annex to Hague IV limiting the employment of arms, projectiles, or material calculated to cause unnecessary suffering must be balanced against the necessity for destructive power adequate to meet a variety of threats at a variety of ranges and in a variety of circumstances, such as combatants in bunkered positions or armoured vehicles, or at extended range. The lawful attack of enemy combatants inevitably will cause – and has caused – vast numbers of permanently disabling wounds, including blindness. U.S. Government disability tables regard permanent blindness as equal to but not greater than other forms of permanent disability.

Proposals to conclude that the use of a laser to intentionally blind would result in unnecessary suffering would lead to a contradiction in the law in that a soldier legally could be blinded ancillary to the lawful use of a laser rangefinder or target acquisition lasers against materiel [*sic*] targets, but could not be attacked individually. Thus enemy soldiers riding on the outside of a tank lawfully could be blinded as the tank is lased incidental to its attack by antitank munitions; yet it would be regarded as illegal to utilize a laser against an individual soldier walking ten meters away from the tank. No case exists in the law of war whereby a weapon lawfully may injure or kill a combatant, yet be unlawful when used in closely related circumstances involving other combatants.

9. *Conclusion.* For the foregoing reasons, it is concluded that the use of lasers as antipersonnel weapons would not cause unnecessary suffering nor otherwise constitute a violation of the international legal obligations of the United States. Accordingly, the use of a laser as an antipersonnel weapon is lawful.

HUGH R. OVERHOLT  
Major General, USA  
The Judge Advocate General

*Prepared by:*

W. Hays Parks,  
Chief, International Law Team,  
International Affairs Division,  
Office of the Judge Advocate General of the Army,  
Washington D.C. (USA)

*Coordinated with:*

Lieutenant Colonel B.M. Carnahan,  
JAGC, USAF,  
International Law Division,  
Office of the Judge Advocate General,  
Department of the Air Force (AF-JACI).

Captain W.M. Schacche, Jr.,  
JAGC, USN.

Major W.F. Warriner, USMC,  
International Law Division,  
Office of the Judge Advocate General,  
Department of the Navy (NJAG-10).

### Discussion

1. a. Does IHL require the US to initiate a legal review of a weapon during its development to ensure that it complies with IHL? Even though the US is not party to Protocol I? (HR, Art. 23(e); P I, Arts 35(2) and 36) [See also **Document No. 47**, ICRC, New Weapons]
  - b. Which responsibilities do States have with regard to the study and development of new weapons? Which assessments must States make? Which criteria must they use in making these assessments? (P I, Art. 36)
  2. a. Is the use of lasers as anti-personnel weapons compatible with IHL for States not party to Protocol IV to the 1980 UN Weapons Convention? Which standard is to be applied for this determination? (HR, Art. 23(e); P I, Art. 35(2)) [See also **Document No. 15**, Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention)] Does the use of lasers to blind enemy soldiers constitute “superfluous injury or unnecessary suffering”, which would mean that their use is prohibited by IHL? What qualifies as “superfluous injury”? As “unnecessary suffering”? Do these terms cover merely physical suffering? Or also psychological suffering? Are these objective terms? Are there objective criteria agreed upon by States Parties and applied by them to determine what constitutes “superfluous injury and unnecessary suffering”?
  - b. Is comparing a weapon with other wounding mechanisms to which a soldier might be exposed on the modern battlefield the most appropriate method for determining “unnecessary suffering”, rather than assessing the weapon and/or its use in isolation? Should a weapon’s objective effect on the victim, e.g., severity of the injury or intensity of suffering, be balanced against its military necessity? Is the determination actually a weighing up of the harm caused versus the ability to meet threats? Are these precise concepts on which to base such a determination?
  - c. If more concrete criteria should be adopted to determine what constitutes “superfluous injury and unnecessary suffering,” which criteria would you suggest? What do you think of the criteria proposed by the ICRC’s SIrUS Project?
- [ICRC, *The SIrUS Project: Towards a Determination of Which Weapons Cause “Superfluous Injury or Unnecessary Suffering”* (Robin M. Coupland, ed., 1997), p. 23:
- “[W]hat constitutes ‘superfluous injury and unnecessary suffering’ [can] be determined by design-dependent, foreseeable effects of weapons when they are used against human beings and cause: specific disease, specific abnormal physiological state, specific abnormal psychological state, specific and permanent disability or specific disfigurement (*Criterion 1*); or field mortality of more than 25% or hospital mortality of more than 5% (*Criterion 2*); or Grade 3 wounds as measured by the Red Cross wound classification (*Criterion 3*); or effects for which there is no well-recognized and proven treatment (*Criterion 4*).”]
3. Is it irreconcilable that weapons can cause death but cannot be calculated or intended to cause “superfluous injury or unnecessary suffering”? According to IHL, what is the purpose of weapons in conflict? To kill? To render an adversary *hors de combat*? Are these not different objectives? If so, is not the objective of IHL overlooked by the argument that use of a laser, even one causing blindness, is more humane than killing the soldier? Does such an argument fail to take into account the fact that conventional weapons are not always lethal? That sudden blindness also has a psychological

impact? That the injury is sure to last beyond the duration of hostilities? That soldiers returning blind have an impact on the whole of society?

[See Preamble to the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, St. Petersburg, 29 November/11 December 1868:

"[...]

Considering:

[...]

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity; ..."]

4. Would it be lawful for a soldier to be blinded ancillary to the lawful use of a laser rangefinder or target acquisition lasers against material targets? Should it be? Would it be legally inconsistent if the soldier then could not be attacked by laser individually? Does it make a difference whether the deliberate objective is to blind the soldier? (Protocol on Blinding Weapons, Art. 3; [See **Document No. 15**, Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention)])
5.
  - a. Do you agree with the US Judge Advocate General that the use of a laser as an anti-personnel weapon is lawful? Because a laser's ability to cause blindness remains subject to a variety of factors and thus blindness does not always occur? Because protection against those factors is possible? Because the military utility of lasers outweighs the harm caused?
  - b. Despite this, must not the use of lasers be deemed illegal, because they are an indiscriminate means of warfare? What if a laser were used in an area where there are civilians? Can a laser distinguish between combatants, military personnel *hors de combat*, and civilians? (P I, Art. 51(4))
6.
  - a. Does not the existence of the Protocol on Blinding Laser Weapons (Protocol IV) further substantiate the US claim that IHL alone does not proscribe the use of lasers as anti-personnel weapons? Or does it solidify the international community's agreement that such use of laser weapons is contrary "to the laws of humanity, and the dictates of public conscience"? (Martens Clause, Hague Convention IV, preambular paras 8-9; GC I-IV, Arts 63(4)/62(4)/142(4)/158(4) respectively; P I, Art. 1(2); P II, Preamble, para. 4)
  - b. Would not IHL be better served if agreements such as Protocol IV proscribed the effect on human beings, here intentional blinding, and not merely a weapon's technology? Nevertheless, is not Protocol IV at least unique in that it applies to a weapon before that weapon's effects have been observed on the battlefield?

**Case No. 81, United Kingdom, Interpreting the Act of Implementation**

[Source: 1 All ER (1968), pp. 779-783]

**CHENEY v. CONN (Inspector of Taxes)****SAME v. INLAND REVENUE COMMISSIONERS**

[CHANCERY DIVISION (Ungoed-Thomas, J), July 3, 1967]

**UNGOED-THOMAS, J:** This is an appeal against an assessment [...] and also an assessment to surtax. Both these cases raise the same point. The submission is that the assessments are invalid because it is to be taken that what is collected will be, in part, applied in expenditure on the armed forces and devoted to the construction of nuclear weapons with the intention of using those weapons if certain circumstances should arise. It is conceded for the purposes of this case that a substantial part of the taxes for the years that I have mentioned was allocated to the construction of nuclear weapons. The issue therefore becomes whether the use of income tax and surtax for the construction of nuclear weapons, with the intention of using them should certain circumstances arise, invalidates the assessments.

The assessments were made under statute and the relevant statute is the Finance Act 1964. [...] The provision is, first, of force statutorily; secondly, unambiguous; and, thirdly, limited to the raising of taxation and not to the purposes for which that taxation has to be applied or any such policy matters at all.

The ground on which it was argued that the use of this money for the construction of nuclear weapons is illegal is that such use conflicts primarily with Conventions incorporated in an Act of Parliament – and, so it was suggested, impliedly ratified by them – and also ratified by the Crown in the usual way; and also because, according to the Case Stated, it was contrary to international law. But the case as presented before me was rested primarily, at any rate, on a conflict between two statutes – namely, the statute which refers to the Geneva Conventions (viz., the Geneva Conventions Act, 1957) and the Finance Act 1964. Before coming to the Act of 1957 I shall deal first with the relationship of statute law to international law and international conventions.

First, international law is part of the law of the land, but it yields to statute. [...] It is therefore very understandable why the taxpayer in the case relies primarily, at any rate, not on a conflict between international law in general and the statute, but on the conflict between the Act of 1957, and its reference to ratification, and another statute, the Finance Act 1964. Secondly, conventions which are ratified by an Act of Parliament are part of the law of the land; and, thirdly, conventions which are ratified, but not by an Act of Parliament, which would thereby give them statutory force, cannot prevail against a statute in unambiguous terms. The law is thus stated in OPPENHEIM'S INTERNATIONAL LAW (8<sup>th</sup> ed.) at p. 924:

“The binding force of a treaty concerns in principle the contracting States only, and not their subjects. As international law is primarily a law between

States only and exclusively, treaties can normally have effect upon States only: This rule can, as has been pointed out by the Permanent Court of International Justice, be altered by the express or implied terms of the treaty, in which case its provisions become self-executory. Otherwise, if treaties contain provisions with regard to rights and duties of the subjects of the contracting States, their courts, officials, and the like, these States must take such steps as are necessary, according to their Municipal Law, to make them provisions binding upon their subjects, courts, officials and the like."

At p. 40 the law is stated thus:

"Such treaties as affect the private rights and, generally, as require for their enforcement by English courts a modification of common law or of a statute must receive parliamentary assent through an enabling Act of Parliament. To that extent binding treaties which are part of international law do not form part of the law of the land unless expressly made so by the legislature. That departure from the traditional common law rule is largely due to the fact that, according to British constitutional law, the conclusion and ratification of treaties are within the prerogative of the Crown, which would otherwise be in a position to legislate for the subject without obtaining parliamentary assent"

IN WADE AND PHILLIPS' CONSTITUTIONAL LAW (7<sup>th</sup> ed.) [...] [I]t is pointed out on p. 275 that: "treaties which, for their execution and application in the United Kingdom, require some addition to, or alteration of the existing law are treaties which involve legislation."

Here the legislation so relied on is, as I have indicated, the Geneva Conventions Act, of 1957. The title and preamble of the Act of 1957 are as follows:

"An Act to enable effect to be given to certain international conventions done at Geneva on Aug. 12, 1949, and for purposes connected therewith. Whereas, with a view to the ratification by Her Majesty of the conventions set out in the schedules to this Act, it is expedient to make certain amendments in the law."

What the Act of 1957 then does is to make certain specific amendments in the law by reference to particular provisions in the Geneva Conventions. There is no conflict whatsoever between the particular provisions included in those specific amendments and to the Finance Act 1964; nor have any of those specific amendments been relied on for that purpose.

What has been relied on has been the combination of the title and the preamble, which I have read. It is said that the whole object of the Act of 1957 was, first, with a view to ratification by the Crown; and secondly, with a view to giving effect to the Geneva Conventions. The ratification by the Crown might or might not have been made. If the ratification were made (as in fact, subsequently, it was made in this case), then, of course, the ratification would take effect, not by reason of this Act of Parliament at all, but by reason of ratification by the executive. It would then have the consequences in law which ratification by the executive has, as contrasted with the effect it would have in law if it were ratified by law, embodied in statute and made by Parliament part

of the law of this land. The title and the preamble relied on do not make the Geneva Conventions statute; and therefore, except to the extent of the specific amendments to the law made by the Act of 1957 itself, which I have mentioned and which have not been relied on for the purposes of this case – and which, indeed, appear hardly applicable to it at all – the Act of 1957 does not provide material which can be relied on as being in conflict with the Finance Act 1964 at all. Is conceded by the Crown for purposes of this case, though not otherwise, that the ratification in fact took place; but it is clear that in so far as the ratification has taken place by executive action and not by parliamentary action, it yields to statute. So even if there were a conflict between what is contained in the conventions ratified and the Finance Act 1964, the Finance Act 1964, unambiguous as it is, would prevail. Therefore, on this ground, apart from any other, the taxpayer's case, in my judgement, fails.

### DISCUSSION

1.
  - a. Why did the Act of 1957 fail to make the Geneva Conventions part of British statutory law? What limitations did the preamble place on the Act? Why is it important that the Geneva Conventions should become part of statutory law?
  - b. From the decision of this Court, are we to presume that none of the provisions of the Geneva Conventions relevant to this situation are self-executing? Does it matter in English law whether a provision of an international treaty is self-executing?
2. Do the Geneva Conventions prohibit the construction of nuclear weapons? Their use? Which provisions, if any, of IHL prohibit the use of nuclear weapons? Are those rules self-executing? (HR, Art. 23(e); P I, Arts 35(2)-(3), 36 and 51, CIHL, Rules 70-71)
3. Would statutory law still take precedence if customary law prohibited the use and/or construction of nuclear weapons? [See **Case No. 62**, ICJ, Nuclear Weapons Advisory Opinion]
4. What obligation does the UK have regarding implementation of the Geneva Conventions? Does the Act of 1957 fulfil this obligation? As interpreted in this Case? (GC I-IV, Arts 49/50/129/146 respectively; CIHL, Rules 139-161)



**Case No. 82, United Kingdom, Labour Party Campaign – Misuse of the Emblem****A. Labour Attacked over ‘Misuse’ of Red Cross Symbol**

[Source: Reynolds, N., *The Daily Telegraph*, February 19, 1988]

THE LABOUR party has been accused of hijacking the red cross emblem, used by medical and relief workers around the world, for its campaign to persuade the Government to make more money available for the Health Service in the Budget.

Two days ago Labour started to distribute one million pamphlets and lapel stickers bearing a red cross superimposed on a pound sign.

The move has angered the British Red Cross Society, the Ministry of Defence, and a Tory MP.

The Red Cross Society has demanded that the campaign be halted immediately for fear of tarnishing the cross's "traditional symbol of neutrality".

The Defence Ministry, the legal protector of the symbol in this country under powers given by the Geneva Conventions Act 1957, last night wrote to Labour, claiming it had broken the law by using a protected emblem without permission.

But the party is unimpressed and has accused the Red Cross Society of "quibbling".

After taking legal advice [...] Labour said last night that it would continue with its campaign.

[...]

His deputy, Mr Roy Hattersley, said yesterday: "We have had a legal opinion which is utterly conclusive. There's been no breach of the law".

A Labour spokesman said that the official red cross was against a white background and had arms of equal length, whereas Labour's cross had unequal arms.

The pamphlet had a buff background and the stickers were yellow.

A spokeswoman for the Red Cross Society said yesterday: "It's awful sad that it's being used for a political party."

If used "for all sorts of things then its basic role as a humanitarian symbol gets diluted and people become very confused", she said.

She believed Labour had used the symbol unwittingly. "We're awfully sorry about this, but they are breaking the law". [...]

A Labour spokesman said of the Red Cross objection: "We are surprised that an organisation that shares our concern for the well-being and effectiveness of the Health Service, would quibble about the use of this symbol."

## B. Labour Official Falls Foul of Red Cross

[Source: Rose, D., *The Guardian*, November 11, 1988]

Mr Larry Whitty, Labour's general secretary, was yesterday convicted of breaching the Geneva Convention for using the Red Cross emblem on party leaflets without permission.

Sir Bryan Robertson granted Mr Whitty a 12-month conditional discharge plus 200 prosecution costs, at Horseferry Road magistrate's court, London.

Mr Philip Kelly, the editor of Tribune, was also given a conditional discharge for 12 months for using the symbol on his front page.

After the hearing, Mr Whitty said the case, brought by the Department of Trade and Industry, was politically motivated. The complaint against Tribune was made by Mr Gerald Hartup, campaigns director of the Freedom Association, the right-wing pressure group.

The court heard that the British Red Cross director, Mr John Burke-Gaffney, asked Mr Whitty last February to withdraw the leaflets, which campaigned against health cuts.

He said it appeared to breach section six of the 1957 Geneva Convention Act, which prohibits the use of the symbol without authority from the Department of Trade and Industry.

Mr Whitty wrote back saying the Labour red cross was not the same as the International Red Cross and so distribution of the leaflets could go ahead.

Outside the court, Mr Whitty accused the Government of bringing a "squalid" prosecution for political reasons.

"This was not a case brought by the Red Cross. It was instigated by government departments. [...]"

A DTI spokeswoman denied this, saying there had been no political direction and Mr Whitty had been treated in the same way as anyone who broke the Geneva Convention.

Mr Kelly accused the Red Cross of being in league with the Government. He said the case should cause people to think about its charitable status.

Mr Burke-Gaffney said after the hearing: "I am sad about the whole thing but I'm glad the court has felt that the emblem should be protected.

"I hope people realise that it is important and needs supporting."

### DISCUSSION

1. Who may use the red cross emblem in peacetime? In which circumstances and under what conditions? (HR, Art. 23(f); GC I, Arts 38, 44 and 53; GC II, Arts 41-43; P I, Arts 8(1), 18, and Annex I, Arts 4-5; P II, Art. 12)
2. a. Did the Labour Party use the emblem properly? Did it even use the emblem – the image on their pamphlet was a cross with arms of unequal length and the background buff or yellow,

in contrast to the protected emblem, which is a red cross with arms of equal length on a white ground? Is this nevertheless misuse of the emblem? Although it draws public attention to problems of the National Health Service, which is entitled to use the emblem (rather than e.g. a campaign of pharmaceutical manufacturers, who may not use the emblem)? (GC I, Art. 53; P I, Art. 38; P II, Art. 12)

- b. Is such misuse of the emblem a war crime? If not, would any misuse of the emblem constitute a war crime? If so, when? Even in peacetime? (HR, Art. 34; GC I, Art. 53; P I, Arts 37(1)(d), 38 and 85(3)(f))
3.
  - a. Would the criminal convictions have occurred if the Labour Party had received prior authorization to use the emblem? Should such use ever be authorized? Would authorization for such use be consistent with the Geneva Conventions and Protocols?
  - b. Who authorizes use of the emblem? International Red Cross and Red Crescent organizations? The National Societies? The States Parties? Who has the responsibility to punish misuse and abuse of the emblem? (GC I, Art. 54; GC II, Art. 45; P I, Art. 18) Is it not logical, therefore, that the case was brought by government departments, and not by the Red Cross?
  - c. Which obligations have States party to the Geneva Conventions and Protocols regarding the emblem? Must each State Party adopt implementing legislation, such as the United Kingdom's Geneva Conventions Act of 1957? Which issues should this legislation encompass? (GC I, Art. 54; GC II, Art. 45; P I, Art. 18)
4.
  - a. Is not, as the Labour spokesman said, the British Red Cross merely quibbling? Why is the Red Cross Society worried about the Labour Party's use of the emblem? Is it only concerned because the Labour Party did not receive prior authorization? In what way does such misuse of the emblem endanger the emblem's authority? What impact does this have on the emblem's essential neutrality? On its impartiality? Does such use undermine the protection the emblem provides?
  - b. Is the political neutrality of the British Red Cross more seriously undermined by the Labour Party's use of the emblem or by a controversy between the Red Cross Society and the Labour Party which ends up with the criminal conviction of a Labour leader?
  - c. May or must a National Red Cross Society strive to prevent abuses of the emblem? Because such abuse constitutes a violation of IHL, or because the same emblem is also used by the National Society? May or must a National Red Cross Society more generally strive to prevent specific violations of IHL? Including seeing to it that violators are taken to court?

**Document No. 83, San Remo Manual on International Law  
Applicable to Armed Conflicts at Sea**

[Source: *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* adopted in June 1994, prepared by lawyers and naval experts convened by the International Institute of Humanitarian Law of San Remo, Geneva, ICRC, November 1995, 43 pp.; available on <http://www.icrc.org/ihl>]

**PART I: GENERAL PROVISIONS**

[...]

**SECTION IV: AREAS OF NAVAL WARFARE**

10. Subject to other applicable rules of the law of armed conflict at sea contained in this document or elsewhere, hostile actions by naval forces may be conducted in, on or over:
  - (a) the territorial sea and internal waters, the land territories, the exclusive economic zone and continental shelf and, where applicable, the archipelagic waters, of belligerent States;
  - (b) the high seas; and
  - (c) subject to paragraphs 34 and 35, the exclusive economic zone and the continental shelf of neutral States.
11. The parties to the conflict are encouraged to agree that no hostile actions will be conducted in marine areas containing:
  - (a) rare or fragile ecosystems; or
  - (b) the habitat of depleted, threatened or endangered species or other forms of marine life.
12. In carrying out operations in areas where neutral States enjoy sovereign rights, jurisdiction, or other rights under general international law, belligerents shall have due regard for the legitimate rights and duties of those neutral States. [...]

**PART II: REGIONS OF OPERATIONS****SECTION I: INTERNAL WATERS, TERRITORIAL SEA  
AND ARCHIPELAGIC WATERS**

14. Neutral waters consist of the internal waters, territorial sea, and, where applicable, the archipelagic waters, of neutral States. Neutral airspace consists of the airspace over neutral waters and the land territory of neutral States.
15. Within and over neutral waters, including neutral waters comprising an international strait and waters in which the right of archipelagic sea lanes passage may be exercised, hostile actions by belligerent forces are forbidden. A neutral State must take such measures as are consistent with Section II of this Part, including the exercise of surveillance, as the means at its disposal allow, to prevent the violation of its neutrality by belligerent forces.

16. Hostile actions within the meaning of paragraph 15 include, *inter alia*:
  - (a) attack on or capture of persons or objects located in, on or over neutral waters or territory;
  - (b) use as a base of operations, including attack on or capture of persons or objects located outside neutral waters, if the attack or seizure is conducted by belligerent forces located in, on or over neutral waters;
  - (c) laying of mines; or
  - (d) visit, search, diversion or capture.
17. Belligerent forces may not use neutral waters as a sanctuary.
18. Belligerent military and auxiliary aircraft may not enter neutral airspace. Should they do so, the neutral State shall use the means at its disposal to require the aircraft to land within its territory and shall intern the aircraft and its crew for the duration of the armed conflict. Should the aircraft fail to follow the instructions to land, it may be attacked, subject to the special rules relating to medical aircraft as specified in paragraphs 181-183.
19. Subject to paragraphs 29 and 33, a neutral State may, on a non-discriminatory basis, condition, restrict or prohibit the entrance to or passage through its neutral waters by belligerent warships and auxiliary vessels.
20. Subject to the duty of impartiality, and to paragraphs 21 and 23-33, and under such regulations as it may establish, a neutral State may, without jeopardizing its neutrality, permit the following acts within its neutral waters:
  - (a) passage through its territorial sea, and where applicable its archipelagic waters, by warships, auxiliary vessels and prizes of belligerent States; warships, auxiliary vessels and prizes may employ pilots of the neutral State during passage;
  - (b) replenishment by a belligerent warship or auxiliary vessel of its food, water and fuel sufficient to reach a port in its own territory; and
  - (c) repairs of belligerent warships or auxiliary vessels found necessary by the neutral State to make them seaworthy; such repairs may not restore or increase their fighting strength.
21. A belligerent warship or auxiliary vessel may not extend the duration of its passage through neutral waters, or its presence in those waters for replenishment or repair, for longer than 24 hours unless unavoidable on account of damage or the stress of weather. The foregoing rule does not apply in international straits and waters in which the right of archipelagic sea lanes passage is exercised.
22. Should a belligerent State be in violation of the regime of neutral waters, as set out in this document, the neutral State is under an obligation to take the measures necessary to terminate the violation. If the neutral State fails to terminate the violation of its neutral waters by a belligerent, the opposing belligerent must so

notify the neutral State and give that neutral State a reasonable time to terminate the violation by the belligerent. If the violation of the neutrality of the State by the belligerent constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, then that belligerent may, in the absence of any feasible and timely alternative, use such force as is strictly necessary to respond to the threat posed by the violation.

## **SECTION II: INTERNATIONAL STRAITS AND ARCHIPELAGIC SEA LANES**

### *General rules*

23. Belligerent warships and auxiliary vessels and military and auxiliary aircraft may exercise the rights of passage through, under or over neutral international straits and of archipelagic sea lanes passage provided by general international law.
24. The neutrality of a State bordering an international strait is not jeopardized by the transit passage of belligerent warships, auxiliary vessels, or military or auxiliary aircraft, nor by the innocent passage of belligerent warships or auxiliary vessels through that strait.
25. The neutrality of an archipelagic State is not jeopardized by the exercise of archipelagic sea lanes passage by belligerent warships, auxiliary vessels, or military or auxiliary aircraft.
26. Neutral warships, auxiliary vessels, and military and auxiliary aircraft may exercise the rights of passage provided by general international law through, under and over belligerent international straits and archipelagic waters. The neutral State should, as a precautionary measure, give timely notice of its exercise of the rights of passage to the belligerent State.

### *Transit passage and archipelagic sea lanes passage*

27. The rights of transit passage and archipelagic sea lanes passage applicable to international straits and archipelagic waters in peacetime continue to apply in times of armed conflict. The laws and regulations of States bordering straits and archipelagic States relating to transit passage and archipelagic sea lanes passage adopted in accordance with general international law remain applicable.
28. Belligerent and neutral surface ships, submarines and aircraft have the rights of transit passage and archipelagic sea lanes passage through, under, and over all straits and archipelagic waters to which these rights generally apply.
29. Neutral States may not suspend, hamper, or otherwise impede the right of transit passage nor the right of archipelagic sea lanes passage.
30. A belligerent in transit passage through, under and over a neutral international strait, or in archipelagic sea lanes passage through, under and over neutral archipelagic waters, is required to proceed without delay, to refrain from the threat or use of force against the territorial integrity or political independence of the neutral littoral or archipelagic State, or in any other manner inconsistent with

the purposes of the Charter of the United Nations, and otherwise to refrain from any hostile actions or other activities not incident to their transit. Belligerents passing through, under and over neutral straits or waters in which the right of archipelagic sea lanes passage applies are permitted to take defensive measures consistent with their security, including launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerents in transit or archipelagic sea lanes passage may not, however, conduct offensive operations against enemy forces, nor use such neutral waters as a place of sanctuary nor as a base of operations.

#### *Innocent passage*

31. In addition to the exercise of the rights of transit and archipelagic sea lanes passage, belligerent warships and auxiliary vessels may, subject to paragraphs 19 and 21, exercise the right of innocent passage through neutral international straits and archipelagic waters in accordance with general international law.
32. Neutral vessels may likewise exercise the right of innocent passage through belligerent international straits and archipelagic waters.
33. The right of non-suspendable innocent passage ascribed to certain international straits by international law may not be suspended in time of armed conflict.

#### **SECTION III: EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF**

34. If hostile actions are conducted within the exclusive economic zone or on the continental shelf of a neutral State, belligerent States shall, in addition to observing the other applicable rules of the law of armed conflict at sea, have due regard for the rights and duties of the coastal State, *inter alia*, for the exploration and exploitation of the economic resources of the exclusive economic zone and the continental shelf and the protection and preservation of the marine environment. They shall, in particular, have due regard for artificial islands, installations, structures and safety zones established by neutral States in the exclusive economic zone and on the continental shelf.
35. If a belligerent considers it necessary to lay mines in the exclusive economic zone or the continental shelf of a neutral State, the belligerent shall notify that State, and shall ensure, *inter alia*, that the size of the minefield and the type of mines used do not endanger artificial islands, installations and structures, nor interfere with access thereto, and shall avoid so far as practicable interference with the exploration or exploitation of the zone by the neutral State. Due regard shall also be given to the protection and preservation of the marine environment.

#### **SECTION IV: HIGH SEAS AND SEA-BED BEYOND NATIONAL JURISDICTION**

36. Hostile actions on the high seas shall be conducted with due regard for the exercise by neutral States of rights of exploration and exploitation of the natural

resources of the sea-bed, and ocean floor, and the subsoil thereof, beyond national jurisdiction.

37. Belligerents shall take care to avoid damage to cables and pipelines laid on the sea-bed which do not exclusively serve the belligerents.

## **PART III: BASIC RULES AND TARGET DISCRIMINATION**

### **SECTION I: BASIC RULES**

38. In any armed conflict the right of the parties to the conflict to choose methods or means of warfare is not unlimited.
39. Parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants and between civilian or exempt objects and military objectives.
40. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
41. Attacks shall be limited strictly to military objectives. Merchant vessels and civil aircraft are civilian objects unless they are military objectives in accordance with the principles and rules set forth in this document.
42. In addition to any specific prohibitions binding upon the parties to a conflict, it is forbidden to employ methods or means of warfare which:
  - (a) are of a nature to cause superfluous injury or unnecessary suffering; or
  - (b) are indiscriminate, in that:
    - (i) they are not, or cannot be, directed against a specific military objective; or
    - (ii) their effects cannot be limited as required by international law as reflected in this document.
43. It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.
44. Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.
45. Surface ships, submarines and aircraft are bound by the same principles and rules.

### **SECTION II: PRECAUTIONS IN ATTACK**

46. With respect to attacks, the following precautions shall be taken:



- (a) those who plan, decide upon or execute an attack must take all feasible measures to gather information which will assist in determining whether or not objects which are not military objectives are present in an area of attack;
- (b) in the light of the information available to them, those who plan, decide upon or execute an attack shall do everything feasible to ensure that attacks are limited to military objectives;
- (c) they shall furthermore take all feasible precautions in the choice of methods and means in order to avoid or minimize collateral casualties or damage; and
- (d) an attack shall not be launched if it may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole; an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive.

Section VI of this Part provides additional precautions regarding civil aircraft.

### **SECTION III: ENEMY VESSELS AND AIRCRAFT EXEMPT FROM ATTACK**

#### *Classes of vessels exempt from attack*

47. The following classes of enemy vessels are exempt from attack:

- (a) hospital ships;
- (b) small craft used for coastal rescue operations and other medical transports;
- (c) vessels granted safe conduct by agreement between the belligerent parties including:
  - (i) cartel vessels, e.g., vessels designated for and engaged in the transport of prisoners of war;
  - (ii) vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations;
- (d) vessels engaged in transporting cultural property under special protection;
- (e) passenger vessels when engaged only in carrying civilian passengers;
- (f) vessels charged with religious, non-military scientific or philanthropic missions, vessels collecting scientific data of likely military applications are not protected;
- (g) small coastal fishing vessels and small boats engaged in local coastal trade, but they are subject to the regulations of a belligerent naval commander operating in the area and to inspection;

- (h) vessels designated or adapted exclusively for responding to pollution incidents in the marine environment;
- (i) vessels which have surrendered;
- (j) life rafts and life boats.

#### *Conditions of exemption*

48. Vessels listed in paragraph 47 are exempt from attack only if they:
- (a) are innocently employed in their normal role;
  - (b) submit to identification and inspection when required; and
  - (c) do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required.

#### *Loss of exemption*

##### *Hospital ships*

49. The exemption from attack of a hospital ship may cease only by reason of a breach of a condition of exemption in paragraph 48 and, in such a case, only after due warning has been given naming in all appropriate cases a reasonable time limit to discharge itself of the cause endangering its exemption, and after such warning has remained unheeded.
50. If after due warning a hospital ship persists in breaking a condition of its exemption, it renders itself liable to capture or other necessary measures to enforce compliance.
51. A hospital ship may only be attacked as a last resort if:
- (a) diversion or capture is not feasible;
  - (b) no other method is available for exercising military control;
  - (c) the circumstances of non-compliance are sufficiently grave that the hospital ship has become, or may be reasonably assumed to be, a military objective; and
  - (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or expected.

##### *All other categories of vessels exempt from attack*

52. If any other class of vessel exempt from attack breaches any of the conditions of its exemption in paragraph 48, it may be attacked only if:
- (a) diversion or capture is not feasible;
  - (b) no other method is available for exercising military control;

- (c) the circumstances of non-compliance are sufficiently grave that the vessel has become, or may be reasonably assumed to be, a military objective; and
- (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or expected.

*Classes of aircraft exempt from attack*

53. The following classes of enemy aircraft are exempt from attack:

- (a) medical aircraft;
- (b) aircraft granted safe conduct by agreement between the parties to the conflicts; and
- (c) civil airliners.

*Conditions of exemption for medical aircraft*

54. Medical aircraft are exempt from attack only if they:

- (a) have been recognized as such;
- (b) are acting in compliance with an agreement as specified in paragraph 177;
- (c) fly in areas under the control of own or friendly forces; or
- (d) fly outside the area of armed conflict.

In other instances, medical aircraft operate at their own risk.

*Conditions of exemption for aircraft granted safe conduct*

55. Aircraft granted safe conduct are exempt from attack only if they:

- (a) are innocently employed in their agreed role;
- (b) do not intentionally hamper the movements of combatants; and
- (c) comply with the details of the agreement, including availability for inspection.

*Conditions of exemption for civil airliners*

56. Civil airliners are exempt from attack only if they:

- (a) are innocently employed in their normal role; and
- (b) do not intentionally hamper the movements of combatants.

*Loss of exemption*

57. If aircraft exempt from attack breach any of the applicable conditions of their exemption as set forth in paragraphs 54-56, they may be attacked only if:

- (a) diversion for landing, visit and search, and possible capture, is not feasible;
  - (b) no other method is available for exercising military control;
  - (c) the circumstances of non-compliance are sufficiently grave that the aircraft has become, or may be reasonably assumed to be, a military objective; and
  - (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or anticipated.
58. In case of doubt whether a vessel or aircraft exempt from attack is being used to make an effective contribution to military action, it shall be presumed not to be so used.

#### **SECTION IV: OTHER ENEMY VESSELS AND AIRCRAFT**

##### *Enemy merchant vessels*

59. Enemy merchant vessels may only be attacked if they meet the definition of a military objective in paragraph 40.
60. The following activities may render enemy merchant vessels military objectives:
- (a) engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;
  - (b) acting as an auxiliary to an enemy's armed forces, e.g., carrying troops or replenishing warships;
  - (c) being incorporated into or assisting the enemy's intelligence-gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
  - (d) sailing under convoy of enemy warships or military aircraft;
  - (e) refusing an order to stop or actively resisting visit, search or capture;
  - (f) being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, e.g., against pirates, and purely deflection systems such as 'chaff'; or
  - (g) otherwise making an effective contribution to military action, e.g., carrying military materials.
61. Any attacks on these vessels is subject to the basic rules set out in paragraphs 38-46.

##### *Enemy civil aircraft*

62. Enemy civil aircraft may only be attacked if they meet the definition of a military objective in paragraph 40.
63. The following activities may render enemy civil aircraft military objectives:

- (a) engaging in acts of war on behalf of the enemy, e.g., laying mines, minesweeping, laying or monitoring acoustic sensors, engaging in electronic warfare, intercepting or attacking other civil aircraft, or providing targeting information to enemy forces;
  - (b) acting as an auxiliary aircraft to an enemy's armed forces, e.g., transporting troops or military cargo, or refuelling military aircraft;
  - (c) being incorporated into or assisting the enemy's intelligence-gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
  - (d) flying under the protection of accompanying enemy warships or military aircraft;
  - (e) refusing an order to identify itself, divert from its track, or proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible, or operating fire control equipment that could reasonably be construed to be part of an aircraft weapon system, or on being intercepted clearly manoeuvring to attack the intercepting belligerent military aircraft;
  - (f) being armed with air-to-air or air-to-surface weapons; or
  - (g) otherwise making an effective contribution to military action.
64. Any attack on these aircraft is subject to the basic rules set out in paragraphs 38-46.

*Enemy warships and military aircraft*

65. Unless they are exempt from attack under paragraphs 47 or 53, enemy warships and military aircraft and enemy auxiliary vessels and aircraft are military objectives within the meaning of paragraph 40.
66. They may be attacked, subject to the basic rules in paragraphs 38-46.

**SECTION V: NEUTRAL MERCHANT VESSELS AND CIVIL AIRCRAFT**

*Neutral merchant vessels*

67. Merchant vessels flying the flag of neutral States may not be attacked unless they:
- (a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;
  - (b) engage in belligerent acts on behalf of the enemy;
  - (c) act as auxiliaries to the enemy's armed forces;
  - (d) are incorporated into or assist the enemy's intelligence system;
  - (e) sail under convoy of enemy warships or military aircraft; or

- (f) otherwise make an effective contribution to the enemy's military action, e.g., by carrying military materials, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.
68. Any attack on these vessels is subject to the basic rules in paragraphs 38-46.
69. The mere fact that a neutral merchant vessel is armed provides no grounds for attacking it.

*Neutral civil aircraft*

70. Civil aircraft bearing the marks of neutral States may not be attacked unless they:
- (a) are believed on reasonable grounds to be carrying contraband, and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible;
  - (b) engage in belligerent acts on behalf of the enemy;
  - (c) act as auxiliaries to the enemy's armed forces;
  - (d) are incorporated into or assist the enemy's intelligence system; or
  - (e) otherwise make an effective contribution to the enemy's military action, e.g., by carrying military materials, and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible.
71. Any attack on these aircraft is subject to the basic rules in paragraphs 38-46.

**SECTION VI: PRECAUTIONS REGARDING CIVIL AIRCRAFT**

72. Civil aircraft should avoid areas of potentially hazardous military activity.
73. In the immediate vicinity of naval operations, civil aircraft shall comply with instructions from the belligerents regarding their heading and altitude.
74. Belligerent and neutral States concerned, and authorities providing air traffic services, should establish procedures whereby commanders of warships and military aircraft are aware on a continuous basis of designated routes assigned to or flight plans filed by civil aircraft in the area of military operations, including information on communication channels, identification modes and codes, destination, passengers and cargo.
75. Belligerent and neutral States should ensure that a Notice to Airmen (NOTAM) is issued providing information on military activities in areas potentially hazardous

to civil aircraft, including activation of danger areas or temporary airspace restrictions. This NOTAM should include information on:

- (a) frequencies upon which the aircraft should maintain a continuous listening watch;
- (b) continuous operation of civil weather-avoidance radar and identification modes and codes;
- (c) altitude, course and speed restrictions;
- (d) procedures to respond to radio contact by the military forces and to establish two-way communications; and
- (e) possible action by the military forces if the NOTAM is not complied with and the civil aircraft is perceived by those military forces to be a threat.

76. Civil aircraft should file the required flight plan with the cognizant Air Traffic Service, complete with information as to registration, destination, passengers, cargo, emergency communication channels, identification modes and codes, updates en route and carry certificates as to registration, air-worthiness, passengers and cargo. They should not deviate from a designated Air Traffic Service route or flight plan without Air Traffic Control clearance unless unforeseen conditions arise, e.g., safety or distress, in which case appropriate notification should be made immediately.
77. If a civil aircraft enters an area of potentially hazardous military activity, it should comply with relevant NOTAMs. Military forces should use all available means to identify and warn the civil aircraft, by using, *inter alia*, secondary surveillance radar modes and codes, communications, correlation with flight plan information, interception by military aircraft, and, when possible, contacting the appropriate Air Traffic Control facility. [...]

## **PART IV: METHODS AND MEANS OF WARFARE AT SEA**

### **SECTION I: MEANS OF WARFARE**

[...]

#### *Mines*

80. Mines may only be used for legitimate military purposes including the denial of sea areas to the enemy.
81. Without prejudice to the rules set out in paragraph 82, the parties to the conflict shall not lay mines unless effective neutralization occurs when they have become detached or control over them is otherwise lost.
82. It is forbidden to use free-floating mines unless:
- (a) they are directed against a military objective; and
  - (b) they become harmless within an hour after loss of control over them.

83. The laying of armed mines or the arming of pre-laid mines must be notified unless the mines can only detonate against vessels which are military objectives.
84. Belligerents shall record the locations where they have laid mines.
85. Mining operations in the internal waters, territorial sea or archipelagic waters of a belligerent State should provide, when the mining is first executed, for free exit of shipping of neutral States.
86. Mining of neutral waters by a belligerent is prohibited.
87. Mining shall not have the practical effect of preventing passage between neutral waters and international waters.
88. The mine-laying States shall pay due regard to the legitimate uses of the high seas by, *inter alia*, providing safe alternative routes for shipping of neutral States.
89. Transit passage through international straits and passage through waters subject to the right of archipelagic sea lanes passage shall not be impeded unless safe and convenient alternative routes are provided.
90. After the cessation of active hostilities, parties to the conflict shall do their utmost to remove or render harmless the mines they have laid, each party removing its own mines. With regard to mines laid in the territorial seas of the enemy, each party shall notify their position and shall proceed with the least possible delay to remove the mines in its territorial sea or otherwise render the territorial sea safe for navigation.
91. In addition to their obligations under paragraph 90, parties to the conflict shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technical and material assistance, including in appropriate circumstances joint operations, necessary to remove minefields or otherwise render them harmless.
92. Neutral States do not commit an act inconsistent with the laws of neutrality by clearing mines laid in violation of international law.

## SECTION II: METHODS OF WARFARE

### *Blockade*

93. A blockade shall be declared and notified to all belligerents and neutral States.
94. The declaration shall specify the commencement, duration, location, and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline.
95. A blockade must be effective. The question whether a blockade is effective is a question of fact.
96. The force maintaining the blockade may be stationed at a distance determined by military requirements.



97. A blockade may be enforced and maintained by a combination of legitimate methods and means of warfare provided this combination does not result in acts inconsistent with the rules set out in this document.
98. Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked.
99. A blockade must not bar access to the ports and coasts of neutral States.
100. A blockade must be applied impartially to the vessels of all States.
101. The cessation, temporary lifting, re-establishment, extension or other alteration of a blockade must be declared and notified as in paragraphs 93 and 94.
102. The declaration or establishment of a blockade is prohibited if:
  - (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
  - (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.
103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:
  - (a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
  - (b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.
104. The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.

### *Zones*

105. A belligerent cannot be absolved of its duties under international humanitarian law by establishing zones which might adversely affect the legitimate uses of defined areas of the sea.
106. Should a belligerent, as an exceptional measure, establish such a zone:
  - (a) the same body of law applies both inside and outside the zone;

- (b) the extent, location and duration of the zone and the measures imposed shall not exceed what is strictly required by military necessity and the principles of proportionality;
  - (c) due regard shall be given to the rights of neutral States to legitimate uses of the seas;
  - (d) necessary safe passage through the zone for neutral vessels and aircraft shall be provided:
    - (i) where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral State;
    - (ii) in other cases where normal navigation routes are affected, except where military requirements do not permit; and
  - (e) the commencement, duration, location and extent of the zone, as well as the restrictions imposed, shall be publicly declared and appropriately notified.
107. Compliance with the measures taken by one belligerent in the zone shall not be construed as an act harmful to the opposing belligerent.
108. Nothing in this Section should be deemed to derogate from the customary belligerent right to control neutral vessels and aircraft in the immediate vicinity of naval operations.

### **SECTION III: DECEPTION, RUSES OF WAR AND PERFIDY**

109. Military and auxiliary aircraft are prohibited at all times from feigning exempt, civilian or neutral status.
110. Ruses of war are permitted. Warships and auxiliary vessels, however, are prohibited from launching an attack whilst flying a false flag, and at all times from actively simulating the status of:
- (a) hospital ships, small coastal rescue craft or medical transports;
  - (b) vessels on humanitarian missions;
  - (c) passenger vessels carrying civilian passengers;
  - (d) vessels protected by the United Nations flag;
  - (e) vessels guaranteed safe conduct by prior agreement between the parties, including cartel vessels;
  - (f) vessels entitled to be identified by the emblem of the red cross or red crescent; or
  - (g) vessels engaged in transporting cultural property under special protection.
111. Perfidy is prohibited. Acts inviting the confidence of an adversary to lead it to believe that it is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that

confidence, constitute perfidy. Perfidious acts include the launching of an attack while feigning:

- (a) exempt, civilian, neutral or protected United Nations status;
- (b) surrender or distress by, e.g., sending a distress signal or by the crew taking to life rafts. [...]

## **PART VI: PROTECTED PERSONS, MEDICAL TRANSPORTS AND MEDICAL AIRCRAFT**

### **GENERAL RULES**

- 159. Except as provided for in paragraph 171, the provisions of this Part are not to be construed as in any way departing from the provisions of the Second Geneva Convention of 1949 and Additional Protocol I of 1977 which contain detailed rules for the treatment of the wounded, sick and shipwrecked and for medical transports.
- 160. The parties to the conflict may agree, for humanitarian purposes, to create a zone in a defined area of the sea in which only activities consistent with those humanitarian purposes are permitted.

### **SECTION I: PROTECTED PERSONS**

- 161. Persons on board vessels and aircraft having fallen into the power of a belligerent or neutral shall be respected and protected. While at sea and thereafter until determination of their status, they shall be subject to the jurisdiction of the State exercising power over them.
- 162. Members of the crews of hospital ships may not be captured during the time they are in the service of these vessels. Members of the crews of rescue craft may not be captured while engaging in rescue operations.
- 163. Persons on board other vessels or aircraft exempt from capture listed in paragraphs 136 and 142 may not be captured.
- 164. Religious and medical personnel assigned to the spiritual and medical care of the wounded, sick and shipwrecked shall not be considered prisoners of war. They may, however, be retained as long as their services for the medical or spiritual needs of prisoners of war are needed.
- 165. Nationals of an enemy State, other than those specified in paragraphs 162-164, are entitled to prisoner-of-war status and may be made prisoners of war if they are:
  - (a) members of the enemy's armed forces;
  - (b) persons accompanying the enemy's armed forces;
  - (c) crew members of auxiliary vessels or auxiliary aircraft;

- (d) crew members of enemy merchant vessels or civil aircraft not exempt from capture, unless they benefit from more favourable treatment under other provisions of international law; or
  - (e) crew members of neutral merchant vessels or civil aircraft that have taken a direct part in the hostilities on the side of the enemy, or served as an auxiliary for the enemy.
166. Nationals of a neutral State:
- (a) who are passengers on board enemy or neutral vessels or aircraft are to be released and may not be made prisoners of war unless they are members of the enemy's armed forces or have personally committed acts of hostility against the captor;
  - (b) who are members of the crew of enemy warships or auxiliary vessels or military aircraft or auxiliary aircraft are entitled to prisoner-of-war status and may be made prisoners of war;
  - (c) who are members of the crew of enemy or neutral merchant vessels or civil aircraft are to be released and may not be made prisoners of war unless the vessel or aircraft has committed an act covered by paragraphs 60, 63, 67 or 70, or the member of the crew has personally committed an act of hostility against the captor.
167. Civilian persons other than those specified in paragraphs 162-166 are to be treated in accordance with the Fourth Geneva Convention of 1949.
168. Persons having fallen into the power of a neutral State are to be treated in accordance with Hague Conventions V and XIII of 1907 and the Second Geneva Convention of 1949. [...]

**Document No. 84, HPCR, Manual on International Law  
Applicable to Air and Missile Warfare**

[Source: *Manual on International Law Applicable to Air and Missile Warfare*, Program on Humanitarian Policy and Conflict Research at Harvard University, Bern, 15 May 2009; available at [www.ihlresearch.org/amw](http://www.ihlresearch.org/amw)]

**Manual on International Law Applicable to Air and Missile Warfare**

Bern, 15 May 2009

[...]

**Foreword**

It is my pleasure and honor to present the *HPCR Manual on International Law Applicable to Air and Missile Warfare*. This Manual provides the most up-to-date restatement of existing international law applicable to air and missile warfare, as elaborated by an international Group of Experts. As an authoritative restatement, the *HPCR Manual* contributes to the practical understanding of this important international legal framework.

The *HPCR Manual* is the result of a six-year long endeavor led by the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR), during which it convened an international Group of Experts to reflect on existing rules of international law applicable to air and missile warfare. This Group of Experts, under the guidance of HPCR Senior Academic Advisor, Professor Dr. Yoram Dinstein, has conducted, since 2004, a methodical and comprehensive reflection on international legal rules applicable to air and missile warfare, drawing from various sources of international law. The enclosed Black-letter Rules of the *HPCR Manual* were adopted by consensus by the Group of Experts in Bern, Switzerland on 15 May 2009. A separate Commentary on the Black-letter Rules was drafted by selected experts from the original Group, under the supervision of Professor Dinstein and HPCR Project Coordinator, Bruno Demeyere. While the *HPCR Manual* restates current applicable law, the Commentary clarifies the prominent legal interpretations and indicates differing perspectives.

The *HPCR Manual* is the product of a collective effort. We would like, first and foremost, to acknowledge the remarkable role of Professor Yoram Dinstein throughout this process. His internationally recognized expertise and analytical engagement have been instrumental in maintaining the momentum and authority of this initiative over the years. Members of the Group of Experts (please see Appendix I in the Introduction to the Commentary for the full list) have individually made important contributions to each step of the process by studying a particular area of the law of air operations and by providing comments on the overall exercise. We would like to recognize, particularly, the members of the Drafting Committee (please see Appendix IV in the Introduction to the Commentary) who have invested countless hours in summarizing the various interpretations of the Black-letter Rules discussed among the experts. HPCR Project Coordinator Bruno Demeyere managed this process in an adept and diligent manner that was much appreciated by his colleagues.

As ever, this project would not have been possible without the substantial financial support and generosity of its donors, primarily the Swiss Federal Department of Foreign Affairs. In addition, several governments supported the convening of the Group of Experts in their various meetings, as well as regional consultations, namely Australia, Belgium, Canada, Germany, the Netherlands, and Norway. The International Society for Military Law and the Law of War also facilitated consultations with military experts at regular intervals during the project. Words of gratitude are also in order for the Fritz Thyssen Foundation and the Max Planck Institute for Comparative Public Law and International Law for their support in the hosting of Group of Experts meetings. Finally, a word of special thanks goes to Barbara Fontana, from the Political Division IV of the Swiss Federal Department of Foreign Affairs, who kept a watchful and constructive eye on this process since its inception.

Through the publication of this Manual, HPCR hopes that legal advisors and military officers will benefit from an in-depth presentation – and interpretation – of international law applicable to air and missile warfare. A greater clarity of the law will also enhance the protection of civilians in armed conflict.

Claude Bruderlein

Director, Program on Humanitarian Policy and Conflict Research

February 2010

[...]

### **Section A: Definitions**

#### **1. For the purposes of this Manual –**

- (a) “Air” or “airspace” means the air up to the highest altitude at which an aircraft can fly and below the lowest possible perigee of an earth satellite in orbit. Under international law, airspace is classified as either national airspace (that over the land, internal waters, archipelagic waters, and territorial seas of any State) or international airspace (that over contiguous zones, exclusive economic zones, the high seas, and territory not subject to the sovereignty of any State).
- (b) “Air or missile operations” mean military operations in armed conflict involving the use of aircraft or missiles of all types; whether in offence or defence; and whether or not over the territory of one of the Belligerent Parties.
- (c) “Air or missile combat operations” mean air or missile operations designed to injure, kill, destroy, damage, capture or neutralize targets, the support of such operations, or active defence against them.
- (d) “Aircraft” means any vehicle – whether manned or unmanned – that can derive support in the atmosphere from the reactions of the air (other than the reactions of the air against the earth’s surface), including vehicles with either fixed or rotary wings.

- (e) “Attack” means an act of violence, whether in offence or in defence.
- (f) “Belligerent Party” means a State Party to an international armed conflict.
- (g) “Cartel aircraft” means an aircraft granted safe conduct by agreement between the Belligerent Parties for the purpose of performing a specific function, such as the transport of prisoners of war or parlementaires.
- (h) “Civilian aircraft” means any aircraft other than military or other State aircraft.
- (i) “Civilian airliner” means a civilian aircraft identifiable as such and engaged in carrying civilian passengers in scheduled or non-scheduled service.
- (j) “Civilian objects” mean all objects which are not military objectives, as defined in Rule 1 (y).
- (k) “Civil defence” means the performance of some or all of the humanitarian tasks mentioned below, intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival. These tasks are: (i) warning; (ii) evacuation; (iii) management of shelters; (iv) management of blackout measures; (v) rescue; (vi) medical services, including first aid, and religious assistance; (vii) fire-fighting; (viii) detection and marking of danger areas; (ix) decontamination and similar protective measures; (x) provision of emergency accommodation and supplies; (xi) emergency assistance in the restoration and maintenance of order in distressed areas; (xii) emergency repair of indispensable public utilities; (xiii) emergency disposal of the dead; (xiv) assistance in the preservation of objects essential for survival; (xv) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization.
- (l) “Collateral damage” means incidental loss of civilian life, injury to civilians and damage to civilian objects or other protected objects or a combination thereof, caused by an attack on a lawful target.
- (m) “Computer network attack” means operations to manipulate, disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computer network itself, or to gain control over the computer or computer network.
- (n) “Contraband” means goods which are ultimately destined for territory under the control of an enemy Belligerent Party and which are susceptible for use in international armed conflict.
- (o) “Cultural property” means, irrespective of origin or ownership:
  - (i) Movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of

buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

- (ii) Buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (i) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (i);
- (iii) Centres containing a large amount of cultural property as defined in sub-paragraph (i) and (ii).
- (p) "Electronic warfare" means any military action involving the use of electromagnetic and directed energy to control the electromagnetic spectrum or to attack the enemy.
- (q) "Feasible" means that which is practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations.
- (r) "International armed conflict" means an armed conflict between two or more States.
- (s) "Law of international armed conflict" means all the principles and rules of treaty and customary international law binding on a State and governing armed conflict between States; the term "law of international armed conflict" is synonymous with "international humanitarian law relating to international armed conflict".
- (t) "Means of warfare" mean weapons, weapon systems or platforms employed for the purposes of attack.
- (u) "Medical aircraft" means any aircraft permanently or temporarily assigned – by the competent authorities of a Belligerent Party – exclusively to aerial transportation or treatment of wounded, sick, or shipwrecked persons, and/or the transport of medical personnel and medical equipment or supplies.
- (v) "Methods of warfare" mean attacks and other activities designed to adversely affect the enemy's military operations or military capacity, as distinct from the means of warfare used during military operations, such as weapons. In military terms, methods of warfare consist of the various general categories of operations, such as bombing, as well as the specific tactics used for attack, such as high altitude bombing.
- (w) "Military advantage" means those benefits of a military nature that result from an attack. They relate to the attack considered as whole and not merely to isolated or particular parts of the attack.



- (x) “Military aircraft” means any aircraft (i) operated by the armed forces of a State; (ii) bearing the military markings of that State; (iii) commanded by a member of the armed forces; and (iv) controlled, manned or preprogrammed by a crew subject to regular armed forces discipline.
- (y) “Military objectives”, as far as objects are concerned, are those objects which by their nature, location, purpose or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
- (z) “Missiles” mean self-propelled unmanned weapons – launched from aircraft, warships or land-based launchers – that are either guided or ballistic.
- (aa) “Neutral” means a State not a Belligerent Party in an international armed conflict.
- (bb) “Precision guided weapons” mean weapons that can be directed against a target using either external guidance or a guidance system of their own.
- (cc) “State aircraft” means any aircraft owned or used by a State serving exclusively non-commercial government functions.
- (dd) “Unmanned Aerial Vehicle (UAV)” means an unmanned aircraft of any size which does not carry a weapon and which cannot control a weapon.
- (ee) “Unmanned Combat Aerial Vehicle (UCAV)” means an unmanned military aircraft of any size which carries and launches a weapon, or which can use on-board technology to direct such a weapon to a target.
- (ff) “Weapon” means a means of warfare used in combat operations, including a gun, missile, bomb or other munitions, that is capable of causing either (i) injury to, or death of, persons; or (ii) damage to, or destruction of, objects.

### **Section B: General Framework**

- 2. (a) The objective of this Manual is to produce a restatement of existing law applicable to air or missile operations in international armed conflict. This is without prejudice to the possible application of some of the Rules in this Manual to non-international armed conflicts (for details, see the Commentary).
- (b) Nothing in this Manual affects existing obligations of States under treaties to which they are Contracting Parties.
- (c) In cases not covered by this Manual, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

3. (a) Subject to binding decisions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the Rules reflected in this Manual also apply to all air or missile operations conducted by United Nations forces when in situations of armed conflict they are engaged therein as combatants, to the extent and for the duration of their engagement.
- (b) The Rules reflected in this Manual also apply to armed conflicts involving any other international governmental organization, global or regional.
4. The fundamental principle is that, in any armed conflict, the right of the Belligerent Parties to choose methods or means of warfare is not unlimited.

### **Section C: Weapons**

5. Weapons used in air and missile warfare must comply with:
  - (a) The basic principle of distinction between civilians and combatants and between civilian objects and military objectives.

Consequently, it is prohibited to conduct air or missile combat operations which employ weapons that (i) cannot be directed at a specific lawful target and therefore are of a nature to strike lawful targets and civilians or civilian objects without distinction; or (ii) the effects of which cannot be limited as required by the law of international armed conflict and which therefore are of a nature to strike lawful targets and civilians or civilian objects without distinction;
  - (b) The prohibition of unnecessary suffering or superfluous injury.

Consequently, it is prohibited to conduct air or missile combat operations which employ weapons that are calculated, or of a nature, to cause unnecessary suffering or superfluous injury to combatants.
6. Specific weapons are prohibited in air or missile combat operations. These include:
  - (a) Biological, including bacteriological, weapons.
  - (b) Chemical weapons.
  - (c) Laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.
  - (d) Poison, poisoned substances and poisoned weapons.
  - (e) Small arms projectiles calculated, or of a nature, to cause explosion on impact with or within the human body.
  - (f) Weapons the primary effect of which is to injure by fragments which in the human body escape detection by x-ray.

7. The use of any weapon not expressly mentioned under this Section of the Manual is subject to the general rules and principles of customary and treaty law of international armed conflict (in particular the principle of distinction and the prohibition of unnecessary suffering), as well as to any other treaty law applicable for Contracting Parties.
8. There is no specific obligation on Belligerent Parties to use precision guided weapons. There may however be situations in which the prohibition of indiscriminate attacks, or the obligation to avoid – or, in any event, minimize – collateral damage, cannot be fulfilled without using precision guided weapons.
9. States are obligated to assess the legality of weapons before fielding them in order to determine whether their employment would, in some or all circumstances, be prohibited.

#### **Section D: Attacks**

##### **I. General rules**

10. (a) In accordance with the basic principle of distinction, attacks must be confined to lawful targets.  
(b) Lawful targets are:
  - (i) Combatants;
  - (ii) Military objectives (as defined in Rules 1 (y) and 22);
  - (iii) Civilians directly participating in hostilities (see section F of this Manual).
11. Attacks directed against civilians or civilian objects are prohibited.
12. (a) In case of doubt as to whether a person is a civilian, that person shall be considered a civilian.  
(b) In case of doubt as to whether an object which is ordinarily dedicated to civilian purposes is being used for military purposes, it may only be attacked if, based on all the information reasonably available to the commander at the time, there are reasonable grounds to believe that it has become and remains a military objective.
13. (a) Indiscriminate attacks are prohibited.  
(b) Indiscriminate attacks are those that cannot be or are not directed against lawful targets (as defined in Rule 10 (b)) or the effects of which cannot be limited as required by the law of international armed conflict, and which therefore are of a nature to strike lawful targets and civilians or civilian objects without distinction.  
(c) Attacks must not treat as a single lawful target a number of clearly separated and distinct lawful targets located in a city, town, village or area containing a similar concentration of civilians or civilian objects.

14. An attack that may be expected to cause collateral damage which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.
15.
  - (a) It is prohibited to order that there shall be no survivors in combat operations, to threaten an adversary therewith, or to conduct hostilities on that basis.
  - (b) Persons who are *hors de combat* – either because they have clearly expressed an intention to surrender or as a result of sickness, wounds or shipwreck – must not be attacked, provided that they abstain from any hostile act and no attempt is made to evade capture.
16.
  - (a) At all times, and particularly after an engagement, Belligerent Parties must, without delay, take all possible measures to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, and to search for the dead and prevent their being despoiled.
  - (b) The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones.

## **II. Specifics of air or missile operations**

17.
  - (a) Only military aircraft, including UCAVs, are entitled to engage in attacks.
  - (b) The same Rule applies to the exercise of other belligerent rights, such as interception.
18. Acts or threats of violence in the course of air or missile operations cannot be pursued for the sole or primary purpose of spreading terror among the civilian population.
19. Belligerent Parties conducting, or subject to, air or missile operations:
  - (a) Must take all possible measures to search for and collect the wounded, sick and shipwrecked, ensure their adequate care, permit their removal, exchange and transport, and search for the dead;
  - (b) Must, whenever circumstances permit, arrange cease-fires, if necessary through a neutral intermediary, to facilitate the activities described in paragraph (a);
  - (c) Ought to accept the assistance of impartial humanitarian organizations and facilitate their work in favor of the wounded and other victims of air or missile attacks.
20. Air or missile attacks must be conducted in accordance with those feasible precautions required under Section G of this Manual designed to avoid – or, in any event, minimize – collateral damage.

21. The application of the general Rules prohibiting attacks directed against civilians or civilian objects, as well as indiscriminate attacks, is confined to air or missile attacks that entail violent effects, namely, acts resulting in death, injury, damage or destruction.

### **Section E: Military Objectives**

#### **I. General rules**

22. In the definition of objects as military objectives (see Rule 1 (y)), the following criteria apply:
  - (a) The “nature” of an object symbolizes its fundamental character. Examples of military objectives by nature include military aircraft (including military UAV/UCAVs); military vehicles (other than medical transport); missiles and other weapons; military equipment; military fortifications, facilities and depots; warships; ministries of defence and armaments factories.
  - (b) Application of the “location” criterion can result in specific areas of land such as a mountain pass, a bridgehead or jungle trail becoming military objectives.
  - (c) The “purpose” of an object – although not military by nature – is concerned with the intended future use of an object.
  - (d) The “use” of an object relates to its present function, with the result that a civilian object can become a military objective due to its use by armed forces.
23. Objects which may qualify as military objectives through the definition in Rules 1(y) and 22(a) include, but are not limited to, factories, lines and means of communications (such as airfields, railway lines, roads, bridges and tunnels); energy producing facilities; oil storage depots; transmission facilities and equipment.
24. The connection between a military objective and military action may be direct or indirect.

#### **II. Specifics of air or missile operations**

25. Aircraft may be the object of attack only if they constitute military objectives.
26. All enemy military aircraft constitute military objectives, unless protected under Section L of this Manual, or as otherwise agreed by the Belligerent Parties under Section N (V).
27. Without prejudice to Sections I, J and L of this Manual, the following activities may render any other enemy aircraft a military objective:
  - (a) Engaging in hostile actions in support of the enemy, e.g. intercepting or attacking other aircraft; attacking persons or objects on land or sea; being

used as a means of attack; engaging in electronic warfare; or providing targeting information to enemy forces.

- (b) Facilitating the military actions of the enemy's armed forces, e.g., transporting troops, carrying military materials, or refuelling military aircraft.
- (c) Being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance or command, control and communications missions.
- (d) Refusing to comply with the orders of military authorities, including instructions for landing, inspection and possible capture, or clearly resisting interception.
- (e) Otherwise making an effective contribution to military action.

#### **Section F: Direct Participation in Hostilities**

- 28. Civilians lose their protection from attack if and for such time as they take a direct part in hostilities.
- 29. Subject to the circumstances ruling at the time, the following activities are examples of what may constitute taking a direct part in hostilities:
  - (i) Defending of military objectives against enemy attacks.
  - (ii) Issuing orders and directives to forces engaged in hostilities; making decisions on operational/tactical deployments; and participating in targeting decision-making.
  - (iii) Engaging in electronic warfare or computer network attacks targeting military objectives, combatants or civilians directly participating in hostilities, or which is intended to cause death or injury to civilians or damage to or destruction of civilian objects.
  - (iv) Participation in target acquisition.
  - (v) Engaging in mission planning of an air or missile attack.
  - (vi) Operating or controlling weapon systems or weapons in air or missile combat operations, including remote control of UAVs and UCAVs.
  - (vii) Employing military communications networks and facilities to support specific air or missile combat operations.
  - (viii) Refueling, be it on the ground or in the air, of a military aircraft which is about to engage in, or which is engaged in, air or missile combat operations.
  - (ix) Loading ordnance or mission-essential equipment onto a military aircraft which is about to engage in, or which is engaged in, air or missile combat operations.

- (x) Servicing or repairing of a military aircraft which is about to engage in, or which is engaged in, air or missile combat operations.
- (xi) Loading mission control data to military aircraft/missile software systems.
- (xii) Combat training of aircrews, air technicians and others for specific requirements of a particular air or missile combat operation.

### **Section G: Precautions in Attacks**

#### **I. General rules**

- 30. Constant care must be taken to spare the civilian population, civilians and civilian objects.
- 31. All feasible precautions must be taken to spare all persons and objects entitled to specific protection under Sections K, L, M and N of this Manual.
- 32. Constant care includes in particular the following precautions:
  - (a) Doing everything feasible to verify, based on information reasonably available, that a target is a lawful target and does not benefit from specific protection;
  - (b) Doing everything feasible to choose means and methods of warfare with a view to avoiding – or, in any event, minimizing – collateral damage; and
  - (c) Doing everything feasible to determine whether the collateral damage to be expected from the attack will be excessive in relation to the concrete and direct military advantage anticipated.
- 33. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be the one where the attack may be expected to cause the least danger to civilian lives and to civilian objects, or to other protected persons and objects.

#### **II. Specifics of air or missile operations**

- 34. Constant care must be taken by all those involved in planning, ordering and executing air or missile combat operations to spare the civilian population, civilians and civilian objects.
- 35. In carrying out air or missile combat operations, an attack must be cancelled or suspended if it becomes apparent:
  - (a) That the target is not a lawful target; or
  - (b) That the target is and remains entitled to specific protection in accordance with Sections K, L, M and N of this Manual; or
  - (c) That the expected collateral damage is excessive in relation to the concrete and direct military advantage anticipated.

36. In order to avoid the release of dangerous forces and consequent severe losses among the civilian population, particular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations (as well as installations located in their vicinity) are attacked.
37. When the attack of a lawful target by air or missile combat operations may result in death or injury to civilians, effective advance warnings must be issued to the civilian population, unless circumstances do not permit. This may be done, for instance, through dropping leaflets or broadcasting the warnings. Such warnings ought to be as specific as circumstances permit.
38. Effective advance warnings must also be given before attacking persons and objects entitled to specific protection under Section K, L and N (I and II), as provided for in these Sections, as well as under Section J.
39. The obligation to take feasible precautions in attack applies equally to UAV/ UCAV operations.

### **III. Specifics of attacks directed at aircraft in the air**

40. Before an aircraft is attacked in the air, all feasible precautions must be taken to verify that it constitutes a military objective. Verification ought to use the best means available under the prevailing circumstances, having regard to the immediacy of any potential threat. Factors relevant to verification may include:
  - (a) Visual identification.
  - (b) Responses to oral warnings over radio.
  - (c) Infrared signature.
  - (d) Radar signature.
  - (e) Electronic signature.
  - (f) Identification modes and codes.
  - (g) Number and formation of aircraft.
  - (h) Altitude, speed, track, profile and other flight characteristics.
  - (i) Pre-flight and in-flight air traffic control information regarding possible flights.
41. Belligerent Parties and Neutrals providing air traffic control service ought to establish procedures whereby military commanders – including commanders of military aircraft – are informed on a continuous basis of designated routes assigned to, and flight plans filed by, civilian aircraft in the area of hostilities (including information on communication channels, identification modes and codes, destination, passengers and cargo).



**Section H: Precautions by the Belligerent Party Subject to Attack**

42. Belligerent Parties subject to air or missile attacks must, to the maximum extent feasible, avoid locating military objectives within or near densely populated areas, hospitals, cultural property, places of worship, prisoner of war camps, and other facilities which are entitled to specific protection as per Sections K, L and N (II).
43. Belligerent Parties subject to air or missile attacks must, to the maximum extent feasible, endeavor to remove the civilian population, individual civilians and other protected persons and objects under their control from the vicinity of military objectives.
44. Belligerent Parties subject to air or missile attacks must, to the maximum extent feasible, take necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.
45. Belligerent Parties actually or potentially subject to air or missile operations must not use the presence or movements of the civilian population or individual civilians to render certain points or areas immune from air or missile operations, in particular they must not attempt to shield lawful targets from attacks or to shield, favor or impede military operations. Belligerent Parties must not direct the movement of the civilian population or individual civilians in order to attempt to shield lawful targets from attacks or to shield military operations.
46. Both the Belligerent Party launching an air or missile attack and the Belligerent Party subject to such an attack have obligations to take precautions. Nevertheless, the latter's failure to take precautionary measures does not relieve the Belligerent Party launching an air or missile attack of its obligation to take feasible precautions.

**Section I: Protection of Civilian Aircraft****I. General rules**

47. (a) Civilian aircraft, whether enemy or neutral, are civilian objects and as such are entitled to protection from attack.  
(b) Civilian aircraft can be the object of attack only if they constitute military objectives.
48. (a) All enemy civilian and State aircraft other than military aircraft may be intercepted, inspected or diverted in accordance with Section U.  
(b) Neutral civilian aircraft may be intercepted, inspected or diverted in accordance with Section U.

**II. Enemy civilian aircraft**

49. Enemy civilian aircraft are liable to capture as prize in accordance with Rule 134.

50. Subject to the specific protection of Sections K and L of this Manual, enemy civilian aircraft are liable to attack if engaged in any of the activities set forth in Rule 27.

### **III. Neutral civilian aircraft**

51. Neutral civilian aircraft are liable to capture as prize if engaged in any of the activities enumerated in Rule 140 and if the requirements of Rule 142 are met.
52. Neutral civilian aircraft may not be attacked unless they are engaged in any of the activities enumerated in Rule 174.

### **IV. Safety in flight**

53. (a) In order to enhance their safety whenever in the vicinity of hostilities, civilian aircraft must file with the relevant air traffic control service required flight plans, which will include information as regards, e.g., registration, destination, passengers, cargo, identification codes and modes (including updates en route).
- (b) Civilian aircraft ought not to deviate from a designated air traffic service route or flight plan without air traffic control clearance unless unforeseen conditions arise, e.g., safety or distress, in which case appropriate notification ought to be made immediately.
54. Civilian aircraft ought to avoid areas of potentially hazardous military operations. In the vicinity of hostilities, civilian aircraft must comply with instructions from the military forces regarding their heading and altitude.
55. Whenever feasible, a Notice to Airmen (NOTAM) ought to be issued by Belligerent Parties, providing information on military operations hazardous to civilian or other protected aircraft and which are taking place in given areas including on the activation of temporary airspace restrictions. A NOTAM ought to include information on the following:
- (a) Frequencies upon which the aircraft ought to maintain a continuous listening watch.
- (b) Continuous operation of civilian weather-avoidance radar and identification modes and codes.
- (c) Altitude, course and speed restrictions.
- (d) Procedures to respond to radio contact by the military forces and to establish two-way communications.
- (e) Possible action by the military forces if the NOTAM is not complied with and if the civilian or other protected aircraft is perceived by those military forces to be a threat.

56. If a civilian or other protected aircraft enters an area of potentially hazardous military activity, it must comply with a relevant NOTAM.
57. In the absence of a NOTAM (and, whenever feasible, in case of non-compliance with a NOTAM) military forces concerned ought to use all available means to warn the civilian or other protected aircraft – through radio communication or any other established procedures – before taking any action against it.

### **Section J: Protection of Particular Types of Aircraft**

#### **I. Civilian airliners**

58. Civilian airliners are civilian objects which are entitled to particular care in terms of precautions.
59. In case of doubt, civilian airliners – either in flight or on the ground in a civilian airport – are presumed not to be making an effective contribution to military action.
60. While civilian airliners (whether enemy or neutral) ought to avoid entering a no-fly or an “exclusion zone”, or the immediate vicinity of hostilities, they do not lose their protection merely because they enter such areas.
61. Any civilian airliner suspected on reasonable grounds of carrying contraband or otherwise being engaged in activities inconsistent with its status is subject to inspection by a Belligerent Party in an airfield that is safe for this type of aircraft and reasonably accessible.
62. Enemy civilian airliners may be captured as prize but only on condition that all passengers and crews are safely deplaned and the papers of the aircraft are preserved.
63. Subject to Rule 68, activities such as any of the following may render a civilian airliner a military objective:
  - (a) Being on the ground in a military airfield of the enemy in circumstances which make that aircraft a military objective.
  - (b) Engaging in hostile actions in support of the enemy, e.g. intercepting or attacking other aircraft; attacking persons or objects on land or sea; being used as a means of attack; engaging in electronic warfare; or providing targeting information to enemy forces.
  - (c) Facilitating the military actions of the enemy’s armed forces, e.g. transporting troops, carrying military materials, or refuelling military aircraft.
  - (d) Being incorporated into or assisting the enemy’s intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance or command, control and communications missions.

- (e) Refusing to comply with the orders of military authorities, including instructions for landing, inspection and possible capture, or clearly resisting interception.
- (f) Otherwise making an effective contribution to military action.

## **II. Aircraft granted safe conduct**

- 64. Aircraft granted safe conduct by agreement between the Belligerent Parties – such as cartel aircraft – are entitled to specific protection from attack.
- 65. (a) Aircraft granted safe conduct lose their specific protection from attack in any one of the following instances:
  - (i) They do not comply with the details of the agreement, including availability for inspection and identification.
  - (ii) They intentionally hamper the movements of combatants and are not innocently employed in their agreed upon role.
- (b) Loss of specific protection will only take place if the circumstances of non-compliance are sufficiently grave that the aircraft has become or may reasonably be assumed to be a military objective.
- 66. In case of doubt whether an aircraft granted safe conduct qualifies as a military objective as per Rule 27, it will be presumed not to qualify as such.
- 67. Aircraft granted safe conduct are exempt from capture as prize, provided that they:
  - (a) Are innocently employed in their normal role;
  - (b) Immediately submit to interception and identification when required;
  - (c) Do not intentionally hamper the movement of combatants and obey orders to divert from their track when required; and
  - (d) Are not acting in breach of a prior agreement.

## **III. Provisions common to civilian airliners and aircraft granted safe conduct**

- 68. Civilian airliners and aircraft granted safe conduct may only be attacked if they have lost their protection as per Rules 63 and 65 and if the following cumulative conditions are fulfilled:
  - (a) Diversion for landing, inspection, and possible capture, is not feasible;
  - (b) No other method is available for exercising military control;
  - (c) The circumstances leading to the loss of protection are sufficiently grave to justify an attack; and

- (d) The expected collateral damage will not be excessive in relation to the military advantage anticipated and all feasible precautions have been taken (see Section G of this Manual).
- 69. Any decision to attack a civilian airliner or an aircraft granted safe conduct pursuant to Rule 68 ought to be taken by an appropriate level of command.
- 70. In case of loss of protection pursuant to this Section, a warning must be issued – whenever circumstances permit – to the civilian airliner or the aircraft granted safe conduct in flight before any action is taken against it.

**Section K: Specific Protection of Medical and Religious Personnel,  
Medical Units and Transports**

- 71. Subject to Rule 74, medical and religious personnel, fixed or mobile medical units (including hospitals) and medical transports by air, land, at sea or on other waters must be respected and protected at all times, and must not be the object of attack.
- 72.
  - (a) Medical and religious personnel ought to wear a water-resistant armband bearing a distinctive emblem provided by the law of international armed conflict (the Red Cross, Red Crescent or the Red Crystal). Medical units and medical transports ought to be clearly marked with the same emblem to indicate their status as such; when appropriate, other means of identification may be employed.
  - (b) As far as possible, the distinctive emblem ought to be made of materials which make it recognizable by technical means of detection used in air or missile operations.
  - (c) The distinctive emblem and other means of identification are intended only to facilitate identification and do not, of themselves, confer protected status.
  - (d) The failure of medical and religious personnel, medical units and medical transports to display the distinctive emblem does not deprive them of their protected status.
- 73. A Belligerent Party may inform the enemy of the position of its medical units. The absence of such notification does not exempt any of the Belligerent Parties from the obligations contained in Rule 71.
- 74.
  - (a) The protection to which medical and religious personnel, medical units or medical transports are entitled does not cease unless they commit or are used to commit, outside their humanitarian function, acts harmful to the enemy.
  - (b) For medical units or medical transports, protection may cease only after a warning has been given setting a reasonable time-limit, and after such warning has remained unheeded.

- (c) The following must not be considered as acts harmful to the enemy:
  - (i) that the personnel of a medical unit are equipped with light individual weapons for their own defence or for that of the wounded, sick or shipwrecked in their charge.
  - (ii) that a medical unit is guarded by sentries or by an escort.
  - (iii) that portable arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the medical unit.
  - (iv) that members of the armed forces or other combatants are in the medical unit for medical or other authorized reasons, consistent with the mission of the medical unit.
- (d) Medical units must not be used to shield lawful targets from attack.

#### **Section L: Specific Protection of Medical Aircraft**

- 75. A medical aircraft is entitled to specific protection from attack, subject to the Rules of this Section of the Manual.
- 76.
  - (a) A medical aircraft must be clearly marked with a distinctive emblem as provided by the law of international armed conflict, i.e. the Red Cross, the Red Crescent or the Red Crystal, together with its national colours, on its lower, upper and lateral surfaces.
  - (b) A medical aircraft ought to use additional means of identification where appropriate.
  - (c) A temporary medical aircraft which cannot – either for lack of time or because of its characteristics – be marked with the distinctive emblem, ought to use the most effective means of identification available.
  - (d) Means of identification are intended only to facilitate identification and do not, of themselves, confer protected status.
- 77. In and over areas controlled by friendly forces, the specific protection of medical aircraft of a Belligerent Party is not dependent on the consent of the enemy.
- 78.
  - (a) In and over areas physically controlled by the enemy, as well as in and over those parts of the contact zone which are physically controlled by friendly forces or the physical control of which is not clearly established, the protection of medical aircraft can be fully effective only by virtue of prior consent obtained from the enemy. Although, in the absence of such consent, medical aircraft in the contact zone operate at their own risk, they must nevertheless be respected once they have been identified as such.
  - (b) The consent of the enemy as per paragraph (a) has to be sought in advance (or immediately prior to the commencement of the operation of a medical aircraft) by a Belligerent Party employing a medical aircraft. The request for

consent ought to be accompanied by a detailed flight plan (as set forth in the International Civil Aviation Organization Flight Plan form).

- (c) When given, consent must be express. Consent for activities consistent with the aircraft's medical status, e.g. evacuation of the wounded, sick or shipwrecked, and transportation of medical personnel or material, ought not to be refused, unless on reasonable grounds.
79. Any conditions of consent obtained from the enemy for the protection of a medical aircraft must be adhered to strictly.
80. (a) While flying over an area covered in Rule 78 (a), medical aircraft may be ordered to land or to alight on water to permit inspection. Medical aircraft must obey any such order.
- (b) If inspection reveals that the medical aircraft has been engaged in activities consistent with its medical status, it must be authorized to continue its flight without delay.
- (c) However, if the medical aircraft has engaged in activities inconsistent with its medical status, or if it has flown without or in breach of a prior agreement, then it may be seized. Its occupants must then be treated in accordance with the relevant rules of the law of international armed conflict.
- (d) Any aircraft seized which had been assigned as a permanent medical aircraft may be used thereafter only as a medical aircraft.
81. A medical aircraft must not possess or employ equipment to collect or transmit intelligence harmful to the enemy. It may, however, be equipped with encrypted communications equipment intended solely for navigation, identification and communication consistent with the execution of its humanitarian mission.
82. A medical aircraft may be equipped with deflective means of defence (such as chaff or flares) and carry light individual weapons necessary to protect the aircraft, the medical personnel and the wounded, sick or shipwrecked on board. Carrying of the individual weapons of the wounded, sick or shipwrecked during their evacuation does not entail loss of protection.
83. Subject to Rule 74, a medical aircraft loses its specific protection from attack if it is engaged in acts harmful to the enemy.
84. Except by prior agreement with a Neutral, a belligerent medical aircraft must not fly over or land in the territory of that Neutral, unless it is exercising the right of transit passage through straits used for international navigation or the right of archipelagic sea lanes passage.
85. (a) Should a belligerent medical aircraft, in the absence of a prior agreement with the Neutral or in deviation from the terms of an agreement, enter the neutral airspace, either through navigational error or because of an emergency affecting the safety of the flight, it must make every effort to give notice and to identify itself. Once the aircraft is recognized as a medical

aircraft by the Neutral, it must not be attacked but may be required to land for inspection. Once it has been inspected, and if it is determined in fact to be a medical aircraft, it must be allowed to resume its flight.

- (b) If the inspection reveals that the aircraft is not a medical aircraft, it may be seized. Any combatants on board will be interned by the Neutral in accordance with Rule 170 (c).
86. (a) Search-and-rescue aircraft used to recover military personnel, even if they are not military aircraft, are not entitled to protection.
- (b) Medical aircraft must not be used to search for the wounded, sick and shipwrecked within areas of combat operations, unless pursuant to prior consent of the enemy. If medical aircraft nevertheless operate for such purposes they do so at their own risk.
87. Without prejudice to the status of medical personnel under the relevant provisions of the law of international armed conflict, members of the crew of medical aircraft must not be captured by the enemy and must be allowed to carry out their mission.

### **Section M: Specific Protection of the Natural Environment**

#### **I. General rule**

88. The destruction of the natural environment carried out wantonly is prohibited.

#### **II. Specifics of air or missile operations**

89. When planning and conducting air or missile operations, due regard ought to be given to the natural environment.

### **Section N: Specific Protection of Other Persons and Objects**

#### **I. Civil defence**

90. (a) Specific protection must be provided to civil defence organizations and their personnel, whether civilian or military. They must be entitled to perform their civil defence tasks except in the case of imperative military necessity.
- (b) Specific protection must also be provided to buildings and materiel used for civil defence purposes and to shelters provided for the civilian population. Objects used for civil defence purposes may not be destroyed or diverted from their proper use except by the Belligerent Party to which they belong.
91. Belligerent Parties have to endeavour to ensure that – while exclusively devoted to the performance of civil defence tasks – their civil defence organizations, personnel, buildings and materials, as well as shelters provided to the civilian population, are identified as such by the recognized international distinctive sign for civil defence and any other appropriate means of identification.



92. The protection to which civilian civil defence organizations, their personnel, buildings, shelters and materiel are entitled does not cease unless they commit or are used to commit, outside their proper tasks, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

## **II. Cultural property**

### **(i) Use of cultural property**

93. (a) Belligerent Parties must refrain from any use of cultural property and its immediate surroundings, or of the appliances in use for its protection, for purposes which are likely to expose it to destruction or damage.
- (b) Cultural property or its immediate surroundings may only be used for military purposes in cases where military necessity imperatively so requires. Such decision can only be implemented after the emblems identifying the object in question as cultural property have been removed.
94. Belligerent Parties ought to facilitate the identification and protection of cultural property under their control, by marking it with the internationally recognized emblem and by providing the enemy with timely and adequate information about its location. However, the absence of such measures does not deprive cultural property of its protection under the law of international armed conflict.

### **(ii) Attacks against cultural property**

95. (a) Subject to paragraph (b) and to Rule 96, Belligerent Parties must refrain from any act of hostility directed against cultural property.
- (b) Cultural property, or its immediate surroundings, may only be attacked in cases where military necessity imperatively so requires.
- (c) In attacking, through air or missile attacks, military objectives in the immediate surroundings of cultural property, the Belligerent Parties must take feasible precautions to avoid damage to the cultural property (see Section G of this Manual).
96. Whenever cultural property has become a military objective, the decision to attack the object must be taken by an appropriate level of command, and with due consideration of its special character as cultural property. An effective advance warning should be given whenever circumstances permit and an attack should only be conducted if the warning remains unheeded.

## **III. Objects indispensable to the survival of the civilian population**

97. (a) Starvation of civilians as a method of warfare is prohibited.

- (b) It is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying the civilian population their use.
- (c) The prohibitions in paragraph (b) do not apply to such of the objects covered by it as are used by the enemy:
  - (i) as sustenance solely for the members of its armed forces; or
  - (ii) if not as sustenance, then in direct support of military action, provided, however, that in no event can actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

#### **IV. UN personnel**

98. (a) UN personnel must be respected and protected.
- (b) Directing attacks against UN personnel is prohibited, as long as they are entitled to the protection given to civilians.
- (c) Directing attacks against material, installations, units and vehicles of the UN is prohibited, unless they constitute military objectives.

#### **V. Protection by special agreement**

99. Belligerent Parties may agree at any time to protect persons or objects not otherwise covered by this Manual.

### **Section O: Humanitarian Aid**

#### **I. General rules**

100. (a) If the civilian population of any territory under the control of a Belligerent Party is not adequately provided with food, medical supplies, clothing, bedding, means of shelter or other supplies essential to its survival, relief actions which are humanitarian and impartial in character – and conducted without adverse distinction – should be undertaken, subject to agreement of the Parties concerned. Such agreement cannot be withheld in occupied territories.
- (b) Relief actions may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross.

101. The Parties concerned must allow and facilitate rapid and unimpeded passage of relief consignments, equipment and personnel in accordance with Rule 100, subject to technical arrangements including search.
102. (a) Humanitarian relief personnel, acting within the prescribed parameters of their mission, must be respected and protected. The protection extends to humanitarian transports, installations and goods.  
(b) Each Belligerent Party in receipt of relief consignments must, to the fullest extent practicable, assist the relief personnel referred to in paragraph (a) in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

## **II. Specifics of air or missile operations**

103. Whenever circumstances permit, Belligerent Parties conducting air or missile operations ought to suspend air or missile attacks in order to permit the distribution of humanitarian assistance.
104. “Technical arrangements” as used in Rule 101 may include such matters as:
  - (a) Establishment of air corridors or air routes.
  - (b) Organization of air drops.
  - (c) Agreement on flight details (i.e. timing, route, landing).
  - (d) Search of relief supplies.

### **Section P: “Exclusion Zones” and No-Fly Zones**

#### **I. General rules**

105. (a) A Belligerent Party is not absolved of its obligations under the law of international armed conflict by establishing “exclusion zones” or no-fly zones.  
(b) Zones designated for unrestricted air or missile attacks are prohibited.
106. Nothing in this Section of the Manual ought to be deemed as derogating from the right of a Belligerent Party:
  - (a) to control civil aviation in the immediate vicinity of hostilities; or
  - (b) to take appropriate measures of force protection in the form of, e.g., the establishment of warning zones.

#### **II. “Exclusion zones” in international airspace**

107. Should a Belligerent Party establish an “exclusion zone” in international airspace:

- (a) The same rules of the law of international armed conflict will apply both inside and outside the “exclusion zone”.
- (b) The extent, location and duration of the “exclusion zone” and the measures imposed must not exceed what is reasonably required by military necessity.
- (c) The commencement, duration, location and extent of the “exclusion zone”, as well as the restrictions imposed, must be appropriately notified to all concerned.
- (d) The establishment of an “exclusion zone” must neither encompass nor completely bar access to the airspace of Neutrals.
- (e) Due regard must be given to the lawful use by Neutrals of their Exclusive Economic Zones and continental shelf, in particular artificial islands, installations, structures and safety zones.

### **III. No-fly zones in belligerent airspace**

- 108. A Belligerent Party may establish and enforce a no-fly zone in its own or in enemy national airspace.
- 109. The commencement, duration, location and extent of the no-fly zones must be appropriately notified to all concerned.
- 110. Subject to the Rules set out in Sections D and G of this Manual, aircraft entering a no-fly zone without specific permission are liable to be attacked.

## **Section Q: Deception, Ruses of War and Perfidy**

### **I. General rules**

- 111. (a) It is prohibited to kill or injure an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of the law of international armed conflict, with the intent to betray that confidence, constitute perfidy.
- (b) The following acts are examples of perfidy as per paragraph (a): feigning of civilian, neutral or other protected status.
- 112. Without prejudice to the rules of naval warfare, the following acts are prohibited at all times irrespective of whether or not they are perfidious:
  - (a) Improper use of the distinctive emblem of the Red Cross, Red Crescent or Red Crystal, or of other protective emblems, signs or signals provided for by the law of international armed conflict.
  - (b) Improper use of the flag of truce.
  - (c) Improper use by a Belligerent Party of the flags or military emblems, insignia or uniforms of the enemy.

- (d) Use by a Belligerent Party of the flags or military emblems, insignia or uniforms of Neutrals.
  - (e) Use by a Belligerent Party of the distinctive emblem of the United Nations, except as authorized by that Organization.
113. Ruses of war are permitted. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of the law of international armed conflict and which do not meet the definition of perfidy in Rule 111 (a).

## **II. Specifics of air or missile operations**

114. In air or missile combat operations, the following acts are examples of perfidy (subject to the definition in Rule 111 (a)):
- (a) The feigning of the status of a protected medical aircraft, in particular by the use of the distinctive emblem or other means of identification reserved for medical aircraft.
  - (b) The feigning of the status of a civilian aircraft.
  - (c) The feigning of the status of a neutral aircraft.
  - (d) The feigning of another protected status.
  - (e) The feigning of surrender.
115. Irrespective of whether or not they are perfidious, in air or missile combat operations, the following acts are prohibited at all times:
- (a) Improper use by aircraft of distress codes, signals or frequencies.
  - (b) Use of any aircraft other than a military aircraft as a means of attack.
116. In air or missile combat operations, the following are examples of lawful ruses of war:
- (a) Mock operations.
  - (b) Disinformation.
  - (c) False military codes and false electronic, optical or acoustic means to deceive the enemy (provided that they do not consist of distress signals, do not include protected codes, and do not convey the wrong impression of surrender).
  - (d) Use of decoys and dummy-construction of aircraft and hangars.
  - (e) Use of camouflage.
117. Aircrews conducting combat operations on land or on water – outside their aircraft – must distinguish themselves from the civilian population, as required by the law of international armed conflict.

## **Section R: Espionage**

### **I. General rules**

118. Espionage consists of activities by spies. A spy is any person who, acting clandestinely or on false pretences, obtains or endeavours to obtain information of military value in territory controlled by the enemy, with the intention of communicating it to the opposing Party.
119. Acts of espionage are not prohibited under the law of international armed conflict.
120. A member of the armed forces of a Belligerent Party who gathers or attempts to gather information in a territory controlled by the enemy is not considered a spy if, while so acting, he is in the uniform of his armed forces.
121. A member of the armed forces of a Belligerent Party who falls into the power of the enemy while engaging in espionage does not have the right to prisoner of war status and may be prosecuted for his acts before domestic courts.
122. A member of the armed forces of a Belligerent Party who, having been engaged in espionage rejoins his own forces but is subsequently captured by the enemy, may no longer be prosecuted for his previous acts of espionage.

### **II. Specifics of air or missile operations**

123. Military aircraft on missions to gather, intercept or otherwise gain information are not to be regarded as carrying out acts of espionage.
124. The use of civilian aircraft and State aircraft other than military aircraft of a Belligerent Party, flying outside the airspace of or controlled by the enemy – in order to gather, intercept or otherwise gain information – is not to be regarded as espionage, although the aircraft may be attacked at such time as it is carrying out its information-gathering mission.

## **Section S: Surrender**

### **I. General rules**

125. Enemy personnel may offer to surrender themselves (and the military equipment under their control) to a Belligerent Party.
126. It is prohibited to deny quarter to those manifesting the intent to surrender.
127. Surrender is contingent on three cumulative conditions:
  - (a) The intention to surrender is communicated in a clear manner to the enemy.
  - (b) Those offering to surrender must not engage in any further hostile acts.
  - (c) No attempt is made to evade capture.

**II. Specifics of air or missile operations**

128. Aircrews of a military aircraft wishing to surrender ought to do everything feasible to express clearly their intention to do so. In particular, they ought to communicate their intention on a common radio channel such as a distress frequency.
129. A Belligerent Party may insist on the surrender by an enemy military aircraft being effected in a prescribed mode, reasonable in the circumstances. Failure to follow any such instructions may render the aircraft and the aircrew liable to attack.
130. Aircrews of military aircraft wishing to surrender may, in certain circumstances, have to parachute from the aircraft in order to communicate their intentions. The provisions of this Section of the Manual are without prejudice to the issue of surrender of aircrews having descended by parachute from an aircraft in distress (see Section T of this Manual).
131. Subject to Rule 87, surrendering combatants, as well as captured civilians accompanying the armed forces (such as civilian members of military aircraft crews) and crews of civilian aircraft of the Belligerent Parties who do not benefit from a more favorable treatment, are entitled to prisoner of war status.

**Section T: Parachutists from an Aircraft in Distress**

132. (a) No person descending by parachute from an aircraft in distress may be made the object of attack during his descent.  
(b) Upon landing in a territory controlled by the enemy, a person who descended by parachute from an aircraft in distress is entitled to be given an opportunity to surrender prior to being made the object of attack, unless it is apparent that he is engaging in a hostile act.
133. This Section does not apply to airborne troops.

**Section U: Contraband, Interception, Inspection and Capture****I. Enemy aircraft and goods on board such aircraft**

134. Enemy civilian aircraft and goods on board may be captured as prize on the ground or – when flying outside neutral airspace – be intercepted and ordered to proceed to a reasonably accessible belligerent airfield that is safe for the type of aircraft involved. Prior exercise of inspection is not required.
135. As an exceptional measure, captured enemy civilian aircraft and goods on board may be destroyed when military circumstances preclude taking the aircraft for prize adjudication, provided that all persons on board have first been placed in safety and documents relating to the prize have been preserved.
136. (a) Enemy military, law-enforcement and customs aircraft are booty of war. Prize procedures do not apply to captured enemy military aircraft and

other State aircraft, inasmuch as their ownership immediately passes to the captor government by virtue of capture.

- (b) If a military aircraft becomes disabled or experiences technical problems that require it to land in enemy territory, the aircraft may be seized and destroyed or converted for use by the enemy.
- (c) Captured aircrews of military aircraft covered under this Rule are prisoners of war.

## **II. Neutral civilian aircraft**

- 137. (a) Belligerent Parties are entitled to intercept neutral civilian aircraft outside neutral airspace, provided that due regard is given to the safety of civil aviation.
  - (b) If, after interception, reasonable grounds for suspecting that a neutral civilian aircraft is subject to capture exist, it may be ordered to proceed for inspection at a reasonably accessible belligerent airfield that is safe for the type of aircraft involved.
  - (c) As an alternative to capture as prize, a neutral civilian aircraft may consent to be diverted from its declared destination.
138. In order to avoid the need for interception, Belligerent Parties are allowed to establish reasonable measures for the inspection of the cargo of neutral civilian aircraft and the certification that an aircraft is not carrying contraband.
139. The fact that a neutral civilian aircraft has submitted to such measures of supervision as the inspection of its cargo and grant of certificates of non contraband cargo by one Belligerent Party is not an act of unneutral service with regard to the opposing Belligerent Party.
140. Neutral civilian aircraft are subject to capture as prize outside neutral airspace, if it is determined as a result of inspection or by other means that any one of the following conditions is fulfilled:
- (a) They are carrying contraband.
  - (b) They are on a flight especially undertaken to transport individual passengers who are members of the enemy's armed forces.
  - (c) They are operating directly under enemy control, orders, charter, employment or direction.
  - (d) They present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal documents.
  - (e) They are violating regulations established by a Belligerent Party within the immediate area of military operations.



- (f) They are engaged in breach of an aerial blockade (see Section V of this Manual).
141. Goods on board neutral civilian aircraft outside neutral airspace are subject to capture as prize in any one of the following cases:
- (a) They constitute contraband.
  - (b) The neutral civilian aircraft is engaged in activities rendering it a military objective under Rule 174.
142. The capture of neutral civilian aircraft and of goods on board can be exercised only in the cases provided for in Rules 140 and 141 and is subject to prize adjudication.

### **III. Safeguards**

143. In all circumstances of capture of a civilian aircraft – whether neutral or enemy – the safety of passengers and crew on board must be provided for. Documents and papers relating to the aircraft must be safeguarded.

### **IV. Determination of enemy character**

144. The fact that a civilian aircraft bears the marks of an enemy Belligerent Party is conclusive evidence of its enemy character. Enemy character of a civilian aircraft can also be determined by registration, ownership, charter or other appropriate criteria.
145. For the purposes of capture and prize, a civilian aircraft bearing no marks is presumed to have enemy character.
146. (a) If the commander of a military aircraft suspects that a civilian aircraft with neutral marks in fact has enemy character, the commander is entitled to exercise the right of interception and, if circumstances require, the right to divert for the purpose of inspection.
- (b) If it is established, after inspection, that the civilian aircraft with neutral marks does not have enemy character, it must be allowed to proceed without delay.

### **Section V: Aerial Blockade**

147. An aerial blockade is a belligerent operation to prevent aircraft (including UAVs/ UCAVs) from entering or exiting specified airfields or coastal areas belonging to, occupied by, or under the control of the enemy.
148. (a) An aerial blockade must be declared by a Belligerent Party and notified to all States.

- (b) The declaration must specify the commencement, duration, location, and extent of the aerial blockade and the period in which neutral aircraft may leave the blockaded area.
  - (c) Whenever feasible, a Notice to Airmen (NOTAM) about the establishment of the aerial blockade ought to be issued by the Blockading Party in accordance with Rule 55.
149. (a) The cessation, temporary lifting, re-establishment, extension or other alteration of an aerial blockade must be declared and notified to all States.
- (b) Whenever feasible, a Notice to Airmen (NOTAM) about any changes under paragraph (a) ought to be issued by the Blockading Party in accordance with Rule 55.
150. An aerial blockade must not bar access to the airspace of Neutrals.
151. An aerial blockade must be effective. The question whether such a blockade is effective is a question of fact.
152. The force maintaining the aerial blockade may be deployed at a distance determined by military requirements.
153. (a) An aerial blockade may be enforced and maintained by a combination of lawful means of warfare, provided that this combination does not result in acts inconsistent with the law of international armed conflict.
- (b) Aircraft in distress must be allowed to enter the blockaded area when necessary.
154. To the extent that an aerial blockade is maintained and enforced exclusively by military aircraft, the condition of effectiveness (Rule 151) requires a sufficient degree of air superiority.
155. An aerial blockade must be enforced impartially as regards the aircraft of all States.
156. For an aerial blockade to be considered effective under Rule 151, it is required that civilian aircraft believed on reasonable grounds to be breaching, or attempting to breach, an aerial blockade, be forced to land, inspected, captured or diverted. If civilian aircraft clearly resist interception, an order to land and capture, they are at risk of attack after prior warning. As for civilian airliners, Section J applies.
157. The establishment or maintenance of an aerial blockade is prohibited in any one of the following cases:
- (a) Its sole or primary purpose is to starve the civilian population or to deny that population other objects essential for its survival.
  - (b) The suffering of the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the aerial blockade.

158. Subject to Rule 100, if the civilian population of the blockaded area is inadequately provided with food or other objects essential for its survival, the Blockading Party must provide for free passage of such foodstuffs or other essential supplies, for example by establishing a humanitarian air corridor, subject to the following conditions:
- (a) The Blockading Party retains the right to prescribe the technical arrangements, including inspection, under which such passage is permitted.
  - (b) The distribution of such supplies may be made subject to the condition that it will be carried out under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.
159. The Blockading Party must allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including inspection, under which such passage is permitted.

### **Section W: Combined Operations**

160. A combined operation is an operation in which two or more States participate on the same side of an international armed conflict, either as members of a permanent alliance or an *ad hoc* coalition.
161. A State may not invoke its participation in combined operations as justification for its failure to perform its obligations under the law of international armed conflict.
162. The legal obligations of a State participating in combined operations do not change when its armed forces are operating in a multinational force under the command or control of a military commander of a different nationality.
163. A State's obligations under the law of international armed conflict do not change when its air or missile forces are operating from the territory of a co-belligerent, including when its air or missile forces are operating from the territory of a co-belligerent that has different obligations under the law of international armed conflict.
164. A State may participate in combined operations with States that do not share its obligations under the law of international armed conflict although those other States might engage in activities prohibited for the first State.

### **Section X: Neutrality**

#### **I. Scope of application**

165. Where the Security Council takes binding preventive or enforcement measures under Chapter VII of the Charter of the United Nations – including the

authorization of the use of force by a particular State or group of States – no State may rely upon the law of neutrality to justify conduct which would be incompatible with its obligations under the Charter of the United Nations.

## **II. General rules**

166. Hostilities between Belligerent Parties must not be conducted within neutral territory.
167. (a) Belligerent Parties are prohibited in neutral territory to conduct any hostile actions, establish bases of operations or use such territory as a sanctuary. Furthermore, neutral territory must not be used by Belligerent Parties for the movement of troops or supplies, including overflights by military aircraft or missiles, or for operation of military communication systems.
- (b) However, when Belligerent Parties use for military purposes a public, internationally and openly accessible network such as the Internet, the fact that part of this infrastructure is situated within the jurisdiction of a Neutral does not constitute a violation of neutrality.
168. (a) A Neutral must not allow any of the acts referred to in Rule 167 (a) to occur within its territory and must use all the means available to it to prevent or terminate them.
- (b) If the use of the neutral territory or airspace by a Belligerent Party constitutes a serious violation, the opposing Belligerent Party may, in the absence of any feasible and timely alternative, use such force as is necessary to terminate the violation of neutrality.
169. The fact that a Neutral resists, even by force, attempts to violate its neutrality cannot be regarded as a hostile act. However, the use of force by the Neutral must not exceed the degree required to repel the incursion and maintain its neutrality.

## **III. Specifics of air or missile operations**

170. (a) Any incursion or transit by a belligerent military aircraft (including a UAV/UCAV) or missile into or through neutral airspace is prohibited. This is without prejudice to the right of transit passage through straits used for international navigation or archipelagic sea lanes passage.
- (b) A Neutral must exercise surveillance, to the extent that the means at its disposal allow, to enable it to prevent the violation of its neutrality by belligerent forces.
- (c) In the event a belligerent military aircraft enters neutral airspace (other than straits used for international navigation or archipelagic sea lanes), the Neutral must use all the means at its disposal to prevent or terminate that

violation. If captured, the aircraft and their crews must be interned for the duration of the armed conflict.

171. Belligerent Parties must not commit any of the following acts:

- (a) Attack on or capture of persons or objects located in neutral airspace.
- (b) Use of neutral territory or airspace as a base of operations – for attack, targeting, or intelligence purposes – against enemy targets in the air, on land or on water outside that territory.
- (c) Conducting interception, inspection, diversion or capture of vessels or aircraft in neutral territory.
- (d) Any other activity involving the use of military force or contributing to the war-fighting effort, including transmission of data or combat search-and-rescue operations in neutral territory.

172. (a) Belligerent military aircraft may not enter the airspace of Neutrals, except that:

- (i) Belligerent military aircraft in distress may be permitted to enter neutral airspace and to land in neutral territory under such safeguards as the Neutral may wish to impose. The Neutral is obligated to require such aircraft to land and to intern the aircraft and their crews.
- (ii) The airspace above neutral international straits and archipelagic sea lanes remains open at all times to belligerent aircraft, including armed military aircraft engaged in transit or archipelagic sea lanes passage.
- (iii) The Neutral may permit belligerent military aircraft to enter for purposes of capitulation.

- (b) Neutrals must use the means at their disposal to require capitulating belligerent military aircraft to land within their territory, and must intern the aircraft and their crews for the duration of the international armed conflict. Should such an aircraft commit hostile acts, or should it fail to follow the instructions to land, it may be attacked without further notice.

173. A Neutral is not bound to prevent the private export or transit on behalf of a Belligerent Party of aircraft, parts of aircraft, or material, supplies or munitions for aircraft. However, a Neutral is bound to use the means at its disposal:

- (a) To prevent the departure from its jurisdiction of an aircraft in a condition to make a hostile attack against a Belligerent Party, if there is reason to believe that such aircraft is destined for such use.
- (b) To prevent the departure from its jurisdiction of the crews of military aircraft, as well as passengers and crews of civilian aircraft, who are members of the armed forces of a Belligerent Party.

174. Without prejudice to Sections J and V of this Manual, the following activities may render a neutral civilian aircraft a military objective:
- (a) It is believed on reasonable grounds to be carrying contraband, and, after prior warning or interception, it intentionally and clearly refuses to divert from its destination, or intentionally and clearly refuses to proceed for inspection to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible.
  - (b) Engaging in hostile actions in support of the enemy, e.g. intercepting or attacking other aircraft; attacking persons or objects on land or sea; being used as a means of attack; engaging in electronic warfare; or providing targeting information to enemy forces.
  - (c) Facilitating the military actions of the enemy's armed forces, e.g. transporting troops, carrying military materials, or refuelling military aircraft.
  - (d) Being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance or command, control and communications missions.
  - (e) Refusing to comply with the orders of military authorities, including instructions for landing, inspection and possible capture, or it clearly resists interception.
  - (f) Otherwise making an effective contribution to military action.
175. The fact that a civilian aircraft bears the marks of a Neutral is *prima facie* evidence of its neutral character.

**Case No. 85, United States, The Prize Cases**

[Source: Supreme Court of the United States, 67 US 635 (1862), available on <http://laws.findlaw.com/us/67/635.html>]

**THE BRIG AMY WARWICK; THE SCHOONER CRENSHAW;  
THE BARQUE HIAWATHA; THE SCHOONER BRILLIANTE****[The Prize Cases]****December 1862****PRIOR HISTORY:**

[...]

The whole matter comes, then, to a few propositions. To justify this condemnation, there must have been war at the time of this so-called capture; not war as the old essayists describe it, beginning with the war between Cain and Abel; not a fight between two, or between thousands; not a conflict carried on with these or those weapons, or by these or those numbers of men; but war as known to international law – war carrying with it the mutual recognition of the opponents as belligerents; giving rise to the right of blockade of the enemy's ports, and affecting all other nations with the character of neutrals, until they shall have mixed themselves in the contest. War, in this, the only sense important to this question, is matter of law, and not merely matter of fact. [...]

It is worthy of remark that the sovereign can exercise these belligerent powers at first, if ever. The lapse of time gives him no new rights of war. The recognition of the rebel state as belligerent by foreign powers, confers no right on the sovereign. It only recognizes an existing right. The recognition of rebel States as sovereign by foreign powers, confers on the sovereign no new war power. The moment he ceases to claim jurisdiction over the rebel territory, the war ceases to be a civil war, and becomes an international war. [...]

According to this theory, if the civil war is one in which each party claims to be the state, neither can exercise belligerent powers. If neither makes that claim, both may exercise them. If one claims to be the state, and the other does not, (as in this case,) the latter only can exercise them. [...]

**OPINION BY: GRIER**

[...]

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents – the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

“A civil war,” says Vattel, “breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

“This being the case, it is very evident that the common laws of war – those maxims of humanity, moderation, and honor – ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, the war will become cruel, horrible, and every day more destructive to the nation.”

As a civil war is never publicly proclaimed, *eo nomine* against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.

The true test of its existence, as found in the writing of the sages of the common law, may be thus summarily stated: “When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land.” [...]

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an “insurrection” by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. [...]

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in



Europe, to wit, on the 13<sup>th</sup> of May, 1861, the Queen of England issued her proclamation of neutrality, “recognizing hostilities as existing between the Government of the United States of America and certain States styling themselves the Confederate States of America.” This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. [...]

### DISCUSSION

1. Is not the definition of war used by the Court (“That state in which a nation prosecutes its right by force”) a very Clausewitzian approach? Is such recourse to war permitted today? (UN Charter, Art. 2(4)) Does this explain why the UN International Law Commission (ILC) chose not to delve into issues concerning *ius in bello*? Was this an appropriate decision by the ILC?
2. Are non-international armed conflicts treated the same as international armed conflicts under IHL? Does the Court suggest that they should be?
3.
  - a. Must war be declared for IHL to apply? (GC I-IV, Art. 2; P I, Art. 1(3); P II, Art. 1) Is that necessary only in cases of internal rebellion? Or is it also necessary in conflicts between States?
  - b. Today, does application of IHL in armed conflict really require mutual recognition of opponents as belligerents? Also in non-international armed conflict? (GC I-IV, Art. 3(4))
4.
  - a. Under international law today, what factors cause an internal conflict, such as a civil war, to become an international conflict? [See, e.g., **Case No. 211**, ICTY, *The Prosecutor v. Tadic* [particularly Part A., paras 72-73] and **Case No. 213**, ICTY, *The Prosecutor v. Rajic* [particularly Part A., paras 13-31]]
  - b. Does recognition by another State, e.g. of insurgents, automatically make a conflict international?
  - c. When do internal tensions or disturbances reach such a level of intensity that common Art. 3 and/or Protocol II apply? Is the test mentioned in the writings of the sages of the common law cited by the Court really the true test?
  - d. Is the existence of an armed conflict in contemporary IHL a matter of fact or a matter of law?

**Document No. 86, Switzerland Acting as Protecting Power in World War II**

[Source: Zayas, A. de, *The Wehrmacht War Crimes Bureau, 1939-1945*, University of Nebraska Press, 1989, pp.82-83]

**DIPLOMATIC PROTECTION**

[...]

**The Third Reich and the Anglo-Americans**

One of the tasks of a Protecting Power is to communicate one government's accusation of another's violation of international law. The German Foreign Office, for instance, would send a note to the German Embassy in Bern, Switzerland; the embassy would transmit that note to the Swiss Foreign Office (called the Federal Political Department), which would telegraph the note to the Swiss Embassy in London or Washington, which would bring it to the attention of the British or American government. After due investigation an official answer would be drafted by the British Foreign Office or the U.S. Department of State and telegraphed to its embassy in Bern for delivery to the Swiss Federal Political Department, which would complete the circle by informing the German Foreign Office through the Swiss Embassy in Berlin. [...]

The German Foreign Office obtained its information about violations of the laws of war from many sources – first of all through the War Crimes Bureau but also through its own liaison officers at the High Command of the Army, Navy and Air Force, in the Wehrmacht propaganda department, and with the armies in the field. The Bureau however, besides making its documents available to the Foreign Office, often itself recommended lodging a protest with the Protecting Power and sometimes prepared the draft of the note.

Perhaps the most frequent cause of protest was the treatment of German prisoners of war, one of the most celebrated cases being the shackling of German soldiers taken prisoner by British commandos at Dieppe in August 1942. Another case involved the misuse of German POWs on dangerous assignments close to the front line. On 20 December 1944 the Bureau sent to the Wehrmacht operations staff a copy of the sworn deposition of Private Hans Greiss, who alleged that he and other German POWs had been forced to dig trenches at the American battle front close to Kirchberg, Jülich, in November 1944. Greiss stated that he and his comrades had been compelled to work under German artillery fire and that the resulting casualties included two dead and twenty wounded. Goldsche recommended lodging a diplomatic protest against the British and American governments, "since this case entails a very serious violation of the Convention on the Treatment of Prisoners of War (Articles 7 and 9)" (1929 Geneva Convention relative to POWs). The operations staff passed the recommendation to the German Foreign Office, which agreed and transmitted an official protest on January 26, 1945. [...]

## Document No. 87, German Invasion of Crete

[Source: Zayas, A. de, *The Wehrmacht War Crimes Bureau, 1939-1945*, University of Nebraska Press, 1989, pp. 156-157]

[...]

Judge Rüdell, in charge of investigating allegations about crimes committed against parachutists, first questioned numerous wounded soldiers who had been flown to hospitals in Athens. Their testimony convinced the chief of staff of the 11<sup>th</sup> Air Corps, Major General Alfred Schlemm, that a special commission under intelligence officer Major Johannes Bock should be sent forthwith to Crete to continue on-site investigations. Rüdell, as a member of the commission, flew to Crete on May 28, 1941. On 14 July he submitted a long report more favorable to the British military than to the Cretan civilian population. He summed up:

On the basis of sworn testimony of German soldiers who participated in the fighting on Crete, [plus] interrogation of Greek and British soldiers, and aided by photographic evidence, we could establish the following:

1. Participation of civilians and policemen in open battle on all battlefields, especially in the western parts of the island; in some areas civilians offered organized resistance according to military principles. The civilian population, including youngsters about ten years old, fired with all sorts of weapons, also with dum-dum and hunting ammunition. Bush and tree snipers were repeatedly observed... .
2. Dead and wounded soldiers were robbed and deprived of parts of their clothing, primarily by the civilian population.
3. On corpses of German soldiers countless mutilations have been established; some had their genitals amputated, eyes put out, ears and noses cut off; others had knife wounds in the face, stomach, and back; throats were slit, and hands chopped off. The majority of these mutilations were probably defilement of the dead bodies; only in a few cases does the evidence indicate that the victim was maltreated and tortured to death. A number of corpses were found with hands, arms, or legs tied up; in one case the corpse had a cord around his neck... .
4. On the enemy side the use of German uniforms, especially parachutist combinations and steel helmets, was observed. Similarly, in order to deceive the other side, they signaled with swastika flags.
5. Shipwrecked soldiers of the light squadron "West"... which had been attacked and partly destroyed by British warships in the night of the 21-22 May, were shot at by the British. Soldiers swimming in the water with life vests or paddling their lifeboats were fired upon and many killed or wounded... .

From these investigations it appears that the mutilation of corpses and the maltreatment of soldiers were committed almost exclusively by Cretan civilians. In some cases survivors observed that civilians fell upon dead soldiers,

robbed them, and cut them with knives. In only one case were enemy soldiers involved in such acts; on the contrary, the British attached great importance to the proper treatment of prisoners of war, prevented abuses by Greek soldiers and civilians, and did all was necessary in the medical field. On the other hand, the shooting of shipwrecked was carried out exclusively by British warships. It is difficult to determine how it was that the civilian population of Crete participated in the fighting and committed atrocities; the statements made by the Cretans and by the British prisoners must be taken *cum grano salis*, because they each tend to put the blame on the other.

**Document No. 88, Germany/United Kingdom, Shackling of Prisoners of War**

[Source: Zayas, A. de, *The Wehrmacht War Crimes Bureau, 1939-1945*, University of Nebraska Press, 1989, p.108]

**The Shackling of Prisoners**

Perhaps the most notorious example of an official German reprisal concerned the shackling of prisoners of war following the British commando landing in Dieppe, France, in August 1942. As witness depositions show, numerous Germans who had been surprised by the British and who could not be immediately treated as prisoners of war were tied up for the duration of the commando action. In retaliation, Hitler ordered that all British prisoners of war in Germany should be similarly tied up. As counter reprisal the British government ordered German prisoners of war to be shackled. Only through the constant efforts of the International Committee of the Red Cross was this vicious circle of reprisals and counter reprisals broken.

**Document No. 89, British Policy Towards German Shipwrecked**

[Source: Zayas, A. de, *The Wehrmacht War Crimes Bureau, 1939-1945*, University of Nebraska Press, 1989, pp. 258-259]

There is no doubt that official British policy was in keeping with the laws of war. But this did not preclude discussion of the limits of the laws of war in the British ministries – particularly, discussion of the possible military advantages of a harsher policy toward shipwrecked enemy crews.

Early in 1943 the German submarine commander Hans Diedrich von Tiesenhausen, who had been rescued by a British destroyer after his submarine was sunk, submitted a protest to the British government and asked that it be forwarded to the Protecting Power. He alleged that after his submarine had shown the white flag, British planes continued the attack and machine-gunned the shipwrecked crew. Von Tiesenhausen's report was considered at a British Foreign Office meeting on 3 June 1943. Legal advisor Patrick Dean, who chaired the meeting, advised against forwarding the report to the Protecting Power. He had already argued at the Air Ministry on 14 May 1943 that an airplane cannot capture a submarine it can only sink it. "The surrender of such vessels should not be accepted unless Allied surface craft in the immediate vicinity are in a position to ensure their capture. In all other circumstances the attack should be pressed home in spite of the flying of a white flag. It has been agreed that for operational reasons this policy should as far as possible be concealed from the German government... if it became known to them, they might institute reprisals against captured British seamen." Yet Dean did not succeed in having his point of view adopted; instead, the Air Ministry drafted very clear instructions for fighter pilots: "In no circumstances is the crew of a U-Boat in the water to be subjected to any form of attack". On 28 May 1943, Dean objected that "circumstances can be imagined (e.g. when a U-Boat crew are swimming from their sunk or damaged U-Boat to an enemy war vessel) where one would have thought that attack upon them from the air was justifiable."

Dean's point of view parallels the German hypothesis with respect to Narvik, that the crews of British destroyers considered it justifiable to shoot at the German shipwrecked because any German sailors who reached land would be incorporated into the German forces there. And it may be that the British destroyers in Narvik acted according to this unwritten policy – but other attacks on shipwrecked survivors were less easily rationalized. A case in point was the machine-gunning of the shipwrecked crew of the U-852 by four British fighter planes on 3 May 1944 near Bender-Beila, Somaliland, which was in British hands so that there was no danger whatsoever that the German crew would join other German forces on land. In fact, the survivors were all taken prisoner shortly after the landing.

This incident is not devoid of historical irony: it was this very U-boat that two months earlier, on 13 March 1944, had sunk the steamer *Peless* in the Atlantic and machine gunned a number of Greek survivors. After the war, in criminal proceedings before a British military court in Hamburg, the commander of the U-852, Heinz Eck, defended his actions on grounds of operational necessity, arguing that Allied air surveillance

was very intensive in the Atlantic and that late in 1943 four German U-boats had been discovered in the same area and sunk by fighter planes. He contended that he had never ordered the killing of survivors; rather, he gave an order to destroy all floating wreckage to prevent Allied planes from using it to find and destroy his ship – even though he knew that a number of shipwrecked would be hit by the shelling and that those not hit would have a much smaller chance of surviving without the larger floating objects to cling to.

[See **Case No. 91**, British Military Court at Hamburg, The Peleus Trial]

**Document No. 90, United Kingdom/Germany,  
Sinking of the Tübingen in the Adriatic**

[Source: Zayas, A., *The Wehrmacht War Crimes Bureau, 1939-1945*, University of Nebraska Press, 1989, pp. 261-266]

**HOSPITAL SHIPS**

[...]

As the bombardment of hospital ships continued, the Bureau compiled a second list of twenty-four cases covering the period from May 1943 to December 1944, including thoroughly documented attacks on the *Erlangen* on June 13 and 15, 1944 and on the *Freiburg* on August 14, 1944. On the basis of these records the German government submitted protest notes to the British government: for instance, a note of November 1, 1944 described attacks on the *Hüxter*, *Innsbruck*, *Erlangen*, *Bonn*, and *Saturnus* as well as upon hospital trains bearing the red cross.

The most significant case on the Bureau's list was the sinking of the *Tübingen* (3,509 tons) on 18 November 1944 at 0745 hours GMT (Central European Time) near Pola, south of Cape Promontore in the Adriatic. The case was all the more remarkable considering that Great Britain had recognized the *Tübingen* as a hospital ship and the British Mediterranean Command knew its exact course. Yet two British Beaufighter planes attacked and sank it.

Apparently, the sinking came as a surprise to the British Foreign Office; in the afternoon of the same day it communicated the news to the Swiss government as Protecting Power. The Swiss telephoned the German delegation in Bern, which in turn cabled the German Foreign Office in Berlin: "Hospital ship *Tübingen* pursuant to assurances given sailed on 17 November... from Bari to Triest. British authorities have been informed that the hospital ship was attacked in the early hours of today by a British plane and severely damaged. The British have ordered an immediate investigation."

The British government sent a second, more extensive note to the Protecting Power on November 19, 1944. The Official German protest followed on 24 November:

On 18 November 1944 at 0745 hours near Pola the German hospital ship *Tübingen* was attacked by two double-engine British bombers with machine guns and bombs so that it sank, although the course of the hospital ship had been communicated to the British government well in advance of its voyage to Saloniki and back for the purpose of transporting wounded German soldiers. Numerous members of the crew were thereby killed and wounded. The German government emphatically protests the serious violations of international law committed by the sinking of the hospital ship *Tübingen*.

The German government demands that the British government take all necessary measures to prevent the recurrence of such – undoubtedly deliberate – violations of international law. It further reserves the right to draw the appropriate consequences of this and many other violations of international law especially



such as were communicated to the Swiss delegation in Berlin by verbal note of November 1, 1944.

This note was forwarded to London by the Swiss on 27 November 1949.

The British Air Ministry had already ordered an inquiry on 18 November 1944, and on 29 November the British Foreign Office informed its delegation in Bern that an investigation of the case was in progress. On 19 November the Royal Air Force headquarters in the Mediterranean had telegraphed the Air Ministry: "The report is too long and intricate to lend itself to summarizing in a signal, but the incident was the result of a curious mixture of bad luck and stupidity." It appears that though a chain of errors on the part of the British pilots and a misunderstanding in the wireless transmission, the order was in fact given to attack the ship. The official British answer, submitted to Germany on 4 December 1944, explained that

four aircraft circled the ship, but as the leader was still unable to identify her he decided to signal sighting details to base and to request instructions. For technical reasons he was unable to transmit the signal himself and he therefore instructed the second aircraft in his section to do so.

The captain of the second aircraft... had identified the ship as a hospital ship and incorrectly assumed that his leader had done so too. He supposed, however, that there must be some special circumstances justifying an exception from standing orders prohibiting attacks on hospital ships and transmitted a message to the following effect: "I H.S. 350" (one hospital ship – course 350 degrees) and giving her position. Owing to atmospheric conditions, this message was received by base incorrectly and read to the following effect: "I H.S.L. 350" (one high-speed launch – course 350 degrees) with a position in the middle of the Gulf of Venice. A second version of this message showing the position of the ship as overland in the Istrian Peninsula and requesting instructions was later retransmitted by another station, but it again incorrectly referred to a high-speed launch.

These messages were then brought to the notice of the controlling officer, who ascertained that no Allied high-speed launch was in the position indicated in the first version of the message, which was in any case many miles from the *Tübingen's* position, and gave orders to attack. On receipt of these orders the leader, who was still unaware that the ship was a hospital ship, instructed his section to attack. It was not until he passed over the ship after completing his attack that he distinguished the name *Tübingen* on her side and realized her identity.

His Majesty's Government have given instructions that the circumstances attending this attack shall be fully investigated at a court of enquiry with a view to preventing any similar incident, and that if the facts disclosed justify such a course, appropriate disciplinary action shall be taken...

Although as stated above, his Majesty's Government regret the sinking of the ship in the circumstances described, they cannot refrain from remarking that had the *Tübingen* been properly illuminated at the time of sighting in accordance with international practice, the leader of the section would have had no difficulty in

identifying her as a hospital ship and the incident would thus have been avoided. They trust that care will be taken to ensure that in the future, all German hospital ships are illuminated in poor visibility in such a way as to leave no doubt as to their identity.

As was to be expected, the German authorities too devoted considerable time to investigating the circumstances of the sinking. On 23 December 1944, ship's captain Wolfgang Diettrich Hermichen, first officer Günter Quidde, and the third officer Heinrich Bruns made sworn statements before German Navy Judge Franz Nadenau; on 29 December they were followed by chief engineer Ernst Frenz, second officer Martin Messeck, and third engineer August Glander. The statement of Captain Hermichen casts doubt on part of the British version:

Both British planes flew 60 to 70 meters right over our ship. With the unaided eye I saw the British colors on the fuselage. Even if the planes had not recognized us before as a hospital ship – something which is, I think, out of the question because of the extraordinarily good visibility – at the very latest, at this moment they must have realized that we were a hospital ship. After both planes had flown over the ship they turned around and flew one by one over the ship, one plane from starboard and the other from port, and attacked us again. The bombardment was repeated about six times from starboard and about three times from port.

Obviously, a key question is whether the ship was immediately identifiable (as the German claimed) or whether the visibility was impaired (as the British contended). Second officer Martin Messeck, who was responsible for illumination, explained: "shortly after 7:00 A.M. I ordered our electrician Kessenich to turn off the night illumination. The sun had risen already about 6:30 A.M... during my watch the weather did not change. After sunrise we had perfectly calm weather..." Shortly after 7 A.M., after the night illumination had been turned off, four fighter bombers circled over us. Yet they turned around and flew southward. They were clearly British planes. I saw their colors." According to the Germans the ship was attacked between 7:45 and 8:05 A.M. and sank at 8:20 A.M. There was enough time to put down lifeboats, and two members of the crew, sailors Töllner and Heuer, were able to take pictures of the sinking ship. The photographs, which survived the war, show good visibility and calm seas.

On the basis of these depositions the High Command of the German Navy submitted a preliminary report to the German Foreign Office, rejecting the British allegations: "The note's contention that the incident would have been avoided if the *Tübingen* had been illuminated can only be termed an inadequate excuse, considering that a German court has now taken statements from the captain of the *Tübingen* as well as the first and third officers, according to whom a mistake about the identity of the ship as a hospital ship was completely out of the question because of the clear weather. [...]

**Case No. 91, British Military Court at Hamburg, The Peleus Trial**

[Source: The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. I, 1947, pp. 1-21]

**THE PELEUS TRIAL**

**TRIAL OF KAPITÄNLEUTNANT HEINZ ECK AND FOUR OTHERS FOR  
THE KILLING OF MEMBERS OF THE CREW OF THE GREEK STEAMSHIP  
PELEUS, SUNK ON THE HIGH SEAS**

BRITISH MILITARY COURT FOR THE TRIAL OF WAR CRIMINALS  
HELD AT THE WAR CRIMES COURT, HAMBURG,  
17<sup>TH</sup>-20<sup>TH</sup>, OCTOBER 1945

[...]

**2. THE CHARGE**

The prisoners were:

Kapitänleutnant Heinz Eck,  
Leutnant zur See August Hoffmann,  
Marine Stabsarzt Walter Weisspfennig,  
Kapitänleutnant (Ing) Hans Richard Lenz,  
Gefreiter Schwender.

They were charged jointly with:

“Committing a war crime in that you in the Atlantic Ocean on the night of 13/14<sup>th</sup> March, 1944, when Captain and members of the crew of Unterseeboat 852 which had sunk the steamship “Peleus” in violation of the laws and usages of war were concerned in the killing of members of the crew of the said steamship, Allied nationals, by firing and throwing grenades at them.” [...]

**3. THE OPENING OF THE CASE BY THE PROSECUTOR**

The “Peleus” was a Greek ship chartered by the British Ministry of War Transport. The crew consisted of a variety of nationalities; on board there were 18 Greeks, 8 British seamen, one seaman from Aden, two Egyptians, three Chinese, a Russian, a Chilean and a Pole.

On the 13<sup>th</sup> March, 1944, the ship was sunk in the middle of the Atlantic Ocean by the German submarine No. 852, commanded by the first accused, Heinz Eck. Apparently the majority of the members of the crew of the “Peleus” got into the water and reached two rafts and wreckage that was floating about. The submarine surfaced, and called over one of the members of the crew who was interrogated as to the name of the ship, where she was bound and other information.

The submarine then proceeded to open fire with a machine-gun or machine-guns on the survivors in the water and on the rafts, and also threw hand grenades on the survivors, with the result that all of the crew in the water were killed or died of their wounds, except for three, namely the Greek first officer, a Greek seaman and a British seaman. These men remained in the water for over 25 days, and were then picked up by a Portuguese steamship and taken into port. [...]

#### **4. EVIDENCE FOR THE PROSECUTION**

[...]

The fifth accused, Kapitän-Leutnant Engineer Lenz, appears to have behaved in the following way: (a) When he heard that the captain had decided to eliminate all traces of the sinking, he approached the captain and informed him that he was not in agreement with this order. Eck replied that he was nevertheless determined to eliminate all traces of the sinking. Lenz then went below to note the survivors' statements in writing and did not take part in the shooting and throwing of grenades. (b) Later on, Lenz went on the bridge and noticed the accused Schwender with a machine gun in his hand. He saw that Schwender was about to fire his machine gun at the target and thereupon he, Lenz, took the machine gun from Schwender's hand and fired it himself in the general direction of the target indicated. He did this because he considered that Schwender, long known to him as one of the most unsatisfactory ratings in the boat, was unworthy to be entrusted with the execution of such an order.

#### **5. OUTLINE OF THE DEFENCE**

[...] The Defence claimed that the elimination of the traces of the "Peleus" was operationally necessary in order to save the U-boat.

The other accused relied mainly on the pleas of superior orders. [...]

With regard to the plea of superior orders, Professor Wegner said that he stuck "to the good old English principles" laid down by the "Caroline case", according to which, he submitted, it was a well-established rule of International Law that the individual forming part of a public force and acting under authority of his own Government is not to be held answerable as a private trespasser or malefactor, that what such an individual does is a public act, performed by such a person in His Majesty's service acting in obedience to superior orders, and that the responsibility, if any, rests with His Majesty's Government. [...].

#### **6. EVIDENCE BY THE ACCUSED HEINZ ECK, COMMANDER OF THE SUBMARINE**

The accused, Heinz Eck, [...] thought that the rafts were a danger to him, first because they would show aeroplanes the exact spot of the sinking, and secondly because rafts at that time of the war, as was well-known, could be provided with modern signalling communication. When he opened fire there were no human beings to be seen on the rafts. He also ordered the throwing of hand grenades after he had realised that mere

machine gun fire would not sink the rafts. He thought that the survivors had jumped out of the rafts. [...]

It was clear to him, he went on, that all possibility of saving the survivors' lives had gone. He could not take the survivors on board the U-boat because it was against his orders. He was under the impression that the mood on board was rather depressed. He himself was in the same mood; consequently he said to the crew that with a heavy heart he had finally made the decision to destroy the remainder of the sunken ship.

Eck referred to an alleged incident involving the German ship "Hartenstein" of which he had been told by two officers. After this boat had saved the lives of many survivors, it was located by an aeroplane. The boat showed the Red Cross sign and one of the survivors, a flying officer, had, with a signal lamp, given some signals to the aeroplane not to attack the boat because of the survivors being on board, including women. The plane left, and after a time it returned and attacked the boat, which was forced to unload the survivors again, in order to dive, and it survived only after sustaining some damage. This case, about which he had been told before the beginning of his voyage, showed him that on the enemy side military reasons came before human reasons, that is to say before the saving of the lives of survivors. For that reason, he thought his measures justified. [...]

Eck's description of the "Hartenstein" incident was, in the main, confirmed by an English witness, a solicitor serving as a temporary civil servant at the Admiralty. He confirmed that, as a result of the incident, the German U-boat Command issued instructions as follows:

"No attempt of any kind should be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews. Orders for bringing Captains and Chief Engineers still apply. Rescue the shipwrecked only if their statements will be of importance for your boat. Be harsh, having in mind that the enemy takes no regard of women and children in his bombing attacks of German cities." [...]

## **8. EXAMINATION OF THE FOUR OTHER ACCUSED**

[...]

The accused Weisspfennig also referred to the order but admitted that in the German navy there were regulations about the conduct of medical officers which forbade them to use weapons for offensive purposes. Weisspfennig disregarded this regulation because he had received an order from the Commandant. He did not know whether his regulations provided that he could refuse to obey an order which was against the Geneva Convention. He knew what the Geneva Convention was and realised that one of the reasons why he was given protection as a doctor was because he was a non-combatant. He realised that there were survivors. He did not regard the use of the machine gun in his particular case as an offensive action. [...]

## 12. SUMMING UP BY THE JUDGE ADVOCATE

The Judge Advocate stated at the very outset that the court should be in no way embarrassed by the alleged complications of International Law which, it had been suggested, surrounded such a case as this. It was a fundamental usage of war that the killing of unarmed enemies was forbidden as a result of the experience of civilised nations through many centuries. To fire so as to kill helpless survivors of a torpedoed ship was a grave breach of the law of nations. The right to punish persons who broke such rules of war had clearly been recognised for many years. [...]

Regarding the defence of operational necessity, the Judge Advocate stated: "The question whether or not any belligerent is entitled to kill an unarmed person for the purpose of saving his own life has been the subject of much discussion. It may be that circumstances can arise – it is not necessary to imagine them – in which such a killing might be justified. But the court had to consider this case on the facts which had emerged from the evidence of Eck. He cruised about the site of this sinking for five hours, he refrained from using his speed to get away as quickly as he could, he preferred to go round shooting, as he says, at wreckage by means of machine guns." The Judge Advocate asked the court whether it thought or did not think that the shooting of a machine gun on substantial pieces of wreckage and rafts would be an effective way of destroying every trace of the sinking. He asked whether it was not clearly obvious that in any event, a patch of oil would have been left which would have been an indication to any aircraft that a ship had recently been sunk. He went on to say: "Do you or do you not think that a submarine commander who was really and primarily concerned with saving his crew and his boat would have done as Captain Schnee, who was called for the defence, said he would have done, namely have removed himself and his boat at the highest possible speed at the earliest possible moment for the greatest possible distance?"

Eck did not reply on the defence of superior orders. He stood before the court taking upon himself the sole responsibility of the command which he issued.

With regard to the defence of superior orders, the Judge Advocate said: "The duty to obey is limited to the observance of orders which are lawful. There can be no duty to obey that which is not a lawful order. The fact that a rule of warfare has been violated in pursuance of an order of a belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime, neither does it confer upon the perpetrator immunity from punishment by the injured belligerent."

The Judge Advocate added: "It is quite obvious that no sailor and no soldier can carry with him a library on international law or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one. If this were a case which involved the careful consideration of questions of international law as to whether or not the command to fire at helpless survivors struggling in the water was lawful, you might well think it would not be fair to hold any of the subordinate accused in this case responsible for what they are alleged to have done; but is it not fairly obvious to you that if in fact the carrying out of Eck's command involved the killing of these helpless survivors, it was not a lawful command, and that it must have

been obvious to the most rudimentary intelligence that it was not lawful command, and that those who did that shooting are not to be excused for doing it upon the ground of superior orders?"

[...]

### 13. THE VERDICT

The five accused were found guilty of the charge.

### 14. THE SENTENCE

After Counsel for the Defence had pleaded in mitigation on behalf of the accused and some of them had also called witnesses, the following findings and sentences of the court were pronounced on 20<sup>th</sup> October, 1945, subject to confirmation:

Eck, Hoffmann, Weisspfennig were sentenced to suffer death by shooting. Lenz was sentenced to imprisonment for life, Schwender was sentenced to suffer imprisonment for 15 years.

The sentences were confirmed by the Commander-in-Chief, British Army of the Rhine, on 12<sup>th</sup> November, 1945, and the sentences of death imposed on Kapitänleutnant Heinz Eck, Marine Oberstabsarzt Walter Weisspfennig, and Leutnant zur See August Hoffmann, were put into execution at Hamburg on 30<sup>th</sup> November, 1945.

## DISCUSSION

Please consider the 1949 Geneva Conventions and the 1977 Additional Protocols applicable for the following discussion.

1. Did Eck violate IHL by not taking the shipwrecked on board his submarine? By destroying their rafts and wreckage? By giving orders to fire upon them? (GC II, Arts 12(2), 18 and 51)
2. Does the Judge Advocate exclude the possibility that firing on shipwrecked persons could be justified by military necessity? Under the 1949 Geneva Conventions, could firing on shipwrecked persons be justified if it were the only means to ensure that a submarine remains undetected? To save the life of the person firing?
3. Which duties of medical personnel did Weisspfennig violate? Is the ban on the use of weapons for offensive purposes by German Navy medical officers necessary under today's IHL? (GC II, Art. 35; P I, Arts 13 and 16(2))
4. Was the conduct of Lenz appropriate? What should he have done so as not to violate IHL? Not participate in the execution of the order? Prevent any of his subordinates from executing the order? Prevent any member of the crew from executing the order? Arrest Eck? (P I, Arts 86-87)
5. When may a superior order prevent punishment for a violation of IHL?
6. Was the British attack on the *Hartenstein* lawful under present-day IHL? Was it lawful for the crew of the *Hartenstein* to show the red cross emblem when the ship was attacked? (GC II, Arts 41 and 43 [See also **Document No. 83**, San Remo Manual on International Law Applicable to Armed Conflicts at Sea])

**Case No. 92, United States Military Court in Germany, Trial of Skorzeny and Others**

[Source: The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. IX, 1949, pp. 90-93]

**TRIAL OF OTTO SKORZENY AND OTHERS**

**General Military Government Court of the U.S. Zone of Germany  
18<sup>th</sup> August to 9<sup>th</sup> September, 1947**

**A. OUTLINE OF THE PROCEEDINGS**

The ten accused involved in this trial were all officers in the 150<sup>th</sup> Panzer Brigade commanded by the accused Skorzeny. They were charged with participating in the improper use of American uniforms by entering into combat disguised therewith and treacherously firing upon and killing members of the armed forces of the United States. They were also charged with participation in wrongfully obtaining from a prisoner-of-war camp United States uniforms and Red Cross parcels consigned to American prisoners of war.

In October, 1944, the accused Colonel Otto Skorzeny had an interview with Hitler. Hitler knew Skorzeny personally from his successful exploit in liberating Mussolini and commissioned him to organise a special task force for the special Ardennes offensive. This special force was to infiltrate through the American lines in American uniform and to capture specified objectives in the rear of the enemy. [...] [The] special task force called the 150<sup>th</sup> Brigade was formed. [...] They received training in English, American mannerisms, driving of American vehicles, and the use of American weapons. The Chief-of-Staff of the German Prisoner-of-War Bureau was approached by Skorzeny to furnish the Brigade with American uniforms. These uniforms were mainly obtained from booty dumps and warehouses, but some were obtained from prisoner-of-war camps where they were taken from the prisoners on orders from two of the accused. [...]

The piercing of the enemy lines by the S.S. Armoured Division was not successful, and on 18<sup>th</sup> December Skorzeny decided to abandon the plan of taking the three Maas bridges [the Ardennes offensive] and put his brigade at the disposal of the commander of the S.S. corps [...], to be used as infantry. He was given an infantry mission to attack towards Malmedy. During this attack several witnesses saw members of Skorzeny's brigade, including two of the accused, wearing American uniforms and a German parachute combination in operational areas, but the evidence included only two cases of fighting in American uniform.

In the first case, Lieutenant O'Neil testified that in fighting in which he was engaged about 20<sup>th</sup> December his opponents wore American uniforms with German parachute overalls, some of them who were captured by him said "that they belonged to the 'First', or the 'Adolf Hitler', or the 'Panzer' Division". The second case was contained in an affidavit of the accused Koscherscheid, who [...] said in his affidavit that during the attack on Malmedy he and some of his men were engaged in a reconnaissance mission in American uniform [...].



All accused were acquitted of all charges. [...]

### DISCUSSION

1. a. Is it ever permissible to wear enemy uniform? Is it always permissible under IHL, or only sometimes? When? Is it permitted to wear enemy uniform during an attack? If not, why not? Is it permissible to wear enemy uniform prior to an attack, as here in the Ardennes Offensive when the task force wanted to enter enemy territory? As long as combatants wear their own uniforms once actual fighting starts? Could Skorzeny have been acquitted if Protocol I was applicable? (HR, Art. 23(b) and (f); P I, Arts 37 and 39(2), CIHL, Rule 62)
- b. Is the wearing of enemy uniforms an act of perfidy? What is the difference between perfidy and ruses of war? Are not the latter permitted? Yet are ruses of war not also attempts to mislead the enemy? Did Skorzeny mislead the enemy as to whether he was protected by IHL? (HR, Arts 23(f) and 24; P I, Arts 37 and 44(3); CIHL, Rule 57)
2. Would not the use of the parcels marked with a red cross to disguise an offensive at least be considered perfidy? Does a person carrying a red cross parcel seek to make the enemy believe that he is protected by IHL? (P I, Arts 37(1)(d), 38 and 39; CIHL, Rule 59) Is such use of the emblem of the red cross or red crescent a grave breach? (P I, Art. 85(3)(f)) Is the marking of such parcels with the red cross an indicative or a protective use of the emblem? Is it lawful? (GC I, Arts 38-44)

### Case No. 93, United States Military Tribunal at Nuremberg, The Justice Trial

[Source: *War Crimes Reports*, vol. 6, 1948, p. 1. Cited in Lauterpacht, H. (ed.), *Annual Digest and Reports of Public International Law Cases: Year 1947*, London, Butterworth & Co. Ltd., 1951, pp. 278, 288-289; footnotes omitted.]

#### ***In re Altstötter and Others (The Justice Trial), Nuremberg, Germany, United States Military Tribunal, December 4, 1947***

THE FACTS. The fourteen accused were judges, public prosecutors or high officials in the Reich Ministry of Justice. They were charged before a United States Military Tribunal with enacting and enforcing statutes, decrees and orders of an essentially criminal nature and with working with German Security Police organizations for essentially criminal purposes, in the course of which, by distortion and denial of judicial process, they committed crimes against civilian inhabitants of occupied territories, prisoners of war and German nationals. [...]

*Held:* that Altstötter and nine other accused were guilty of various charges. The four other accused were acquitted. [...]

- (10) *Effect of Aggressive War on the Right of the Aggressors to Rely on Rules of Warfare.*  
 “It is persuasively urged that the fact that Germany was waging a criminal war of aggression colours all of these acts with the dye of criminality. To those who planned the war of aggression and who were charged with and were guilty of the crime against the peace as defined in the Charter, this argument is conclusive; but these defendants are not charged with crimes against the peace, nor has it been proven here that they knew that the war which they were supporting on the home front was based upon a criminal conspiracy or was *per se* a violation of international law. The lying propaganda of Hitler and Göbbels concealed even from many public officials the criminal plans of the inner circle of aggressors. If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer. The rules of land warfare upon which the prosecution has relied would not be the measure of conduct and the pronouncement of guilt in any case would become a mere formality. [...]

#### DISCUSSION

1. How does *jus in bello* contrast with *jus ad bellum*? Is *jus in bello* merely an extension of *jus ad bellum*? Why did the UN International Law Commission decide not to concentrate on the codification of *jus in bello*? [See **Quotation**, Part I, Chapter 2. II. 2. a) cc) the prohibition of the use of force] What is *jus contra bellum*?
2. a. Is the Court correct in this case in deeming that the argument presented improperly mixes *jus ad bellum* and *jus in bello*? That violations of *jus ad bellum* do not automatically imply violations of *jus in bello*? If the Court had agreed with the argument presented that a violation of *jus ad*

*bellum* conclusively establishes guilt for these charges, is the contrary true that the other party to the conflict is incapable of committing violations because its war is “just” and therefore may use all means to secure its rights? What impact would a proven violation of *jus ad bellum* have upon a charge of committing a crime against peace?

- b. What are the dangers of mixing *jus ad bellum* and *jus in bello*? Would it not make respect for IHL impossible to obtain? In practical terms, how is one to ascertain and then establish which party to a conflict is resorting to force in conformity with *jus ad bellum* and which is violating *jus contra bellum*? Do not victims on both sides in the conflict need the same protection? Are the victims all responsible for violations of *jus ad bellum* committed by their side?
3. If *jus ad bellum* is completely separate from *jus in bello*, which limitations are placed upon *jus ad bellum* in relation to IHL and vice versa? (P I, Preamble)

**Case No. 94, United States Military Tribunal at Nuremberg,  
United States v. Alfried Krupp et al.**

[Source: The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. X, 1949, pp. 130-159; footnotes omitted]

**THE KRUPP TRIAL  
TRIAL OF ALFRIED FELIX ALWYN KRUPP VON BOHLEN  
UND HALBACH AND ELEVEN OTHERS**

**UNITED STATES MILITARY TRIBUNAL, NUREMBERG,  
17<sup>th</sup> NOVEMBER, 1947 – 30<sup>th</sup> JUNE 1948**

[...]

**4. The judgment of the tribunal on counts II and III [...]**

**(ii) *The Law relating to Plunder and Spoliation* [...]**

"[...] The Articles of the Hague Regulations, quoted above [Arts 45-52 and 56], are clear and unequivocal. Their essence is: if, as a result of war action, a belligerent occupies territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down in the Regulations. The economy of the belligerently occupied territory is to be kept intact, except for the carefully defined permissions given to the occupying authority – permissions which all refer to the army of occupation. [...]"

"Spoliation of private property, then, is forbidden under two aspects; firstly, the individual private owner of property must not be deprived of it; secondly, the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort – always with the proviso that there are exemptions from this rule which are strictly limited to the needs of the army of occupation insofar as such needs do not exceed the economic strength of the occupied territory.

"Article 43 of the Hague Regulations is as follows:

'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'

This Article permits the occupying power to expropriate either public or private property in order to preserve and maintain public order and safety. However, the Article places limitations upon the activities of the occupant. This restriction is found in the clause which requires the occupant to respect, unless absolutely prevented, the laws in force in the occupied country. This provision reflects one of the basic standards of the Hague Regulations, that the personal and private rights of persons in the occupied territory shall not be interfered with except as justified by emergency

conditions. The occupying power is forbidden from imposing any new concept of law upon the occupied territory unless such provision is justified by the requirements of public order and safety. [...]

“[...] Art. 46 [...] requires belligerent to respect enemy private property and which forbids confiscation, and [...] Art. 47 [...] prohibits pillage.’

[...]

“The general rule contained in Article 46 is further developed in Articles 52 and 53. Article 52 speaks on the ‘requisitions in kind and services’ which may be demanded from municipalities or inhabitants, and it provides that such requisitions and services ‘shall not be demanded except for the needs of the *Army of Occupation*.’ As all authorities are agreed, the requisitions and services which are here contemplated and which alone are permissible, must refer to the needs of the Army of Occupation. It has never been contended that the Krupp firm belonged to the Army of Occupation. For this reason alone, the ‘requisitions in kind’ by or on behalf of the Krupp firm were illegal. [...]

“The situation which Article 52 has in mind is clearly described by the second paragraph of Article 52:

‘Such requisitions and services shall only be demanded on the authority of the Commander in the locality occupied.’

“The concept relied upon by the defendants – namely: that an aggressor may first overrun enemy territory, and then afterwards industrial firms from within the aggressor’s country may swoop over the occupied territory and utilise property there – is utterly alien to the laws and customs of warfare as laid down in the Hague Regulations, and is clearly declared illegal by them because the Hague Regulations repeatedly and unequivocally point out that requisitions may be made only for the needs of, and on the authority of, the Army of Occupation. [...]

“The defendants cannot as a legal proposition successfully contend that, since the acts of spoliation of which they are charged were authorised and actively supported by certain German governmental and military agencies or persons, they escape liability for such acts. It is a general principle of criminal law that encouragement and support received from other wrong-doers is not excusable. It is still necessary to stress this point as it is essential to point out that acts forbidden by the laws and customs of warfare cannot become permissible through the use of complicated legal constructions. The defendants are charged with plunder on a large scale. Many of the acts of plunder were committed in a most manifest and direct way, namely, through physical removal of machines and materials. Other acts were committed through changes of corporate property, contractual transfer of property rights, and the like. It is the results that count, and though the results in the latter case were achieved through ‘contracts’ imposed upon others, the illegal results, namely, the deprivation of property, was achieved just as though materials had been physically removed and shipped to Germany”.

**(iii) The Plea of National Emergency**

The Judgment continued:

“Finally, the Defence has argued that the acts complained of were justified by the great emergency in which the German War Economy found itself. [...]

“[...] [T]he contention that the rules and customs of warfare can be violated if either party is hard pressed in any way must be rejected on other grounds. War is by definition a risky and hazardous business. That is one of the reasons that the outcome of a war, once started, is unforeseeable and that, therefore, war is a basically-unrational means of “settling” conflicts – why right-thinking people all over the world repudiate and abhor aggressive war. It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly – and at the sole discretion of any one belligerent – disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.”

**(iv) The Tribunal's Application of these Rules to the facts of the Case:  
Findings on Count II**

In the following paragraphs the Tribunal is seen to have made specific application, to certain of the facts of the case, of the rules elaborated above:

“We conclude from the credible evidence before us that the confiscation of the Austin plant based upon German inspired anti-Jewish laws and its subsequent detention by the *Krupp firm* constitute a violation of Article 43 of the Hague Regulations which requires that the laws in force in an occupied country be respected: that it was also a violation of Article 46 of the Hague Regulations which provides that private property must be respected: that the *Krupp firm*, through defendants Krupp, Loeser, Houdremont, Mueller, Janssen and Eberhardt, voluntarily and without duress participated in these violations by purchasing and removing the machinery and leasing the property of the Austin plant and in leasing the Paris property: and that there was no justification for such action, either in the interest of public order and safety or the needs of the army of occupation. [...]

“From a careful study of the credible evidence we conclude there was no justification under the Hague Regulations for the seizure of the Elmag property and the removal of the machinery to Germany. This confiscation was based on the assumption of the incorporation of Alsace into the Reich and that property in Alsace owned by Frenchmen living outside of Alsace could be treated in such a manner as to totally disregard the obligations owned by a belligerent occupant. This attempted incorporation of Alsace into the German Reich was a nullity under international law and consequently this interference with the rights of private property was a violation of Article 46 of the Hague Regulations.”

Of the taking of machines from the Als-Thom Factory, the Tribunal also ruled: "We conclude from the credible evidence that the removal and detention of these machines was a clear violation of Article 46 of the Hague Regulations."

Again, the Tribunal decided that: "We conclude that it has been clearly established by credible evidence that from 1942 onwards illegal acts of spoliation and plunder were committed by, and in behalf of, the Krupp firm in the Netherlands on a large scale, and that particularly between about September, 1944, and the spring of 1945, certain industries of the Netherlands were exploited and plundered for the German war effort, 'in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy.'" [...]

### ***(vii) The Plea of Superior Orders or Necessity***

After dealing with the law and evidence regarding the employment of civilians, the Tribunal turned its attention next to a plea put forward by the Defence:

"The real defence in this case, particularly as to Count III, is that known as necessity. It is contended that this arose primarily from the fact that production quotas were fixed by the Speer Ministry; that it was obligatory to meet the quotas and that in order to do so it was necessary to employ prisoners of war, forced labour and concentration camp inmates made available by government agencies because no other labour was available in sufficient quantities and, that had the defendants refused to do so, they would have suffered dire consequences at the hands of the government authorities who exercised rigid supervision over their activities in every respect. [...]"

"The defence of necessity in municipal law is variously termed as 'necessity', 'compulsion', 'force and compulsion', and 'coercion and compulsory duress'. Usually, it has arisen out of coercion on the part of an individual or a group of individuals rather than that exercised by a government.

"The rule finds recognition in the systems of various nations. The German criminal code, Section 52, states it to be as follows:

'A crime has not been committed if the defendant was coerced to do the act by irresistible force or by a threat which is connected with a present danger for life and limb of the defendant or his relatives, which danger could not be otherwise eliminated'.

"The Anglo-American rule as deduced from modern authorities has been stated in this manner:

'Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil. Homicide through necessity – i.e., when the life of one person can be saved only by the sacrifice of another – will be discussed in a subsequent chapter. The issue, it should be observed, is not simply whether a particular life is to be sacrificed in case of necessity, but whether it is right for a person to commit a crime in order to save his life. The canon law prescribes that a person whose life is dependent

on immediate relief may set up such necessity as a defence to a prosecution for illegally seizing such relief. To the same general effect speak high English and American authorities. Life, however, can usually only be taken, under the plea of necessity, when necessary for the preservation of the life of the party setting up the plea, or the preservation of the lives of relatives in the first degree.'

"As the Prosecution says, most of the cases where this defence has been under consideration involved such situations as two shipwrecked persons endeavouring to support themselves on a floating object large enough to support only one; the throwing of passengers out of an over-loaded lifeboat; or the participation in crime under the immediate and present threat of death or great bodily harm. So far as we have been able to ascertain with the limited facilities at hand, the application to a factual situation such as that presented in the Nurenberg Trials of industrialists is novel. [...]

"The defence of necessity is not identical with that of self-defence. The principal distinction lies in the legal principle involved. Self-defence excuses the repulse of a wrong whereas the rule of necessity justifies the invasion of a right. [...]

"Here we are not dealing with necessity brought about by circumstances independent of human agencies or by circumstances due to accident or misadventure. Upon the contrary, the alleged compulsion relied upon is said to have been exclusively due to the certainty of loss or injury at the hands of an individual or individuals if their orders were not obeyed. In such cases if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct. That is this case. [...]

The Tribunal dealt with another aspect of the plea of necessity as follows:

"It will be observed that it is essential that the 'act charged was done to avoid an evil both serious and irreparable,' and 'that the remedy was not disproportioned to the evil'. What was the evil which confronted the defendants and what was the remedy that they adopted to avoid it? The evidence leave no doubt on either score." In the opinion of the Tribunal, in all likelihood the worst fate which would have followed a disobedience of orders to use slave labour would have been, for Krupp, the loss of his plant, and for the other accused the loss of their posts.

#### ***(viii) The Individual Responsibility of the Accused***

When dealing with the law protecting prisoners of war, the Tribunal interjected the following remark: "The laws and customs of war are binding no less upon private individuals than upon government officials and military personnel. In case they are violated there may be a difference in the degree of guilt, depending upon the circumstances, but none in the fact of guilt." [...]

[T]he Tribunal emphasised that guilt must be personal. It continued: "The mere fact without more that a defendant was a member of the Krupp Directorate or an official of



the firm is not sufficient. The rule which we adopt and apply is stated in an authoritative American text as follows:

‘Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company’s business may be held criminally liable individually therefore. [...] He is liable where his [...] authority is established, or where he is the actual present and efficient actor. When the corporation itself is forbidden to do an act, the prohibition extends to the board of directors and to each director, separately and individually.’ [*Corpus Juris Secundum*, Vol. 19, pp. 363, American Law Book Co. (1940), Brooklyn, N.Y.]

“Under the circumstances as to the set up of the Krupp enterprise after it became a private firm in December, 1942, the same principles apply. [...]

### DISCUSSION

1. According to IHL, what constitutes looting? In what circumstances may property of occupied territory be used? Any type of property? Who may use such property? (HR, Arts 23(g), 46(2), 47, 52, 53 and 55; CIHL, Rules 49-52) Do the foregoing IHL provisions prohibit the use of such property by private individuals? Even if those private individuals are authorized by the occupying power? May an occupying power delegate certain of its prerogatives under IHL to private enterprises?
2.
  - a. To whom do the rules of IHL apply? Only to States? Only to combatants? Only to agents of the State? To private individuals? If applicable to private individuals, does IHL prohibit only actions committed by individuals against the State? Or also actions against another individual? (GC I-IV, Arts 49/50/129/146 respectively; P I, Arts 85 and 86)
  - b. Was it proper for the Court to find private individuals guilty of violations of IHL? Particularly if the State not only authorized but actively encouraged such actions? Could the Court have so held if those individuals had not acted in conformity with the policy and ideology of the Nazi regime, but instead under an “occupying power” following a “Manchester liberal approach” of not interfering with private enterprise? Are looting and slave labour imaginable under pure market conditions, without any interference by the occupying power?
3. Did the Court correctly determine that the accused could not invoke the defence of national emergency? Is it correct to say that in no circumstances may a State or an individual derogate from the rules of IHL in a national emergency? Is the pertinent passage in this decision compatible with the theory of the ICJ in the *Nuclear Weapons Advisory Opinion* [See **Case No. 62**, ICJ, *Nuclear Weapons Advisory Opinion*], where the ICJ leaves the question open whether “in an extreme circumstance of self-defence, in which the very survival of a State is at stake”, rules of IHL might be violated?
4.
  - a. Is the defence of necessity or duress available for an individual accused of grave breaches of IHL? If so, when?
  - b. Are the defences of national emergency and of necessity to be treated in the same way as far as breaches of IHL are concerned?

**Case No. 95, United States Military Tribunal at Nuremberg, The Ministries Case**

[Source: Levie, H.S. (ed.), *International Law Studies: Documents on Prisoners of War*, Naval War College, R.I., Naval War College Press, vol. 60, Document No. 104, 1979, pp. 481-496]

**U.S. v. ERNST von WEIZSAECKER ET AL.  
(THE MINISTRIES CASE)**

**(U.S. Military Tribunal, Nuremberg, April 11-13, 1949)**

**SOURCE  
14 TWC 308**

[...]

**COUNT THREE – WAR CRIMES, MURDER, AND ILL-TREATMENT  
OF BELLIGERENTS AND PRISONERS OF WAR**

[...]

**STEENGRACHT VON MOYLAND**

\* \* \* \* \*

*Sagan murders.* – The International Military Tribunal found:

“In March 1944 fifty officers of the British Royal Air Force who escaped from the camp at Sagan where they were confined as prisoners [*sic*], were shot on recapture on direct orders of Hitler. Their bodies were immediately cremated, and the urns containing their ashes were returned to the camp. It is not contended by the defendants that this was other than plain murder, in complete violation of international law.”

Switzerland, the Protective [*sic*] Power, on 26 May 1944, made inquiry of the German Foreign Office in regard to the escape of these British officers from Stalag Luft III. On 6 June the defendant Steengracht von Moyland, for the Foreign Office, answered that a preliminary note was submitted to the Swiss Legation on 17 April concerning the escape which took place on 25 March, stating that according to the investigation nineteen of the eighty prisoners of war who had escaped were taken back to the camp; that the hunt still continued and investigations had not been concluded; that there were preliminary reports that thirty-seven British prisoners of war were shot down when they were brought to bay by the pursuing detachment and when they offered resistance or attempted escape anew after recapture; and thirteen other prisoners of war of non-British nationality were shot after having escaped from the same camp; that the Foreign Office reserved the right to make a definite statement after the conclusion of the investigation, and as soon as details were known, but that the following could be said: that mass escapes of prisoners of war occurred in March, amounting to several thousands; that they in part were systematically prepared by the general staffs in conjunction with agents abroad and pursued political and military

aims; were an attack on the public security of Germany; were intended to paralyze its administration, and in order to nip in the bud such ventures, especially severe orders were issued to the pursuit detachments not only for recapture but also for protection of the detachments themselves; and accordingly, pursuit detachments launched a relentless pursuit of escaped prisoners of war who disregarded a challenge while in flight or offered resistance, or attempted to re-escape after having been captured, and made use of their arms until the fugitives were deprived of the possibility of resistance or further flight; that arms had to be used against some prisoners of war, including the fifty prisoners of war from Stalag Luft III; that the ashes of twenty-nine British prisoners of war have been brought to camp so far.

Apparently on 23 June the British Foreign Secretary made a declaration with respect to these murders. On 26 June the Swiss again made inquiry of the Foreign Office and received a reply dated 21 July that Germany emphatically rejected the British Foreign Secretary's declaration; that because of alleged bombings of civilian population and other alleged acts, Great Britain must be denied the moral right to take a stand in the matter of the escapees or to raise complaints against others, and the German Government declined to make further communications in the matter.

On 25 May Vogel on instructions from Ritter informed Legation Councillor Sethe that the Foreign Office had not yet received a copy of the communication of the OKW dated 29 April. On 4 June, Ritter informed the Foreign Office that the day before Keitel had agreed to the draft of the note to the Swiss Legation regarding British prisoners of war, and inquired why the Foreign Office wanted to inform the Protective [*sic*] Power of the funeral beforehand, as this information had not been requested. [...]

On 22 June von Thadden submitted a memorandum to the chief of Inland II that Anthony Eden had made a statement in the House of Commons that a decision would be made with respect to the shooting of British prisoners who escaped from prison camps, and that Albrecht, chief of the Foreign Office legal division, had advised him that the British had been informed via Switzerland that it had been found necessary to shoot several British and other officers in the course of such activities because of refusal to submit to orders when captured; that nineteen other officers who did not offer resistance were taken back to the camp, and that further details of the fifty cases of prisoners being shot would be submitted to the British.

On 17 July Brenner of the Foreign Office informed Ritter that Hitler agreed to the note to the Swiss delegation regarding the escapes from Stalag Luft III, and approved the drafting of a warning against attempts to escape and the publication of Germany's note to the Swiss Legation, and that this warning should be made public; that von Ribbentrop had ordered Ritter to transmit Germany's second reply to the Swiss envoy, and directed Ritter to cooperate with the OKW in composing the warning which was to be posted in the prisoner-of-war camps and to submit the same to von Ribbentrop for approval; that the warning could perhaps state that there were certain death zones where very special weapons were tested, and any person found in one of these zones would be shot on sight, and, as there are numerous such zones in Germany, escaping prisoners would expose themselves not only to the danger of being mistaken for spies, but of unwittingly entering one of the zones and being shot. [...]

[T]wo officials of the criminal police appeared and submitted photostatic copies of teletype messages and reports from various police offices throughout Germany reporting that individuals or groups of prisoners of war from the Sagan camp had been shot while resisting recapture, or in renewed attempts to escape.

It was apparent to both Ritter and Albrecht that these teletype reports were fictitious – a fact which the police officials did not seriously dispute. Thereupon, according to Albrecht, after conference with Ritter he drafted a reply on the basis of this fictitious and false information, and Ritter submitted it to von Ribbentrop with the urgent advice, in which Albrecht concurred, that it be not sent. [...]

While it may be true that at an early stage Keitel had given orders not to inform the Foreign Office of the Sagan murders, and that the OKW's "provisional communication" of April 29, 1944 was not contemporaneously delivered to the Foreign Office, the fact remains that by May 25, 1944 Legation Councillor Sethe had examined and made a copy of it in the office of the High Command, so that when the note was drafted Ritter had full knowledge of the fact that escaped prisoners of war had been deliberately murdered by officers of the German Reich, in clear violation of international law and of the Geneva Convention. [...]

Brenner's memorandum of 17 July relates to the second note and the warning, and states that Ritter had been directed by von Ribbentrop to cooperate with the OKW in composing the warning, and to submit it to the Foreign Minister for approval, and had made suggestions with respect to the wording of the "death zone" clause. It bears the notation, "Submitted, Ambassador Ritter,".

On August 5, 1944 Ritter wrote to Albrecht that the "enclosed version of a warning has now been approved by the Reich Minister for Foreign Affairs and the OKW;" that the OKW was then engaged in translating it, and when completed it would be given to the prisoner-of-war sections of the OKW for distribution to the camps; that "the Foreign Office has not yet communicated the warning to the Swiss Government, which must coincide with the time of the posting of the warning in the camps; the draft of the note to the Swiss was to be submitted to Ribbentrop for approval in advance, so that it could be dispatched as soon as possible after the warning has been posted."

On July 21, 1944 the Foreign Office delivered to the Swiss Government a second note stating that the Foreign Office refused to further communicate about the matter on the pretense of Eden's speech of 23 June in the House of Commons. This was an infantile proceeding which, of course, deceived no one.

It does not appear, however, that the proposed note mentioned in Ritter's memo to Albrecht of 5 August was ever sent, and there is no evidence that the warnings were ever posted. It is a fair inference that the German Government concluded that its ostrich-like note of 21 July had enabled it to withdraw with what it hoped to be some shreds of dignity, from an unspeakable situation which it could not maintain, and which it could not afford to have bared to the civilized world; and therefore, the proposed note was not sent, the warnings remained unposted, and a veil was dropped over the whole matter.

While Steengracht von Moyland was not as close to the situation as Ritter, nevertheless it was he who, as the responsible leading official of the Foreign Office, second only to von Ribbentrop, delivered at least the first note to the Swiss delegation.

It is altogether likely that he delivered the second message, inasmuch as that was one of his admitted official functions. He testified he had had no "clear recollection" of the Foreign Office directors' meeting of June 22, 1944 at which was discussed both Eden's speech and Albrecht's statement that the British had been informed, through Switzerland, that several British and other fliers had been shot, and that further details respecting the fifty cases of shooting would be submitted to the British. [...]

In discussing Reinhardt's statement that "such occurrences as in camp Sagan in which fifty officers were shot after having made an attempt to escape are extremely regrettable," Steengracht von Moyland said: "We all regretted this extremely, and it was a terrible crime."

In a matter as important as this, involving the inevitable repercussions in neutral as well as enemy nations, it is unbelievable that a state secretary would deliver a note so patently lame without making some inquiry about the matter, and it is extremely unlikely that Albrecht or Ritter would not have informed him not only that the justifications for the shootings were fictitious, but their misgivings about the terms of the note as well.

A man of ordinary intelligence would recognize that this was an attempt to cover up an incident which could not bear the light of day. We are convinced that Steengracht von Moyland delivered the note of June 6, 1944 to the Swiss Government, and that he was informed of the actual facts.

The murder of these unfortunate escapees [...] was a crime of insensate horror and brutality [...], and that it violated every principle of the Geneva Convention, is unquestioned. No defendant does other than condemn it, and each disclaims any guilty connection with it.

Steengracht von Moyland had no part in either the issuance of the order or its execution. The murders were long-accomplished facts before he knew of them.

However, under the Geneva Convention and Hague Regulation (Art. 77, Geneva Convention [Prisoners of War], 1929, and Art. 14, Hague Regulation [Annex to Convention No. IV, Laws and Customs of War on Land], 1907), Germany was under the duty of truthfully reporting to the Protecting Power, the facts surrounding the treatment of prisoners of war, and of the circumstances relating to the deaths of such prisoners. To make a false report was a breach of its international agreement, and a breach of international law. The detaining powers' duty to report the facts was intended to prevent the very kind of savagery upon helpless prisoners which took place in the Sagan incident.

If a belligerent can starve, mistreat, or murder its prisoners of war in secret, or if it can, with impunity, give false information to the Protecting Power, the restraining influence which Protecting Powers can exercise in the interests of helpless unfortunates would

be wholly eliminated. Thus, the duty to give honest and truthful reports in answer to inquiries such as were addressed by the Swiss Government is implicit.

The false reports which Ritter helped draft and which Steengracht von Moyland transmitted, stupid and inept as they were, were intended and calculated to deceive both the Protecting Power and Great Britain, and at least give a color of legality to what was beyond the pale of international law.

The inquiries from the Protecting Power regarding the treatment of and fate of prisoners of war, addressed to the German Government both by necessity and by diplomatic usage, were addressed to the Foreign Office. The reply of the German Government to the Protecting Power of necessity and by diplomatic usage came from the Foreign Office.

Steengracht von Moyland and Ritter must each be held guilty of the crime set forth in paragraph 28c of count three of the indictment.

\* \* \* \* \*

#### **VON WEIZSAECKER AND WOERMANN**

\* \* \* \* \*

*Depriving French prisoners of war of a protecting power.* – On November 1, 1940, Ritter transmitted to the Foreign Office a memorandum stating that he had informed General Jodl of Hitler's determination to have the United States removed as the Protecting Power for French prisoners of war. This was initiated by von Weizsaecker.

On 2 November, Albrecht, Chief of the Foreign Office Legal Department, wired the German embassy at Paris that the Fuehrer had issued instructions that in the future the French were themselves to act as the Protecting Power for French prisoners of war, and directed Abetz to take up discussions with Laval with the following objectives:

- (1) That the French take over protection of their own prisoners of war, and
- (2) That it explicitly state to the United States that its activities as a Protecting Power were finished, and, finally,
- (3) That Laval be informed that Scapini would suit Germany as Plenipotentiary for prisoners-of-war matters, and that he be directed to visit Berlin for discussion of details.

This teletype was initiated by Ritter, von Weizsaecker, and Woermann.

On 3 November, Abetz wired the Foreign Office that Laval had been so informed and that the Vichy government was immediately informing the United States that it was no longer recognized as a Protecting Power for French prisoners of war, and further that Scapini had been requested to see Marshal Petain on Tuesday to be officially informed of his intended duties and to prepare for the journey to Berlin. This reply was received by von Weizsaecker.

Woermann asserts that "after direct relations have been taken up between Germany and France, a Protecting Power is no longer needed," and that these matters could be

regulated between them and Scapini. He asserts that Scapini's appointment instead of leading to a deterioration of the conditions of the French prisoners of war, improved it. We greatly doubt that the Franch [*sic*] action was voluntary. Hitler had decided what they should do. The Foreign Office told Abetz to see that the French complied, and within 24 hours the matter was consummated.

Matters of such importance are not consummated with that degree of speed between foreign powers who are each free to act and consider. However, the prosecution has offered no evidence that by reason of the change the conditions and treatment of the French prisoners of war deteriorated, and in the absence of such proof, this incident cannot form the basis of a finding of guilt.

*Murder of captured British soldiers.* – On 14 February 1941 the United States as Protecting Power made inquiries as to the circumstances under which six British soldiers were captured and then shot in the forest of Dieppe.

A memo from the office of von Ribbentrop, initiated by von Weizsaecker, directs Legation Councillor Albrecht to ascertain the facts, stating that he was of the opinion that the note should be "rejected in the sharpest terms."

Albrecht made written inquiry of the Wehrmacht prisoner-of-war department. Here the record ends. Whether the Wehrmacht replied, and what response the Foreign Office made to the United States Government, whether the Foreign Office ever even acted on the facts, or rejected the note, are all wholly unknown.

Conviction cannot be based on such a record.

## DISCUSSION

*In the following discussion please apply international humanitarian law as it stands today.*

1. What is a Protecting Power? (P I, Art. 2(c)) What role does it play? (GC I-IV, Arts 8/8/8/9 respectively) Are the tasks of the Protecting Power limited to those defined in the various articles of the Geneva Conventions? Which tasks does the Protecting Power perform e.g. with respect to prisoners of war? (GC III, Arts 13-108 and 126)
2.
  - a. What are the procedures for appointing a Protecting Power? Who may be a Protecting Power? Who appoints the Protecting Power? Must the enemy power automatically accept the Protecting Power? Could it refuse all neutral powers appointed? (GC I-IV, Arts 10/10/10/11 respectively; P I, Art. 5)
  - b. After concluding an armistice with the Detaining Power, may a State dismiss a Protecting Power? If the prisoners of war remain detained, do they still benefit from the services of a Protecting Power? Even despite the fact that the territory of their power of origin is occupied by the Detaining Power? May a power of origin be the Protecting Power of its own prisoners of war? Could a Detaining Power agree with a power of origin to waive the protection laid down by Convention III? (GC III, Arts 5, 6 and 8; P I, Art. 5)
3. When do the duties of a Protecting Power end? When occupation extends to the whole territory of the power of origin? When a cease-fire is concluded? When there are no longer any protected persons within the meaning of the Convention? (GC III, Arts 5 and 8; P I, Art. 5)

4.
  - a. Which obligations has the Detaining Power vis-à-vis the Protecting Power? Has the Detaining Power an obligation to inform the Protecting Power of all violations of IHL committed against prisoners of war? Of any deaths of prisoners of war? Of the results of an inquiry into the death of a prisoner of war? Of the reasons for any deaths of prisoners of war? (GC III, Arts 121, 122 and 126) What are the consequences for wilfully disregarding these obligations? Does such disregard constitute a grave breach of the Conventions? A war crime? (HR, Art. 14; GC I-IV, Arts 50/51/130/147 respectively; P I, Arts 11(4) and 85)
  - b. Are the defendants found guilty for having disregarded the obligation to properly inform the Protecting Power? Or for the specific act which they concealed, i.e. murdering prisoners of war? Or for both? If for the specific act they concealed, why? Does concealing the crime after the fact constitute a participation in that act? Should that be the case? (GC I-IV, Arts 50/51/130/147 respectively; P I, Arts 11(4) and 85)
5. According to IHL today, if the United Kingdom were bombing Germany's civilian population, would the United Kingdom lose the right to ensure that Germany applies the Conventions with regard to British prisoners of war? Would Germany no longer remain bound to respect the Conventions vis-à-vis the United Kingdom? (GC I-IV, Arts 1 and 2(3); GC II, Art. 13(3); P I, Arts 51(6) and 96(2); Vienna Convention on the Law of Treaties, Art. 60 [See **Quotation**, Part I, Chapter 13. IX. 2(c)(dd) But no reciprocity].
6.
  - a. May a Detaining Power shoot at prisoners of war to prevent their escape? At prisoners of war who have escaped in order to recapture them? Only as an extreme measure? Only when they are armed? Would the German behaviour have been compatible with IHL if the facts were as described in the reply by the German Foreign Office on 6 June 1944? (GC III, Art. 42)
  - b. May a Detaining Power punish prisoners of war for an attempted escape? For a successful escape if they are recaptured before reaching their lines? May the punishment even be the death penalty? May those who escaped be punished for common-law crimes committed for the sole purpose of escaping (stealing money, shooting at a guard etc.)? (GC III, Arts 89, 91-93 and 100)
7. Does this case show that IHL had any importance for Hitler and his officials?



**Document No. 96, United States Military Tribunal at Nuremberg,  
United States v. Wilhelm List**

[Source: The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. VIII, 1949, pp.34-76]

**THE HOSTAGES TRIAL****TRIAL OF WILHELM LIST AND OTHERS****UNITED STATES MILITARY TRIBUNAL, NUREMBERG****8<sup>th</sup> JULY, 1947, TO 19<sup>th</sup> FEBRUARY, 1948**

The accused were all former high ranking German army officers and they were charged with responsibility for offences committed by troops under their command during the occupation of Greece, Yugoslavia, Albania and Norway, these offences being mainly so-called reprisal killings, purportedly taken in an attempt to maintain order in the occupied territories in the face of guerrilla opposition, or wanton destruction of property not justified by military necessity. The accused were charged with having thus committed war crimes and crimes against humanity.

[...] In its judgment the Tribunal dealt with a number of legal issues, including [...] the extent of responsibility of commanders for offences committed by their troops and the degree of effectiveness of the plea of superior orders. [...]

**3. JUDGMENT OF THE TRIBUNAL**

[...]

**(ii) The Plea of Superior Orders**

The Judgment [states]:

“The defendants invoke the defensive plea that the acts charged as crimes were carried out pursuant to orders of superior officers whom they were obliged to obey. [...]

“It cannot be questioned that acts done in time of war under the military authority of an enemy, cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war. Implicit obedience to orders of superior officers is almost indispensable to every military system. But it implies obedience to lawful orders only. If the act done pursuant to a superior’s orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected. But the general rule is that members of the armed forces are bound to obey only

the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates International Law and outrages fundamental concepts of justice. In the German War Trials (1921), the German Supreme Court of Leipzig in *The Llandovery Castle* case said: 'Patzigs order does not free the accused from guilt. It is true that according to para. 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible. According to No. 2, however, the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law.'

"It is true that the foregoing rule compels a commander to make a choice between possible punishment by his lawless government for the disobedience of the illegal order of his superior officer, or that of lawful punishment for the crime under the law of nations. To choose the former in the hope that victory will cleanse the act of its criminal characteristics manifests only weakness of character and adds nothing to the defence.

"We concede the serious consequences of the choice especially by an officer in the army of a dictator. But the rule becomes one of necessity, for otherwise the opposing army would in many cases have no protection at all against criminal excesses ordered by superiors.

"The defence relies heavily upon the writings of Professor L. Oppenheim to sustain their position. It is true that he advocated this principle throughout his writings. As a co-author of the British *Manual of Military Law*, he incorporated the principle there. It seems also to have found its way into the United States *Rules of Land Warfare* (1940). We think Professor Oppenheim espoused a decidedly minority view. It is based upon the following rationale: The law cannot require an individual to be punished for an act which he was compelled by law to commit. The statement completely overlooks the fact that an illegal order is in no sense of the word a valid law which one is obliged to obey. The fact that the British and American armies may have adopted it for the regulations of its own armies as a matter of policy, does not have the effect of enthroneing it as a rule of International Law. We point out that army regulations are not a competent source of International Law. They are neither legislative nor judicial pronouncements. They are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilised nations generally. It is possible, however, that such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions had been put into general practice. It will be observed that the determination, whether a custom or practice exists, is a question of fact. Whether a fundamental principle of justice has been accepted, is a question of judicial or legislative declaration. In determining the former, military regulations may play an important role but, in the latter, they do not constitute an authoritative precedent.

"Those who hold to the view that superior order is a complete defence to an International Law crime, base it largely on a conflict in the articles of war

promulgated by several leading nations. While we are of the opinion that army regulations are not a competent source of International Law, where a fundamental rule of justice is concerned, we submit that the conflict in any event does not sustain the position claimed for it. If, for example, one be charged with an act recognised as criminal under applicable principles of International Law and pleads superior order as a defence thereto, the duty devolves upon the Court to examine the sources of International Law to determine the merits of such a plea. If the Courts finds that the army regulations of some members of the family of nations provide that superior order is a complete defence and that the army regulations of other nations express a contrary view, the court would be obliged to hold, assuming for the sake of argument only that such regulations constitute a competent source of International Law, that general acceptance or consent was lacking among the family of nations. Inasmuch as a substantial conflict exists among the nations whether superior order is a defence to a criminal charge, it could only result in a further finding that the basis does not exist for declaring superior order to be a defence to an International Law crime. But, as we have already stated, army regulations are not a competent source of International Law when a fundamental rule of justice is concerned. This leaves the way clear for the court to affirmatively declare that superior order is not a defence to an International Law crime if it finds that the principle involved is a fundamental rule of justice and for that reason has found general acceptance.

"International Law has never approved the defensive plea of superior order as a mandatory bar to the prosecution of war criminals. This defensive plea is not available to the defendants in the present case, although if the circumstances warrant, it may be considered in mitigation of punishment under the express provisions of Control Council Law No. 10." [...]

**(v) *The irrelevance to the Present Discussion of the Illegality of Aggressive War***

The Judgment states:  
[...]

"For the purposes of this discussion, we accept the statement as true that the wars against Yugoslavia and Greece were in direct violation of the Kellogg-Briand Pact and were therefore criminal in character. But it does not follow that every act by the German occupation forces against person or property is a crime or that any and every act undertaken by the population of the occupied country against the German occupation forces thereby became legitimate defense. The prosecution attempts to simplify the issue by posing it in the following words:

'The sole issue here is whether German forces can with impunity violate international law by initiating and waging wars of aggression and at the same time demand meticulous observance by the victims of these crimes of duties and obligations owed only to a lawful occupant.'

"At the outset, we desire to point out that international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.

"It must not be overlooked that international law is prohibitive law. Where the nations have affirmatively acted, as in the case of the Hague Regulations, 1907, it prohibits conduct contradictory thereto. Its specific provisions control over general theories, however reasonable they may seem. We concur in the views expressed in the following text on the subject:

"Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents and neutral states. This is so, even if the declaration of war is *ipso facto* a violation of international law, as when a belligerent declares war upon a neutral state for refusing passage to its troop, or when a state goes to war in patent violation of its obligations under the Covenant of the League or of the General Treaty for the Renunciation of War. To say that, because such a declaration of war is *ipso facto* a violation of neutrality and international law, it is "inoperative in law and without any judicial significance" is erroneous. The rules of international law apply to war *from whatever cause it originates*." [...]

#### **(x) The extent of Responsibility of the Commanding General of Occupied Territory**

On this point the Tribunal expressed its opinion in these words:

"We have herein before pointed out that it is the duty of the commanding general in occupied territory to maintain peace and order, punish crime and protect lives and property. This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territory having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself, was responsible for the crime and that he is thereby absolved from responsibility. It is here claimed, for example, that certain SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent or approval of these defendants. But this cannot be a defence for the commanding general of occupied territory. The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defence. The fact is that the reports of subordinate units almost without exception advised these defendants of the policy of terrorism and intimidation being carried out by units in the field. [...]

“The matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime and protecting lives and property, subordinations are relatively unimportant. His responsibility is general and not limited to a control of units directly under his command. Subordinate commanders in occupied territory are similarly responsible to the extent that executive authority has been delegated to them”.

Elsewhere the Judgment laid down that a commanding general “is charged with notice of occurrences taking place within the territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence. Absence from headquarters cannot and does not relieve one from responsibility for acts committed in accordance with a policy he instituted or in which he acquiesced. He may not, of course, be charged with acts committed on the order of someone else which is outside the basic orders which he has issued. If time permits he is required to rescind such illegal orders, otherwise he is required to take steps to prevent a recurrence of their issue.

“Want of knowledge of the contents of reports made to him is not a defence. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.

“The reports made to the defendant List as Wehrmacht Commander Southeast charge him with notice of the unlawful killing of thousands of innocent people in reprisal for acts of unknown members of the population who were not lawfully subject to such punishment. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence, constitutes a serious breach of duty and imposes criminal responsibility.” [...]

#### **4. THE FINDINGS OF THE TRIBUNAL**

[...]

Of Foertsch, the Tribunal concluded that

“the nature of the position of the defendant Foertsch as Chief of Staff, his entire want of command authority in the field, his attempts to procure the rescission of certain lawful orders and the mitigation of others, as well as the want of direct evidence placing responsibility upon him, leads us to conclude that the Prosecution has failed to make a case against the defendant. No overt act from which a criminal intent could be inferred, has been established.

"That he had knowledge of the doing of acts which we have herein held to be unlawful under International Law cannot be doubted. It is not enough to say that he must have been a guilty participant. It must be shown by some responsible act that he was. Many of these acts were committed by organisations over which the Wehrmacht, with the exception of the commanding general, had no control at all. Many others were carried out through regular channels over his voiced objection or passive resistance. The evidence fails to show the commission of an unlawful act which was the result of any action, affirmative or passive, on the part of this defendant. His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law. He must be one who orders, abets or takes a consenting part in the crime. We cannot say that the defendant met the foregoing requirements as to participation. We are required to say therefore that the evidence does not show beyond a reasonable doubt that the defendant Foertsch is guilty on any of the counts charged."

**Document No. 97, United States Military Tribunal at Nuremberg,  
United States v. Wilhelm von Leeb *et al.***

[Source: The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. XII, 1949, pp.86-89]

*The following analysis is based upon the judgment of US v. Wilhelm von Leeb, et al. (The High Command Case, US Military Tribunal, Nuremberg, October 27-28, 1948) Source 11 TWC 462.*

[...]

**(xii) The Interpretation and Applicability of the Hague and Geneva Conventions**

The Tribunal pointed out that: "Another question of general interest in this case concerns the applicability of the Hague Convention and the Geneva Convention as between Germany and Russia." [...]

Of the applicability of the Geneva Convention, the Tribunal said that: "It is to be borne in mind that Russia was not a signatory Power to this Convention. There is evidence in this case derived from a divisional order of a German division that Russia had signified her intention to be so bound. However, there is no authoritative document in this record upon which to base such a conclusion. In the case of Goering, *et al.*, [...] the IMT [...] stated as follows:

"The argument in defence of the charge with regard to the murder and ill-treatment of Soviet prisoners of war, that the U.S.S.R. was not a party to the Geneva Convention, is quite without foundation. On 15<sup>th</sup> September, 1941, Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war, signed by General Reinecke on 8<sup>th</sup> September, 1941. He then stated:

"The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the U.S.S.R. Therefore only the principles of general International Law on the treatment of prisoners of war apply. Since the eighteenth century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people... The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint."

"Article 6 (b) of the Charter provides that "ill-treatment... of civilian population of or in occupied territory ... killing of hostages ... wanton destruction of cities, towns, or villages" shall be a war crime. In the main, these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46, which stated: "Family honour and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected.""

"It would appear from the above quotation that Tribunal accepted as International Law the statement of Admiral Canaris to the effect that the Geneva Convention was not binding as between Germany and Russia as a contractual agreement, but that the general principles of International Law as outlined in those Conventions were applicable. In other words, it would appear that the IMT in the case above cited, followed the same lines of thought with regard to the Geneva Convention as with respect to the Hague Convention to the effect that they were binding insofar as they were in substance an expression of International Law as accepted by the civilized nations of the world, and this Tribunal adopts this viewpoint."

The Tribunal next dealt with two points of interpretation as follows:

"One serious question that confronts us arises as to the use of prisoners of war for the construction of fortifications. It is pointed out that the Hague Convention specifically prohibited the use of prisoners of war for any work in connection with the operations of war, whereas the later Geneva Conventions provided that there shall be no *direct* connection with the operations of war. This situation is further complicated by the fact that when the proposal was made to definitely specify the exclusion of the building of fortifications, objection was made before the conference to that limitation, and such definite exclusion of the use of prisoners, was not adopted. It is no defence in the view of this Tribunal to assert that international crimes were committed by an adversary, but as evidence given to the interpretation of what constituted accepted use of prisoners of war under International Law, such evidence is pertinent. At any rate, it appears that the illegality of such use was by no means clear. The use of prisoners of war in the construction of fortifications is a charge directed against the field commanders on trial here. This Tribunal is of the opinion that in view of the uncertainty of International Law as to this matter, orders providing for such use from superior authorities, not involving the use of prisoners of war in dangerous areas, were not criminal upon their face, but a matter which a field commander had the right to assume was properly determined by the legal authorities upon higher levels.

"Another charge against the field commanders in this case is that of sending prisoners of war to the Reich for use in the armament industry. The term for the armament industry appears in numerous documents. While there is some question as to the interpretation of this term, it would appear that it was used to cover the manufacture of arms and munitions. It was nevertheless legal for field commanders to transfer prisoners of war to the Reich and thereafter their control of such prisoners terminated. Communications and orders specifying that their use was desired by the armament industry, or that prisoners were transmitted for the armament industry are not in fact binding as to their ultimate use. Their use subsequent to transfer was a matter over which the field commander had no control. Russian prisoners of war were in fact used for many purposes outside the armament industry. Mere statements of this kind cannot be said to furnish irrefutable proof against the defendants for the illegal use of prisoners of war whom they transferred. In any event, if a defendant is to be held accountable for transmitting prisoners of war to the armament industry, the evidence would have to establish that prisoners of war shipped from his area were in fact so used.



“Therefore, as to the field commanders in this case, it is our opinion that upon the evidence, responsibility cannot be fixed upon the field commanders on trial before us for the use of prisoners of war in the armament industry.”

The Tribunal then returned to the question of the declaratory character of the Hague and Geneva Conventions:

“In stating that the Hague and Geneva Conventions express accepted usages and customs of war, it must be noted that certain detailed provisions pertaining to the care and treatment of prisoners of war can hardly be so designated. Such details it is believed could be binding only by international agreement. But since the violation of these provisions is not in issue in this case, we make no comment thereon, other than to state that this judgment is in no way based on the violation of such provisions as to Russian prisoners of war.

“Most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations and binding upon Germany and the defendants on trial before us in the conduct of the war against Russia. These concern (1) the treatment of prisoners of war; [...].

[Here the Court provides twenty-four quotations of parts of some of the provisions of the 1907 Hague Regulations and the 1929 Geneva Convention on Prisoners of War, which it considers to be binding as customary law.]

## Document No. 98, The Tokyo War Crimes Trial

[Source: International Military Tribunal for the Far East, *The Tokyo War Crimes Trial*, November 1948, reprinted from Friedman, L. (ed.), *The Law of War: A Documentary History*, New York, Random House, vol. 2, 1972, pp. 1037-1040]

[...]

**(b) Responsibility for War Crimes Against Prisoners**

Prisoners taken in war and civilian internees are in the power of the Government which captures them. This was not always the case. For the last two centuries, however, this position has been recognised and the customary law to this effect was formally embodied in the Hague Convention No. IV in 1907 and repeated in the Geneva Prisoner of War Convention of 1929. Responsibility for the care of prisoners of war and of civilian internees (all of who we will refer to as “prisoners”) rests therefore with the Government having them in possession. This responsibility is not limited to the duty of mere maintenance but extends to the prevention of mistreatment. In particular, acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions are to be prevented [*sic*] by the Government having responsibility for the prisoners.

In the discharge of these duties to prisoners Governments must have resort to persons. Indeed the Governments responsible, in this sense, are those persons who direct and control the functions of Government. In this case and in the above regard we are concerned with the members of the Japanese Cabinet. The duty to prisoners is not a meaningless obligation cast upon a political abstraction. It is a specific duty to be performed in the first case by those persons who constitute the Government. In the multitude of duties and tasks involved in modern government there is of necessity an elaborate system of subdivision and delegation of duties. In the case of the duty of Governments to prisoners held by them in time of war those persons who constitute the government have the principal and continuing responsibility for their prisoners, even though they delegate the duties of maintenance and protection to others.

In general the responsibility of prisoners held by Japan may be stated to have rested upon:

- (1) Members of the Government;
- (2) Military or Naval Officers in command of formations having prisoners in their possession;
- (3) Officials in those departments which were concerned with the well-being of prisoners;
- (4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners.

It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the

continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill-treatment of prisoners if:

- (1) They fail to establish such a system.
- (2) If having established such a system, they fail to secure its continued and efficient working.

Each of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application. An Army Commander or a Minister of War, for example, must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he has issued on matters of the first importance.

Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be committed unless:

- (1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or
- (2) They are at fault in having failed to acquire such knowledge.

If, such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his Office required or permitted him to take any action to prevent such crimes. On the other hand it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.

A member of a Cabinet which collectively, as one of the principal organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill-treatment in the future.

Army or Navy Commanders can, by order, secure proper treatment and prevent ill-treatment of prisoners. So can Ministers of War and of the Navy. If crimes are committed against prisoners under their control, of the likely occurrence of which they

had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.

Departmental officials having knowledge of ill-treatment of prisoners are not responsible by reason of their failure to resign; but if their functions included the administration of the system of protection of prisoners and if they had or should have had knowledge of crimes and did nothing effective, to the extent of their powers, to prevent their occurrence in the future then they are responsible for such future crimes.

**Case No. 99, United States, *Ex Parte Quirin et al.***

[Source: Supreme Court of the United States, 317 US 1 (1942); footnotes omitted.]

***EX PARTE QUIRIN ET AL.;***  
**UNITED STATES EX REL. QUIRIN, ET AL. v. COX, PROVOST MARSHAL [...]**

OPINION: MR. CHIEF JUSTICE STONE delivered the opinion of the Court. [...]

All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship, or in any case that he has by his conduct renounced or abandoned his United States citizenship. [...]

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners [...] boarded a German submarine which proceeded across the Atlantic to [...] New York. The four were there landed from the submarine in the hours of darkness [...] carrying with them a supply of explosives, fuses, and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned, and proceeded in civilian dress to New York City. [...]

All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. [...]

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942, appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War [...]. On the same day, by Proclamation, the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States ... through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals." [...]

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are

subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. [...]

Specification 1 states that petitioners, "being enemies of the United States and acting for [...] the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States [...] and went behind such lines, contrary to the law of war, in civilian dress [...] for the purpose of committing [...] hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States."

This specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners' contentions. As we have seen, entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and warlike act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. [...] Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation, quite as much as at the armed forces. Every consideration which makes the unlawful belligerent punishable is equally applicable whether his objective is the one or the other. The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our Armed Forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. [...] It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused. [...]

Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this Court should be denied. [...]

### DISCUSSION

*For the purposes of this discussion please consider the Geneva Conventions and Protocol I applicable.*

1. a. Who is entitled to prisoner-of-war status under IHL? Only combatants? (GC I, Art. 28(2); GC III, Art. 4; P I, Arts 44(4)-(5) and 45)  
b. Does citizenship affect the status of persons otherwise entitled to prisoner-of-war status? Even if they have the citizenship of the Detaining Power? May they, even if they are prisoners of war, be punished for the act of treason consisting of having participated in a war against their country or having fought in the armed forces of the enemy? (GC III, Arts 4, 16 and 85; P I, Art. 43)
2. Why does the Court specifically mention the enemy combatant's absence of a uniform? What status do combatants have who fail to distinguish themselves from the civilian population? (HR, Art. 1; GC III, Art. 4(A)(2); GC IV, Art. 4; P I, Art. 44(3)-(4)) What purpose does this principle of distinction serve? Does this explain why IHL rules do not give combatant status to spies? (HR, Arts 29-31; P I, Arts 44(4), 45(3) and 46) Are saboteurs treated the same as spies under IHL? What is the difference between a saboteur and a spy?
3. Could this decision have been issued if Protocol I had been applicable?

**Case No. 100, United States, Johnson v. Eisentrager**

[See also **Case No. 266**, United States, Habeas Corpus for Guantanamo Detainees]

[**Source:** U.S. Supreme Court JOHNSON v. EISENTRAGER, 339 U.S. 763 (1950); June 5, 1950; available on <http://laws.findlaw.com/us/339/763.html>]

**U.S. Supreme Court**  
**JOHNSON v. EISENTRAGER, 339 U.S. 763 (1950)**

**JOHNSON, SECRETARY OF DEFENSE, ET AL.**  
**v. EISENTRAGER, ALIAS EHRHARDT, ET AL.**

**CERTIORARI TO THE UNITED STATES COURT OF APPEALS**  
**FOR THE DISTRICT OF COLUMBIA CIRCUIT. No. 306**

**Argued April 17, 1950**

**Decided June 5, 1950**

[...]

MR. JUSTICE JACKSON delivered the opinion of the Court.

The ultimate question in this case is one of jurisdiction of civil courts of the United States vis-a-vis military authorities in dealing with enemy aliens overseas. The issues come here in this way:

Twenty-one German nationals petitioned the District Court of the District of Columbia for writs of *habeas corpus*. They alleged that, prior to May 8, 1945, they were in the service of German armed forces in China. [...] On May 8, 1945, the German High Command [...] executed an act of unconditional surrender, expressly obligating all forces under German control at once to cease active hostilities. These prisoners have been convicted of violating laws of war, by engaging in, permitting or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan. Their hostile operations consisted principally of collecting and furnishing intelligence concerning American forces and their movements to the Japanese armed forces. They, with six others who were acquitted, were taken into custody by the United States Army after the Japanese surrender and were tried and convicted by a Military Commission constituted by our Commanding General at Nanking by delegation from the Commanding General, United States Forces, China Theater, pursuant to authority specifically granted by the Joint Chiefs of Staff of the United States. The Commission sat in China, with express consent of the Chinese Government. The proceeding was conducted wholly under American auspices and involved no international participation. After conviction, the sentences were duly reviewed [...].

The prisoners were repatriated to Germany to serve their sentences. [...]

The petition prays an order that the prisoners be produced before the District Court, that it may inquire into their confinement and order them discharged from such



offenses and confinement. It is claimed that their trial, conviction and imprisonment violate Articles I and III of the Constitution, and the Fifth Amendment thereto, and other provisions of the Constitution and laws of the United States and provisions of the Geneva Convention governing treatment of prisoners of war. [...]

## I

[...]

It is war that exposes the relative vulnerability of the alien's status. The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us. While his lot is far more humane [...] and endurable than the experience of our citizens in some enemy lands, it is still not a happy one. But disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage. [...]

American doctrine as to effect of war upon the status of nationals of belligerents took permanent shape following our first foreign war. [...] Conscription, compulsory service and measures to mobilize every human and material resource and to utilize nationals – wherever they may be – in arms, intrigue and sabotage, attest [...] this Court's earlier teaching that in war "every individual of the one nation must acknowledge every individual of the other nation as his own enemy – because the enemy of his country." [...] And this without regard to his individual sentiments or disposition. [...] The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, [...] regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign. [...]

The standing of the enemy alien to maintain any action in the courts of the United States has been often challenged and sometimes denied. [...] A unanimous Court recently clarified both the privilege of access to our courts and the limitations upon it. We said: "The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law today." [...]

But the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy. [...]

## II

[...]

We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a

writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied [...] protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States. [...]

A basic consideration in *habeas corpus* practice is that the prisoner will be produced before the court. [...] To grant the [...] writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Moreover, we could expect no reciprocity for placing the litigation weapon in unrestrained enemy hands.[...] [T]he writ of *habeas corpus* is generally unknown. [...]

Despite this, the doors of our courts have not been summarily closed upon these prisoners. Three courts have considered their application and have provided their counsel opportunity to advance every argument in their [...] support and to show some reason in the petition why they should not be subject to the usual disabilities of nonresident enemy aliens. [...] After hearing all contentions they have seen fit to advance and considering every contention we can base on their application and the holdings below, we arrive at the same conclusion the Court reached in each of those cases, viz.: that no right to the writ of *habeas corpus* appears. [...]

**DISCUSSION**

1.
  - a. Did a German national, by continuing to fight, together with Japan, against the US after 8 May 1945, violate the “laws of war”? IHL?
  - b. If Geneva Convention III had applied, would the petitioners have been prisoners of war once they had fallen into the power of the US? If they had been prisoners of war, could they have been sentenced for what they did? Without a possibility to petition the US Supreme Court? (GC III, Arts 82, 84, 85, 99, 102 and 106)
  - c. If the petitioners had been civilians protected by Geneva Convention IV, could they have been sentenced for what they did? Without a possibility to petition the US Supreme Court? (GC IV, Arts 64, 66, 70 and 73)
2. How do you consider the restrictions imposed under US law against “enemy aliens”? Are they in conformity with the rules of IHL? (HR, Art. 23(h); GC IV, Arts 35-43)
3. May a protected person bring a legal action before the courts of the adverse party in whose power he or she is? Even if he or she is not on the enemy’s own territory? (HR, Art. 23(h); GC III, Art. 14(3); GC IV, Art. 38)
4. May a prisoner of war present a *habeas corpus* petition to the courts of the detaining power? May a civilian enemy alien present a *habeas corpus* petition to the courts of the detaining power? Is every enemy national either a prisoner of war or a protected civilian? (GC III, Arts 4 and 5; GC IV, Art. 4)

**Case No. 101, United States, Trial of Lieutenant General Harukei Isayama and Others**

[Source: Levie, H.S. (ed.), *International Law Studies: Documents on Prisoners of War*, Naval War College, R.I., Naval War College Press, vol. 60, 1979, pp. 345-348]

**TRIAL OF LIEUTENANT GENERAL HARUKEI ISAYAMA  
AND SEVEN OTHERS**

**(U.S. Military Commission, Shanghai, July 25, 1946)**

**SOURCE  
5 LRTWC 60**

[...]

**A. OUTLINE OF THE PROCEEDINGS****1. THE CHARGES**

[...]

When taken together, the charge and accompanying Bill of Particulars, which specified the offences asserted that the accused Lieutenant-General Harukei Isayama did “permit, authorize and direct an illegal, unfair, unwarranted and false trial” before a Japanese Military Tribunal of certain American prisoners of war, did “unlawfully order and direct a Japanese Military Tribunal” to sentence to death these American prisoners of war, and did, “unlawfully order, direct and authorize the illegal execution” of the American prisoners of war. [...] With respect to the [other] accused [...], the Charges and Bills of Particulars asserted that they as members of the Japanese Military Tribunals did “knowingly, wrongfully, unlawfully and falsely try, prosecute and adjudge certain charges” against the several American prisoners of war “upon false and fraudulent evidence and without affording said prisoners of war a fair hearing,” did “knowingly, unlawfully and wilfully sentence” the several American Prisoners of war to be put to death resulting in their unlawful death. Several of the accused were further charged in their capacities as chief judge and prosecutors and those who acted as judges were further charged with the wrongful and wilful failure to perform their duties as such judges and with the failure and neglect to provide a fair and proper trial.

The accused pleaded not guilty.

**2. THE EVIDENCE BEFORE THE COMMISSION**

The evidence showed that fourteen United States airmen were captured by the Japanese Formosan Army and interrogated for alleged violations of the Formosa Military Law relating to the punishment of enemy airmen for acts of bombing and strafing in violations of International Law. These fourteen airmen were for the most part radiomen, photographers and gunners, and were captured between 12<sup>th</sup> October, 1944,

on which the Military Law was issued, and 27<sup>th</sup> February, 1945. The senior members of the plane crews – the pilots and co-pilots – were sent to Tokyo for intelligence purposes and were not tried by the Japanese with their fellow crew-members.

The Law in question provided that its terms would apply to all enemy airmen within the jurisdiction of the 10<sup>th</sup> Area Army and that punishment would be meted out to all enemy airmen who carried out any of the following: bombing and strafing with intent to destroy or burn private objectives of non-military nature; bombing and strafing non military objectives apart from unavoidable circumstances; disregarding human rights and carrying out inhuman acts; or entering into the jurisdiction with intentions of carrying out any of the foregoing. Death was provided as the punishment, but this, according to circumstances, could be changed to imprisonment for life or for not less than 10 years. The law stated that the punishment would be carried out by the appropriate Commander; and provided for the establishment of a Military Tribunal at Taihoku composed of officers of the 10<sup>th</sup> Area Army and other units under its command, and for the applicability of the regulations of the special court-martial to the Military Tribunal. It was further provided that anyone violating this law would be tried by Military Tribunal; that the commander would be in charge of the Tribunal and that the Tribunal would be composed of three judges – two ordinary army officers and one judicial officer – to be appointed by the commander.

All of the fourteen were interrogated by members of the 10<sup>th</sup> Area Army Judicial Department. There was some evidence that, during the investigation, the chief of the judicial Department, the accused Furukawa, inquired in Tokyo as to the disposition of the captured airmen, and that he was told that the fourteen should be tried if they came within the scope of the Military Law. On his return to Formosa he instructed his subordinates to complete the investigations. The evidence before the United States Military Commission disclosed that the records of the interrogations of several of the American airmen were falsified before the trial by the Japanese Court or before the Japanese Court records were completed.

The interpreter who was present when the falsified statements were taken testified that none of the airmen concerned made any admissions of indiscriminate bombing or strafing. This evidence was supported by the testimony of certain of those who had the task of recording the interrogations. The accused denied the falsification and claimed that admissions of guilt had been made by the airmen.

It was the contention of the accused in the present trial that, in accordance with Japanese War Department directives, the 10<sup>th</sup> Areas Army asked instructions of the Central Government during the pre-trial investigations and forwarded statements of opinion prior to referring the cases for trial. A reply came back from Tokyo stating that if the opinions given were correct, severe judgement should be meted out. The accused Isayama, Chief of Staff, 10<sup>th</sup> Area Army, was advised of all proceedings. [...]

The fourteen Americans were tried in units according to the planes of which they were crew members. There were six cases, all brought to trial on 21<sup>st</sup> May, 1945. The American airmen were not afforded the opportunity to obtain evidence or witnesses on their own behalf. The defence attempted to justify this, first on the ground that lack

of personnel and facilities made it impossible to permit the airmen to go to the scenes of their alleged indiscriminate bombings and strafings, and secondly on the ground that the airmen were given full opportunity in court to make whatever statements they wished. Some testimony was adduced by the prosecution in the United States trial to show that, except for the charges, no other document or evidence was interpreted to the airmen, and that they were not defended by counsel.

There was some evidence indicating that, under the Japanese system of military justice, an accused was not allowed defence counsel in time of war; the evidence before a tribunal was largely documentary, based on admissions and statements of the accused in pre-trial interrogations and reports of damage and investigations by the gendarmerie; and the accused might testify before the tribunal and might introduce evidence on his behalf. It was the contention of the defence that this was the procedure followed in each of the trials of the fourteen American airmen, and this procedure, it was testified, was the normal one.

It was the contention of the defence that since an intention on the part of the Japanese Prosecution to demand the death penalty had been approved by Tokyo, and since the death penalty had been demanded at the trials, the military tribunal had to adjudge death and the commander had to order its execution [...]. The commander [...] issued an order for the execution of all fourteen after final instructions were received from Tokyo. On the morning of 19<sup>th</sup> June, 1945, the American fliers were lined up in front of an open ditch, shot to death and then buried in that ditch.

The Japanese records of trial relating to these American airmen, and which were turned over to American authorities in September 1945, were not completed until after the Japanese surrender. [...] The accused did not sign the records of the trials until after the war.

### 3. THE FINDINGS AND SENTENCES

All of the accused were found guilty.

#### DISCUSSION

1. Were the American prisoners of war denied a fair trial, as the US Court concluded? If so, because the trial violated the rules of IHL then applicable? Even though Japan was not a State Party to the 1929 Geneva Convention relative to the Treatment of Prisoners of War? Were the accused before the US Military Commission denied a fair trial according to the rules of IHL applicable today? (GC III, Arts 82-89 and 99-108)
2.
  - a. Under contemporary IHL, may or must POWs be punished by the Detaining Power for acts such as those qualified as crimes by the Formosa Military Law, even though they were committed prior to capture? (GC III, Art. 85; P I, Arts 51 and 85)
  - b. According to contemporary IHL, did the Formosa Military Law apply to the accused? Was that law compatible with IHL? If not, was it because the law was enacted without proper notification to the Protecting Powers? Could the law at least have been applicable to the fourteen airmen who were captured on the same day that it was enacted? Was it because the law was enacted

without the consent of the Power on which the prisoners of war depended? Or because the law called for the death penalty as a punishment? Or because the law applied only to enemy airmen? (GC III, Arts 82, 87, 88 and 100)

3.
  - a. Was the Japanese trial conducted in accordance with the judicial guarantees stipulated by contemporary IHL? If not, were the accused validly sentenced? (GC III, Arts 84, 102 and 105; CIHL, Rule 100)
  - b. Was the evidence against the airmen properly obtained? (GC III, Art. 99(2))
  - c. Should the accused have been granted the opportunity to obtain evidence or witnesses? (GC III, Art. 105)
  - d. Although the Japanese system of military justice did not allow an accused to have a defence counsel, should the accused here have been provided with a defence counsel? (GC III, Arts 99(3) and 105)
  - e. Should the Court have granted the accused the right of appeal? Did they have such a right? (GC III, Art. 106)
4. Could the Japanese and the US trial have taken place, even though the Protecting Power had not been notified of the proceedings? (GC III, Art. 104)
5. Would it have been consistent with contemporary IHL to carry out the executions so quickly following the sentence? Must not the Protecting Power first be notified? Which information must such a communication contain? (GC III, Arts 100(3), 101 and 107)
6. Under contemporary IHL, would the US have had the right or the obligation to punish the Japanese judges for their participation in the sentencing of the airmen? Were the Japanese judges under US jurisdiction when they committed their crimes? May a judge be sentenced for a judgment he has rendered? (GC III, Art. 130)

Case No. 102, United States, *In re Yamashita*

[Source: Supreme Court of the United States 327 US 1 (1946); footnotes partially omitted.]

[...]

Mr. Chief Justice Stone delivered the opinion of the court. [...]

*The charge.* Neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war. The charge, so far as now relevant, is that petitioner, between October 9, 1944 and September 2, 1945, in the Philippine Islands, “while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he [...] thereby violated the laws of war.”

Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner’s command during the period mentioned. The first item specifies the execution of “a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity.” Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments.

It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war. Articles 4, 28, 46, and 47, annex to the Fourth Hague Convention, 1907 [...]. But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by “permitting them to commit” the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. [...]



It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

This is recognized by the annex to the fourth hague convention of 1907, respecting the laws and customs of war on land. Article 1 lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates." [...] And Article 26 of the Geneva Red Cross Convention of 1929 [...] for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, makes it "the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing Articles, (of the Convention) as well as for unforeseen cases ..." and, finally, Article 43 of the Annex of the Fourth Hague Convention [...] requires that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals. [...]

We do not make the laws of war but we respect them so far as they do not conflict with the commands of congress or the constitution. There is no contention that the present charge, thus read, is without the support of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances.

[Footnote 4 reads: In its findings the commission took account of the difficulties "faced by the accused with respect not only to the swift and overpowering advance of american forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply ..., training, communication, discipline and morale of his troops," and the "tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character ... of his troops." It nonetheless found that petitioner had not taken such measures to control his troops as were "required by the circumstances."]

We do not weigh the evidence. We merely hold that the charge sufficiently states a violation against the law of war, and that the commission, upon the facts found, could properly find petitioner guilty of such a violation. [...] It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt. [...]

**Mr. Justice Murphy, dissenting. [...]**

[...] I find it impossible to agree that the charge against the petitioner stated a recognized violation of the laws of war. [...]

[R]ead against the background of military events in the Philippines subsequent to October 9, 1944, these charges amount to this: "We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them."

Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality.

International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault; nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. [...]

The court's reliance upon vague and indefinite references in certain of the Hague Conventions and the Geneva Red Cross Convention is misplaced. Thus the statement in Article 1 of the Annex to Hague Convention No. IV of October 18, 1907 [...] to the effect that the laws, rights and duties of war apply to military and volunteer corps only if they are "commanded by a person responsible for his subordinates," has no bearing upon the problem in this case. Even if it has, the clause "responsible for his subordinates" fails to state to whom the responsibility is owed or to indicate the type of responsibility contemplated. The phrase has received differing interpretations by authorities on international law. In Oppenheim, *International Law* (6<sup>th</sup> ed., rev. by Lauterpacht, 1940, vol. 2, p. 204, fn. 3) it is stated that "the meaning of the word 'responsible'... is not clear. It probably means 'responsible to some higher authority,' whether the person is appointed from above or elected from below; ..." Another authority has stated that the word "responsible" in this particular context means

“presumably to a higher authority,” or “possibly it merely means one who controls his subordinates and who therefore can be called to account for their acts.” Wheaton, *International Law* (7<sup>th</sup> ed., by Keith, London, 1944, p. 172, fn. 30). Still another authority, Westlake, *International Law* (1907, part II, p. 61), states that “probably the responsibility intended is nothing more than a capacity of exercising effective control.” Finally, Edmonds and Oppenheim, *Land Warfare* (1912, p. 19, par. 22) state that it is enough “if the commander of the corps is regularly or temporarily commissioned as an officer or is a person of position and authority ...” It seems apparent beyond dispute that the word “responsible” was not used in this particular Hague Convention to hold the commander of a defeated army to any high standard of efficiency when he is under destructive attack; nor was it used to impute to him any criminal responsibility for war crimes committed by troops under his command under such circumstances. The provisions of the other conventions referred to by the court are on their face equally devoid of relevance or significance to the situation here in issue. Neither Article 19 of Hague Convention No. X [...] nor Article 26 of the Geneva Red Cross Convention of 1929 [...] refers to circumstances where the troops of a commander commit atrocities while under heavily adverse battle conditions. Reference is also made to the requirement of Article 43 of the Annex to Hague Convention No. IV [...] that the commander of a force occupying enemy territory “shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” But the petitioner was more than a commander of a force occupying enemy territory. He was the leader of an army under constant and devastating attacks by a superior re-invading force. This provision is silent as to the responsibilities of a commander under such conditions as that. [...]

The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history. This is not to say that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities. But that punishment should be based upon charges fairly drawn in light of established rules of international law and recognized concepts of justice. [...]

## DISCUSSION

1. a. At that time, was the charge against the petitioner a recognized violation of the laws of war? Or was it merely the administration of victor’s justice?
- b. Is such a charge a recognized violation of IHL today? (P I, Arts 86 and 87; CIHL, Rule 153)
2. a. If a military commander is personally responsible for criminal misconduct by members of his command vis-à-vis protected persons, and if he fails to take the necessary steps to prevent such misconduct before it occurs (and to end it and punish offenders if it does occur), which necessary steps suffice to avoid personal responsibility? How is this to be assessed? Will the minimum necessary steps vary with the circumstances?
- b. For a finding of culpability, is a subjective or an objective standard applied, i.e., must the commander know that his subordinates are going to commit a breach of IHL or have information which should have enabled him to so conclude? Which is the higher standard of mens rea?

3. a. Is Justice Murphy correct in his dissent that a commander should not be held responsible for the actions of his troops when “under constant and overwhelming assault”? Is such a requirement militarily unrealistic? Does that matter? Should it matter?
- b. Can an intense combat situation really be fairly assessed in retrospect? Particularly by the victors of a conflict? If not, can soldiers thus never be fairly prosecuted and punished? [*See also Case No. 117, United States, United States v. William L. Calley, Jr.*]

**Case No. 103, Burma, Ko Maung Tin v. U Gon Man**

[Source: AD, vol. 14, 1947, pp. 233-235]

**KO MAUNG TIN**

**v.**

**U GON MAN**

**Burma, High Court (Appellate Civil)**

**(Roberts, C.J., Ba U, Blagden, Wright, and E. Maung, JJ.)**

**May 3, 1947**

THE FACTS. During the Japanese occupation of Burma the appellant advanced Rs. 1,000 in Japanese notes to the respondent, who executed a promissory note in favour of the appellant promising to repay Rs. 1,000 only in Japanese notes with interest, and deposited title deeds of his properties with intent to create a mortgage by deposit of title deeds. After the British reoccupation appellant filed a suit against the respondent on the promissory note. For the respondent it was contended that the issue of the Japanese currency was unlawful and that Rs. 1,000 (Japanese currency) was not currency within the meaning of "sum certain" in the definition of a promissory note. [...]

*Held:* that the action on the promissory note must be dismissed [...]. The Japanese Military Authorities acted in excess of their authority under international law, in issuing a system of currency parallel to the currency established by the lawful Government.

*Per E. Maung, J.:* "In holding that the Japanese Military Authorities in occupation of Burma acted in excess of their legitimate authority at international law in setting up a parallel system of currency and relating the same to the system established by the lawful Government for Burma, I am not unmindful of the precedents set in the War of 1914-18 by Germans in France and Belgium and Austrians in Serbia, repeated in the War of 1939 onwards by Germany and powers associated with her. German jurists and the *Reichsgericht* sought to justify these actions on the theory that in an effective occupation of enemy territory the power of the occupying country totally excludes and replaces the State power of a lawful Government. This theory has not received general acceptance and is not in consonance with modern views on the status of the occupying power. The right of an occupant in occupied territory is merely a right of administration. See McNair, *Legal Effects of War* (2<sup>nd</sup> ed.) at page 337.

"Articles 42 to 56 of the Hague Regulations of 1907 clearly cannot be invoked in support of the exercise of the occupying power of effecting a change in the currency system of the occupied territory and to make that change binding on the lawful Government.

[...]

**DISCUSSION**

1. May an occupying power legislate for a territory it occupies? In which respects? Under which conditions? (HR, Art. 43; GC IV, Art. 64)
2. May an occupying power introduce its own currency in an occupied territory as a legal currency? At least alongside the local currency? May it create a separate legal currency for the occupied territory? When does the introduction of a currency constitute an act of legislation?

**Case No. 104, Netherlands, *In re Pilz***

[Source: AD, vol. 17, 1950, pp. 391-392, original report in *NJ*, No. 681, 1950]

**PUNISHMENT OF WAR CRIMES*****In re PILZ*****Holland, District Court of The Hague (Special Criminal Chamber)****December 21, 1949****Special Court of Cassation. July 5, 1950**

THE FACTS. In occupied Holland a young Dutchman who had enlisted in the German army attempted to escape from his unit and was fired on while so doing. The accused, a German military doctor, was prosecuted after the war for having refused to allow German personnel to give the wounded man medical attention and for having abused his authority by ordering, or at least permitting, a subordinate to shoot him. In its judgment of December 21, 1949, the Special Criminal Chamber of the District Court of The Hague held that it had no jurisdiction to take cognizance of a case of this nature. On appeal by the Public Prosecutor,

*Held* (by the Special Court of Cassation): that the appeal must be dismissed. The Court of Cassation agreed with the Court below that the Netherlands courts would have jurisdiction in this case only if the German doctor had committed a war crime, and that, therefore, it was necessary to enquire whether the acts for which he was prosecuted constituted a violation of the laws of war. The Hague Regulations of 1907 concerning the laws and customs of war had not, however, been violated, since the object of the Regulations, and in particular of Article 46, was to protect the inhabitants of an enemy-occupied country and not members of the occupying forces. The legal position of the latter was regulated not by international convention, but by the military law of the occupying Power. As the Court below had established as a fact, the wounded person belonged to the occupying army. Under these conditions his nationality, or former nationality, was irrelevant, since by his enlistment in the Occupant's army he had forfeited the protection of the law of nations and had voluntarily submitted himself to the laws of the occupying Power. Nor did the Geneva Convention of July 27, 1929, for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field apply, since this Convention only protected members of an army against acts by members of the opposing army. Denial of medical aid to the wounded soldier in this case and permitting his murder were, if proved, abominable crimes on the part of a military doctor, contrary to all humanitarian principles and to the calling of a physician. They did not, however, constitute war crimes, but were crimes in the domestic sphere of German military law and jurisdiction. Nor were the acts for which the German doctor was prosecuted in Holland crimes against humanity in the sense of the Charter of the International Military Tribunal, since the victim no longer belonged to the civilian

population of occupied territory, and the acts committed against him could not be considered as forming part of a system of "persecutions on political, racial or religious grounds".

### DISCUSSION

*Please assume, for the purpose of this discussion, that the Geneva Conventions and Protocol I apply.*

1. Does Geneva Convention I only apply to treatment by the enemy? Does Protocol I? Does an enemy national voluntarily joining the armed forces of the power in whose hands he is lose protected person status? (GC I-IV, Arts 7/7/7/8 respectively; P I, Arts 10, 11 and 75) Is it a violation of IHL to refuse medical attention to such a person? To summarily execute such a person? (E.g., GC I-IV, Arts 50/51/130/147 respectively; GC IV, Art. 5(3); P I, Arts 10 and 75)
2. Is denial of medical attention a grave breach of IHL? Even in this case? (GC I-IV, Arts 50/51/130/147 respectively; GC III, Art. 13; P I, Art. 11(1) and (4))
3. Does an officer permitting a subordinate to shoot at a deserter who is hors de combat violate IHL? (GC I-IV, Art. 3; P I, Arts 75 and 85(3)(e))



**Case No. 105, Singapore, Bataafsche Petroleum v. The War Damage Commission**

[Source: *AJIL*, vol. 51(4), 1957 pp. 802-815; footnotes omitted.]

**N.V. DE BATAAFSCHE PETROLEUM MAATSCHAPPIJ & ORS.****v.****THE WAR DAMAGE COMMISSION****22 Malayan Law Journal 155 (1956)****Court of Appeal, Singapore,****April 13, 1956****Whyatt, C.J., Mathew, C.J., and Whitton, J.**

Oil stocks in the Netherlands East Indies, which were owned by Dutch corporations, were seized by Japanese armed forces and used for Japanese civilian and military purposes. They were not, however, requisitioned by the Japanese under the Hague Regulations. Large quantities of these stocks were found in Singapore at the end of the war, and were seized by the British Army as war booty. The Dutch corporations claimed compensation. Their claim was dismissed below, but on appeal was allowed. Whyatt, C.J., in an opinion stating the facts more fully, said in part:

[...] The appellants contend that the petroleum was their property and not, as the respondents allege, the property of the Japanese State and in support of their contention, they rely upon two broad submissions, first, that they had a valid title to the petroleum under municipal law, and secondly, that they were never lawfully deprived of their title by the Japanese belligerent occupant.

Before examining these submissions in detail, it will be convenient to set out the relevant facts which have been proved or admitted in the course of these lengthy proceedings. The appellants are three oil companies, incorporated in Holland, who prior to the outbreak of the war with Japan in 1941, carried on the business of producers and refiners of oil in Sumatra. [...] By the end of 1941, the appellants had established production in 32 oil reservoirs, as they are technically known, situated in various places in the concession areas [...].

For the evidence of the events which occurred during the Japanese occupation, [...] the testimony of Japanese naval and military officers [...] may be summarised as follows: When the Japanese armed forces occupied Sumatra, they immediately seized the appellants' installations in the field and also their refineries at Palembang because, as a Japanese naval officer, Admiral Watanabe, called by the respondents, put it, "oil was the most vital war material at that time, and personally, I thought we started the war for the sake of the oil." The installations had been badly damaged as part of the Netherlands Indies Government's denial policy, and the Japanese military authorities organized a special technical unit under military discipline to repair them. By the end of the first year of the Japanese occupation, they were all in working order again and crude oil was once more being extracted from the reservoirs and being processed in the appellants' refineries. The Japanese military authorities did not bring any new oilfields into production but continued to extract

oil from the existing reservoirs throughout the period of the occupation. The oil so extracted, or at least a substantial part of it, was shipped as refined products, and sometimes as crude, to Singapore where it was kept in storage tanks, belonging in some cases to the appellants' associated companies, until eventually it was forwarded to various destinations [...] to meet not only military demands but also civilian requirements in those areas. The Japanese colonel in charge of the Shipping Department of the Petroleum Office in Singapore [...] gave no estimate of the respective quantities allocated to military and civilian consumers. When the British landed in Singapore on the 5<sup>th</sup> September 1945, they found in the storage tanks [...] refined petroleum and [...] crude oil, all of which, as is admitted by the respondents, had been extracted from the oil reservoirs in Sumatra by the armed forces of the belligerent occupant [...]. The British military forces seized the petroleum stocks as war booty. [...]

I now proceed to consider whether the Japanese belligerent occupant had a right, under international law, to seize the crude oil in the ground and so deprive the appellants of their title to it. It was common ground that if such a right did exist in the belligerent occupant, it was derived from Article 53 of the Hague Regulations. Before, however, I examine this Article, it is necessary to consider a formidable submission advanced by the appellants which, if sound, renders a detailed examination of the Hague Regulations academic. The appellants contended that Japan commenced the war, or at least launched an invasion against the Netherlands Indies, in order to secure the oil supplies of that country, because oil is an indispensable raw material in conditions of modern warfare. Therefore the Japanese invading armies, as soon as they had established the necessary military superiority, seized the appellants' installations, "lock, stock and barrel," and then proceeded, as speedily as possible, to repair and put them into operation, using for that purpose civilian technicians, [...] who were attached to the army and placed under service discipline. The whole operation, according to the appellants' argument, was prepared and executed by the Japanese military forces in accordance with Japan's Master Plan to exploit the oil resources of the Netherlands Indies in furtherance of their war of aggression. The plan was successful and enabled the Japanese forces in South East Asia in the course of the war to distribute vast quantities of oil, both crude and refined, to meet the needs of military and civilian consumers in the territories under their control and in Japan proper. This exploitation of the oil resources of the Netherlands Indies was, so the appellants contend, premeditated plunder of private property by the Japanese State on a totalitarian scale and, as such, it was contrary to the laws and customs of war.

The appellants rely upon the evidence of Japanese naval and military officers to prove the facts upon which this submission is based. The Chief of the Fuel Section of the Supply Depot of the Ministry of the Navy in Tokyo stated that he was concerned in the spring of 1942 with plans for restoring the oil fields of the Netherlands Indies and later he toured the captured oil fields and arranged for personnel and material to be sent to repair them and put them into working order again. [...] Further details concerning the processing, refining and distribution

of the oil were given by the Japanese military officers who were stationed at Palembang and at the Headquarters of the Petroleum Office in Singapore which clearly show that in addition to supplying military requirements, the oil was also used to meet civilian demands. In my view this evidence establishes that the seizure of the appellants' oil installations in Sumatra by the invading army was carried out as part of a larger plan prepared by the Japanese State to secure the oil resources of the Netherlands Indies, not merely for the purpose of meeting the requirements of an army of occupation but for the purpose of supplying the naval, military and civilian needs of Japan, both at home and abroad, during the course of the war against the Allied Powers.

These facts being proved, the next question to be determined is whether seizure of private property on such a scale and for such purposes was contrary to the laws and customs of war. On this point there is, fortunately, considerable authority available from decisions arising out of the war in Europe. First, there is the decision of the Nuremberg Tribunal, delivered in 1946, in which the principle is laid down that to exploit the resources of occupied territories in pursuance of a deliberate design to further the general war of the belligerent without consideration of the local economy, is plunder and therefore a violation of the laws and customs of war. This principle has been approved and further expounded in the cases of *In re Flick*, (1947) U.S. Military Tribunal, Nuremberg, and *In re Krupp*, (1948) U.S. Military Tribunal, Nuremberg [See Case No. 94, United States Military Tribunal at Nuremberg, United States v. Alfred Krupp et al.], and *In re Krauch*, (1948) U.S. Military Tribunal, Nuremberg, where it was applied to the acts of German industrialists who systematically plundered the economy of occupied territories by acquiring substantial or controlling interests in private property contrary to the wishes of the owners. The present case is much stronger as the plunder of the appellants' property was committed not by Japanese industrialists but by the Japanese armed forces themselves, systematically and ruthlessly, throughout the whole period of occupation. In my opinion, these authorities fully support the appellants' submission. Accordingly I reach the conclusion that the seizure and subsequent exploitation by the Japanese armed forces of the oil resources of the appellants in Sumatra was in violation of the laws and customs of war and consequently did not operate to transfer the appellants' title to the belligerent occupant.

I now turn to the alternative argument urged by the appellants under this head, namely, that in any event the seizure was illegal as the crude oil in the ground was not "*munitions-de-guerre*" within the meaning of Article 53 of the Hague Regulations because it was then a raw material and, moreover, an immoveable raw material. According to the British Manual of Military Law issued by the Army Council pursuant to the provisions of Article I of the Hague Regulations, "*munitions-de-guerre*" are such "things as are susceptible of direct military use." The respondents accept this interpretation of "*munitions-de-guerre*," as indeed they are bound to do since they are, in fact, the Crown although not appearing as the Crown *eo nomine* in these proceedings. Consequently they are compelled to argue that crude oil in the ground, although a raw material, is susceptible of direct military use or at least had a sufficiently close connection with direct military use

to bring it within Article 53. No direct authority was cited for the proposition that raw materials could be "*munitions-de-guerre*" but the respondents referred to a passage in *Oppenheim's International Law* (7<sup>th</sup> Edition) at page 404 where it is said that "all kinds of private moveable property which can serve as war material, such as ... cloth for uniforms, leather for boots ... may be seized ... for military purposes ..." which they contend supports the view that raw materials can be "*munitions-de-guerre*". On the other hand, *Professor Castren*, a Finnish Professor, in "Law of War and Neutrality," at page 236, says that "Raw materials and semi-manufactured products necessary for war can hardly be regarded as munition of war". It may be that certain types of raw material or semi-manufactured products, such as cloth for uniforms and leather for boots, which could possibly be made up into finished articles by army personnel without the assistance of civilian technicians and outside plant can, without stretching the meaning of "*munitions-de-guerre*" unduly, be regarded as having a sufficiently close connection with direct military use to bring them within Article 53. It is not, however, necessary to decide this point as the facts of this case show that there is no such close connection in the present instance. According to the evidence, elaborate installations and civilian technicians were needed by the army to enable them to appropriate this oil and prepare it for use in their war machines. It had to be extracted from underground reservoirs, and then transported to a refinery, and then subjected to a complicated refining process before it was of any use to any one. In these circumstances, it cannot be said, in my opinion, that at the moment of its seizure in the ground, the oil had a sufficiently close connection with direct military use to bring it within the meaning of "*munitions-de-guerre*" in Article 53.

A further argument advanced by the appellants was that "*munitions-de-guerre*" does not include an immoveable and as the crude oil when seized, was part of the realty, it was not a "*munitions-de-guerre*." The appellants conceded that certain things included in the categories specified in Article 53 which partake of the character of the realty, as for example, a railway transportation system, are seizable but they contended that oil in the ground could not be regarded as an exceptional case and in support of this view, reliance was placed on a *dictum* of Lord Simon in *Schiffahrt-Treuhand v. Procurator General*, (1953) A.C. 232, (at page 262) to the effect that "it was not legitimate to seize enemy private property on land (unless it was ammunition or arms which could be used against the enemy in fighting)... ." Lord Simon was not, of course, intending to give an exhaustive interpretation of "*munitions-de-guerre*" but, it would, I think, be a startling extension of his phrase "arms or ammunition which could be used against the enemy in fighting" to say that it could include minerals *in situ*. In my judgment, Article 53 was intended to apply, generally speaking, to moveables and only in those categories where the description is wide enough to include things which may belong, in part, to the realty, as, for example, "appliances for the transport of persons or things" mentioned at the beginning of the second paragraph of the Article, is it permissible to interpret it so as to include immoveables. "*Munitions-de-guerre*" is not, in my view, such a category. Accordingly I hold that crude oil in the

ground, being an immoveable and not susceptible of direct military use, is not a "*munitions-de-guerre*" within the meaning of Article 53.

The appellants, who were nothing if not prolific in preferring alternative arguments, contended that even if crude oil in the ground could be seized as "*munitions-de-guerre*" under Article 53, the seizure in this case was invalid because no receipt was given to the owners or any one representing them. Article 53 does not in terms require a receipt whereas Article 52 (which deals with requisitioning) expressly provides for one; consequently it might be said, as a matter of pure construction, that the omission in Article 53 was deliberate on the part of those who framed the Regulations and such a requirement ought not to be implied. This, however, is not the view taken by municipal courts which have construed this Article. In the case of *Billotte*, (1948) Netherlands District Court, Arnhem ... it was held that the failure of German military personnel to give a receipt when seizing a car rendered the seizure invalid. The Court of Cassation at the Hague took a similar view in *Hinrichsen's* case in 1950. In that case a German Customs Frontier Guard seized two motor cycles without giving a receipt to the owner and the Court held that "this may not be done without in some way being officially acknowledged, in order to ensure compliance with the rule that such goods must be returned and compensation fixed when peace is made." In reaching their decision the Court of Cassation referred to the report of the proceedings at the First Hague Peace Conference (1899) in which it was stated that although it had not seemed opportune to make a special stipulation with regard to a receipt, the Committee nevertheless were of the opinion that the fact of seizure should be clearly stated one way or another if only to furnish the owner with an opportunity to claim an indemnity. [...] The respondents sought to distinguish these authorities from the present case on the ground that a receipt or acknowledgement was not required when the seizure was otherwise notorious. No authority was cited in support of this view, but in any case it does not meet the case where, as here, the fact of seizure is notorious but the quantity seized is unknown. The appellants do not know and have no means of discovering how much crude oil was seized from their oil reservoirs during the Japanese occupation and even if everything else had been done according to law, it would not now be possible for them to claim the compensation expressly provided for in Article 53. It would have been quite a simple matter for the Japanese belligerent occupant to have given an official acknowledgment to the Custodian of Enemy Property who [...] was appointed by the Japanese in Sumatra to represent absent owners, and to have furnished him with proper records of the crude oil they extracted; but nothing of the kind was done and the failure to do so, was, in my opinion, an infringement of Article 53 and renders the seizure invalid.

The last alternative argument advanced by the appellants on the construction of Article 53 was that even where the seizure is valid in all respects, the belligerent occupant obtains only a provisional title to seized property and must restore it to the original private owner if it still *in esse* at the cessation of hostilities. They contended that in the present instance the seized property was still *in esse* when hostilities ended and therefore the rights of the appellants revived and the property

should have been restored to them. In support of this proposition, the appellants relied, first, upon the express words of the Article which states that "seized articles must be restored ... when peace is made," secondly, upon the views of *Westlake* (War, Vol. II, page 115) and *Rolin* (Le Droit Moderne de la guerre, paragraph 492), and lastly on two cases decided in municipal courts in 1943 and 1947 [...]. The respondents conceded that the provisions about restoration apply to some seizures and that if, for example, the seized article had been a motor lorry, the belligerent occupant would have been bound to restore it to the owner; but they contended that it would be contrary to common sense to apply these provisions to consumable war materials, such as petroleum, which are not readily identifiable as belonging to any particular owner. Such a distinction does not appear to be based on any principle but rather on the supposed difficulty of carrying out the provisions of the Article in practice. But if, in fact, there is no practical difficulty in identifying the owner of the property, as was the position in this case, I can see no justification for departing from the plain words of Article 53. The respondents further objected that if there was a duty to restore these petroleum stocks, it did not arise until peace was actually made. It is obvious, however, that the right of the belligerent occupant to use "*munitions-de-guerre*" must cease with the cessation of hostilities, and it appears to me that when this occurs, the only right then remaining in the belligerent occupant is a right to retain possession of the property on behalf of the owner, all other rights in the property reverting in the original owner. Accordingly I am of the opinion that, on any view of the matter, the appellants were entitled to require the belligerent occupant to hold these surplus petroleum stocks on their behalf until such time as they could be restored in accordance with the provisions of Article 53.

I have now dealt with the many contentions put forward by the appellants in respect of the Hague Regulations. At the outset of his argument, counsel for the appellants claimed that in seizing this crude oil, the Japanese military forces had contravened the rules of international law in every single particular. It was a sweeping claim but I am bound to say that I think he has made it good [that] the seizure of the oil resources of the Netherlands Indies was economic plunder, the crude oil in the ground was not a "*munitions-de-guerre*", the failure to give a receipt was a fatal omission and the duty to restore the unconsumed petroleum was not fulfilled. In all these matters, the belligerent occupant, in my judgment, contravened the laws and customs of war and consequently failed either to acquire a valid title for himself or to deprive the appellants of the title which I have found existed in them prior to the seizure. [...]

For these reasons I am of the opinion that the appeal should be allowed. The appellants should have the costs of the appeal and of the proceedings before the Board. [Other opinion omitted.] [...]

**DISCUSSION**

1. If proven that Japan invaded in order to take over private property (the oil) solely for the war effort, why does this make, as the Court states, examination of Art. 53 of the Hague Regulations merely academic? Does such action by Japan violate the laws and customs of war? Does it mean that Japan cannot exercise the rights of an occupying power under IHL? That all its actions become unlawful? To which laws and customs of war does the Court refer? Is the Court's reasoning confusing *jus ad bellum* and *jus in bello*?
2.
  - a. When may an army take property in the territory it occupies? May the occupying army seize property for its own use? For the use of its civilian population? (HR, Arts 23(g), 46(2), 52, 53 and 55; CIHL, Rules 49-51)
  - b. What property may an occupying army seize, utilize, or destroy? Does it matter whether the property is state-owned or privately owned? What other characteristics of the property are determinative in assessing appropriate seizure or requisition by an occupier? (HR, Arts 23(g), 46(2), 52, 53 and 55; CIHL, Rule 51)
3.
  - a. Does crude oil not constitute a munition of war? What constitutes munitions of war (*munitions-de-guerre*) under Art. 53 of the Hague Regulations? To constitute munitions of war, must an item fulfil two requirements: be susceptible of direct military use and be moveable? Is the British Manual of Military Law's definition of munitions of war binding on all?
  - b. If one accepts the definition of munitions of war provided by the British Manual of Military Law, was the Court's analysis of the facts of this case, determining oil to be a raw material not susceptible of direct military use, convincing? Are raw materials never munitions of war?
  - c. Need munitions of war be moveable property? Does the Court convincingly interpret the wording of Art. 53 of the Hague Regulations on this point? Is oil really immovable?
4. What is the distinction between the seizure and the requisition of items? What is permissible for an occupying power to seize? To requisition? Under IHL, are there different rules governing seizure and requisition? Does the Court correctly interpret requirements necessary for compliance with Art. 53 of the Hague Regulations concerning seizure? Are these stated explicitly in that article, or implicitly? (HR, Arts 52 and 53) Was Japan's failure to give a receipt "a fatal omission", as the Court writes?
5. Must seized property be returned? If so, when? "When peace is made"? (HR, Art. 53) When is that exactly? On the cessation of hostilities?
6. Does the appropriation in the present case not violate Art. 147 of Convention IV? Is Art. 147 alone sufficient to make the Japanese appropriation a grave breach of IHL, or is a substantive rule protecting such property necessary for that article's application?



**Case No. 106, China, Military Writings of Mao Tse-Tung**

[Source: *Selected Military Writings of Mao Tse-Tung*, Peking, Foreign Language Press, 1963, p. 341; footnotes omitted.]

**ON THE REISSUE OF THE THREE MAIN RULES OF DISCIPLINE  
AND THE EIGHT POINTS FOR ATTENTION****INSTRUCTION OF THE GENERAL HEADQUARTERS  
OF THE CHINESE PEOPLE'S LIBERATION ARMY**

**October 10, 1947**

1. Our Army's Three Main Rules of Discipline and Eight Points for Attention [...] have now been unified and are hereby reissued. It is expected that this version will be taken as the standard one for thorough education in the army and strict enforcement. As to other matters needing attention, the high command of the armed forces in different areas may lay down additional points in accordance with specific conditions and order their enforcement.
2. The Three Main Rules of Discipline are as follows:
  - (1) Obey orders in all your actions.
  - (2) Do not take a single needle or piece of thread from the masses.
  - (3) Turn in everything captured.
3. The Eight Points for Attention are as follows:
  - (1) Speak politely.
  - (2) Pay fairly for what you buy.
  - (3) Return everything you borrow.
  - (4) Pay for anything you damage.
  - (5) Do not hit or swear at people.
  - (6) Do not damage crops.
  - (7) Do not take liberties with women.
  - (8) Do not ill-treat captives.

**DISCUSSION**

1. Are these Rules of Discipline and Points for Attention consistent with IHL?
2. With specific attention to Art. 3 common to the four Geneva Conventions, what provisions of IHL are missing from these Rules and Points?
3. In what areas do these Rules and Points extend beyond IHL? (GC I-IV, Art. 3; P II)



4. Which implementation mechanisms do these Rules and Points provide for?
5. Regarding Rule (1), must a member of the army always obey orders? Even if such orders are inconsistent with other Rules or Points?

**Case No. 107, United States, United States v. Batchelor**

[Source: United States Army Board of Review, 19 CMR 452 (1955)]

**UNITED STATES****v.****Corporal CLAUDE J. BATCHELOR [...]  
CM 377832****Petition for review by USCMA pending****August 1, 1955**

**PRIOR HISTORY: Sentence adjudged September 30, 1954. Approved sentence:**  
Dishonorable discharge, total forfeiture, and confinement for twenty (20) years.

**OPINION: [...]****I**

Upon trial by general court-martial, the case being treated as non-capital by direction of the convening authority, the accused pleaded not guilty to but was convicted of two offenses of communicating with the enemy without proper authority (Charge I, Specifications 1 and 2), uttering a certain letter, which was disloyal to the United States, with design to promote disloyalty and disaffection among the civilian populace of the United States (Charge II and its specification), misconduct as a prisoner of war (Additional Charge I, Specification 2), and unlawfully participating in a "trial" of a fellow prisoner of war and recommending that he be shot (Additional Charge II and its specification), all offenses having been committed at Camp 5, Pyoktong, North Korea, while the accused was in the hands of the enemy as a prisoner of war, in violation of Articles 104, 134, 105 and 134, respectively, of the Uniform Code of Military Justice. [...]

**II**

The accused was convicted of knowingly, and without proper authority, communicating, corresponding and holding intercourse with the enemy, while in their hands as a prisoner of war, from on or about 1 July 1951 until on or about 1 September 1953, by joining with, participating in and leading discussion groups conducted by the enemy proposing, developing, discussing and reflecting certain views and opinions that the United States conducted bacteriological warfare in Korea, was an illegal aggressor in the Korean conflict, and that Communism should be embraced by the prisoners of war; by making speeches favoring Communism; by circulating petitions criticizing the United States for participating in the Korean conflict; by urging United Nations prisoners of war to sign said petitions; and by aiding and assisting

the enemy to influence other United Nations prisoners of war to accept and follow the philosophies and tenets of Communism, in violation of Article 104 of the Code (Charge I, Specification 2). [...]

## VIII

[...]

### **c. Denial of Motions Predicated on Claimed Inapplicability of Code of Prisoners of War (Nos. II and III)**

Appellate defense counsel contend, in substance, that all charges, being based on acts done while the accused was a prisoner of war of the Chinese Communists, should be dismissed because the Geneva Prisoner of War Convention of 1929 vests all authority over prisoners of war in the captor power and withdraws such authority from the home power (No. III) [...].

#### **(1) Jurisdiction as to offenses committed while prisoner of war**

[...] [A]ppellate defense counsel apparently contend that the Geneva Prisoner of War Convention of 1929, as supplemented by TM 19-500, OPERATES to preclude any such jurisdiction. It is, of course, true that the United States is legally bound to adhere to this Convention [...], and, although the Geneva Prisoner of War Convention of 1949 was not ratified until recently, July 14, 1955 to be exact, it is noted that a letter of July 6, 1951 from the representative of the United States in the Security Council to the Secretary-General of the United Nations states that "The United Nations Forces in Korea have been and are under instructions to observe at all times the Geneva Conventions of 1949 on ... the treatment of prisoners of war ..." (UN Doc. S/2232, 25 Dept/State Bull. 189 (1951). But these Prisoner of War Conventions (hereinafter cited by year and article, e.g. 1929-2) were not intended to, and do not, produce the effect ascribed by appellate defense counsel. They did not purport to affect the jurisdiction of the home power, once the prisoner of war has been repatriated, as to offenses committed in violation of its laws while in enemy captivity. Nor do they purport to authorize or condone any acts such as are alleged in the specifications of the charges. On the other hand, the express purpose of the Conventions is to assure humane treatment and eliminate cruel and inhuman treatment of victims of warfare (1929-preamble; 1949-3) and, in effecting this purpose, they merely accept the inevitable temporary disciplinary control by the captor-enemy (1929-9, 18, 45, 50, 51, 54, 62, 66; 1949-21, 39, 82, 87-94, 98, 100) while giving expression to the principle that prisoners of war continue in the service of their own country (Oppenheim's *International Law*, 7<sup>th</sup> Ed., Lauterpacht, Vol. II, sec. 127e), and most certainly recognizing the continuance to allegiance to the home country (1929-19, 27, 31, 49, 75; 1949-5, 18, 22, 40, 43, 49, 50, 54, 68, 87, 118) without any duty of allegiance to the captor-enemy of whom they are not nationals (1929-45, 66; 1949-87, 100; Oppenheim's *International Law*, supra, secs. 128, 128b). Nor do the portions of Articles 2 and 45 of the 1929 Convention, which are particularly relied upon, support the contention of appellate defense counsel. Thus, the provision in Article 2 that "Prisoners of War are in the power of the hostile power, but not of the individual or

corps who have captured them” merely assures humane treatment and protection by the captor-enemy power (see Winthrop’s *Military Law and Precedents*, [2<sup>nd</sup> Ed., 1920 reprint], p. 790), Article 2 itself recognizing this by further providing that “They must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity... .” The provision in Article 45 that “Prisoners of war shall be subject to the laws, regulations, and orders in force in the armies of the detaining power” – Article 45 being the first Article of “General Provisions” under “Chapter 3 – Penalties Applicable to Prisoners of War” – is but the expressed recognition of what we have previously termed the inevitable temporary disciplinary control by the captor-enemy power. The same is patently true of paragraph 57 of TM 19-500 (Change 7, August 29, 1945) providing that “Prisoners are subject to the laws, regulations, and orders in force in the Army of the United States including the Articles of War. They are not subject to the laws, regulations, or orders of the country in whose Armed Forces they served, except as prescribed in this manual”, such paragraph 57 falling under the principal heading of “Discipline and Control”, and TM 19-500 being expressly intended to supplement the Geneva Convention of 1929 (par. 2a, Change 3, August 9, 1945). [...]

Manifestly, therefore, the first contention is devoid of merit and it is so determined.

## **(2) Applicability of Article 104 of the Code of prisoners of war [...]**

Nor does the Geneva Prisoner of War Convention of 1929, or that of 1949, even purport to authorize such communications as are alleged in the specifications of Charge I. On the other hand, those Conventions appear to go no further than to require a prisoner of war “to give, if he is questioned on the subject, his true name and rank, or else his regimental number” (1929-5; 1949-17) and to permit complaints because of the conditions of captivity either directly (1929-42; 1949-78) or through their prisoner of war representatives (1929-43; 1949-79). Prisoners of war may not be coerced into giving other information (1929-5; 1949-17). Thus, it has been said:

“Obviously, prisoners are not bound to furnish information on matters other than their rank and identity. It would be unlawful to inflict punishment or hardships on those prisoners who refuse to give such information. ...” (Wheaton’s *International Law – War*, 7<sup>th</sup> Ed., 1944, p. 184)

and

“The Convention lays down in detail the information which a prisoner may be required to give. This is restricted to his surname, first names and rank, date of birth, and army, regimental, personal or serial number. ...” (Oppenheim’s *International Law*, Lauterpacht, Vol. II, 127)

Patently, an authorization to declare identity and to complain about conditions of captivity can, by no stretch of the imagination, be construed as a license to engage in the activity charged against the accused herein. [...]

Can it now be fairly said, for the first time, that Congress itself intended these Articles to include such an unexpressed exception simply because the rule of non-intercourse was stated, in the mentioned texts, to be “absolute” whereas, under those Prisoner of

War Conventions legally binding upon us, certain minor deviations, such as declaration of identity and complaints, may have been recognized in the case of prisoners of war? We think not. [...]

[...]

## IX

The board of review having found the findings of guilty and sentence as approved by proper authority correct in law and fact and having determined, on the basis of the entire record, that they should be approved, such findings of guilty and sentence are hereby affirmed.

### DISCUSSION

1. May a prisoner of war invoke Geneva Convention III against his own country? Does Convention III regulate the relations between a prisoner of war and his own country?
2. Is a prisoner of war subject to the laws of the Detaining Power or to those of the power on which he depends? (GC III, Arts 82 and 99) What if the two laws contradict each other?
3.
  - a. Does IHL protect a duty of allegiance of a prisoner of war towards the Power on which he depends? May a Detaining Power allow a prisoner of war to violate this duty? May it encourage him to do so? May it promise him advantages going beyond those provided for by Convention III if he does so? May a Detaining Power allow a prisoner of war to engage in propaganda against his own country among the other prisoners of war? In the media? (GC III, Art. 87)
  - b. If a prisoner of war changes his allegiance and professes, of his own free will, allegiance to the Detaining Power, does he lose his rights under Convention III? May he be accepted for enrolment in the armed forces of the (former) Detaining Power? (GC III, Arts 7, 23, 52 and 130)

**Case No. 108, Hungary, War Crimes Resolution**

[Source: 53/1993. (X. 13.) AB (On War Crimes); original published in Hungarian in *Magyar Közlöny*, 1993, p. 147; English translation by courtesy of the staff of the Court. <http://www.icrc.org/ihl-nat>]

**RESOLUTION IN THE NAME OF THE REPUBLIC OF HUNGARY  
Constitutional Court Docket No: 288/A/1993**

On the basis of the petition submitted by the President of the Republic concerning the constitutional review of the provisions of the law passed by the National Assembly but not yet proclaimed, the Constitutional Court has made the following resolution:

1. In the application of article 33 (2) of [...] the Penal code [...] it is a constitutional requirement that the non-applicability of statutory limitations may only be determined with respect to those criminal offenses which have not lapsed according to Hungarian law in effect at the time of the commission of the offense; except if international law classifies the offense as a war crime or crime against humanity, declares or makes possible the non-applicability of statutory limitations, and Hungary has assumed the obligation by international law to preclude the applicability of statutory limitations.
2. The Constitutional Court holds that it is consistent with the Constitution if article 33 (2) of the Penal Code is applied without regard of the Hungarian statutory limitations in effect at the time of the commission of the following offenses defined by international law:
  - “Grave violations of rights” as defined by the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, concluded in Geneva on August 12, 1949, applied to all cases of declared war or of any other armed conflict between two or more of the High Contracting Parties, as determined by common article 2 of the Geneva Conventions, concluded on August 12, 1949;
  - prohibited acts in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, [...] as determined by common Article 3. [...]

**REASONING****I.**

1. On February 16, 1993, the National Assembly enacted the law “concerning the procedures in the matter of certain criminal offenses committed during the 1956 October revolution and freedom struggle,” (hereinafter referred to as “the Law”).

The text of the Law is the following: [...]

Article 2, section (1): Of the Geneva Conventions on the protection of the victims of war, concluded on August 12, 1949 and acceded to by Law 32 of 1954, in connection with:

- a) article 130 of the August 12, 1949 Convention Relative to the Treatment of Prisoners of War, based on article 3 (1); and
  - b) article 147 of August 12, 1949 Convention Relative to the Protection of Civilian Persons in Time of War, defining “grave violations of rights”, based on article 3(1), concerning the applicability of statutory limitations for the punishment of criminal offenses committed during the 1956 October revolution and freedom struggle – also noting article 1 (a) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, accepted by the United Nations Assembly on November 26, 1968, and entered into force by Law I of 1971, article 33 (2) of the Penal Code must be applied. [...]
2. According to article 33 (2) of the Penal Code, no statutory limitation of punishment may be applied to the following offenses:
- a) war crimes, [...]
  - b) other crimes against humanity (Chapter XI); [...]

#### IV.

##### **The particular characteristics of war crimes and crimes against humanity**

In the presently discussed case the interpretation of both the Constitution and domestic law must proceed in light of the fact that the norms regulating war crimes and crimes against humanity comprise a particular part of international law, one which involves not merely responsibilities of nations with respect to one other, but also the determination of obligations and imposition of criminal liability onto individuals as well. By this action, therefore, international law touches upon such an area which otherwise falls within the sovereign state's domestic penal power, and it does so, with respect to war crimes and crimes against humanity, in a manner which, in many respects, diverges from the basic principles and application of domestic penal law.

1. In the cases of war crimes and crimes against humanity, such criminal offenses are involved whose classification did not arise as part of the domestic law's criminal taxonomy, but are deemed to constitute criminal offenses by the international community which defines their elements. [...]
2. The international community prosecutes and punishes war crimes and crimes against humanity; it does so by international trials and, second, by insisting that those states which desire to be members of the international community prosecute such offenders. [...]
3. Therefore, the state which prosecutes and punishes crimes against humanity and war crimes, acts upon the mandate given to it by the community of nations, according to the conditions imposed by international law. The community of nations occasionally may also demand, through the action of international

organizations, to review and reject that domestic legal practice which does not comply with international law. [...]

4. The prosecution and punishment of war crimes and crimes against humanity may only proceed within a framework of legal guarantees; it would be self-contradictory to protect human rights without such guarantees. But these international guarantees cannot be replaced or substituted by the legal guarantees of domestic law.
  - a) [...] [T]he development of international law has since continuously separated the sphere of "international humanitarian law" from the war context, and has also made the prosecution and punishment of these crimes independent of the requirements and conditions of the domestic penal, including with respect to statutory limitations of the applicability of punishment, so much so that two conventions have been concluded on the non-applicability of statutory limitations for war crimes and crimes against humanity.
  - b) [...] The aim of the 1968 New York Convention (Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 U.N.T.S. 73 [available on <http://www.icrc.org>]) was precisely the termination of the uncertainties and randomness associated with various domestic laws when the Convention declared that the war crimes and crimes against humanity enumerated therein "do not lapse irrespective of the date of their commission". (Translated from the Hung. ed.) From the Convention's preamble it is evident that war crimes and crimes against humanity, on the one hand, and "ordinary criminal acts," on the other hand, cannot be treated in an identical manner. [...]

Article 7 (2) of the European Convention [for the Protection of Human Rights and Fundamental Freedoms] and article 15 (2) of the International Convention [on Civil and Political Rights] permit in principle for signatory states not to apply the domestic statutory limitations for crimes defined by the community of nations. In contrast, the New York Convention replaces this permissive provision with a mandatory one. Moreover, the New York Convention is retroactive. [...]

## V.

### **Criminal offenses defined by international law and the Constitution**

1. [...] The regulations of war crimes and crimes against humanity are undoubtedly part of customary international law; they are general principles recognized by the community of nations or, in the parlance of the Hungarian Constitution, they are among "the rules generally recognized by international law." [...]
4. [...]
  - b) It is "on the basis" of the "grave violation of rights" defined in the August 12, 1949, Geneva Convention relative to the Protection of Civilian Persons in Time of War, and by considering article 1 (a) of the New York Convention of 1968 which prohibits the application of statutory limitations for prosecuting and punishing war crimes and crimes against humanity, that article 2 of the Law



orders the application of article 33 (2) of the Penal Code to the criminal offenses committed during the 1956 October revolution and freedom struggle.

The “grave violations of rights” of common article 2 of the Geneva Conventions refer to international armed conflict. For armed conflict of non-international (domestic) in nature, the behaviors deemed prohibited are defined by common article 3. In separate articles, the Conventions define precisely and in a detailed manner the sphere of protected persons; only against these categories of persons can the “grave violation of right” be committed. [...] In contrast, common article 3 applies “at any time and in any place whatsoever” to all persons “taking no active part in the hostilities”.

The drafting of the Law conflates several regulations of the Geneva Conventions addressing different subject matters and categories of protected persons and creates a connection among them which does not appear in the Conventions. Domestic regulation may not alter the content of an international agreement. Hence, the constitutional concerns raised concerning the text of the Laws is justified.

The Constitutional Court points out that the New York Convention of 1968 imposes the non-applicability of statutory limitations requirement not only on those behaviors prohibited under the Geneva Conventions which qualify as “grave violations or rights”. Article I (a) of the New York Convention – upon whose “consideration” the Law mandates the application of article 33 (2) of the Penal Code – does, indeed, refer to “grave violations of rights,” but as an example of the war crimes defined by the Nuremberg International Military Tribunal. According to article I, “independent of their commission, the statutes of limitations of the following criminal offenses do not lapse: a) the war crimes defined by the August 8, 1945, Charter of the Nuremberg International Military Tribunal, especially those which are enumerated as “grievous violations of rights”. (tran. from Hung. ed.).

The activities enumerated in common article 3 of the Geneva Conventions constitute crimes against humanity and they contain those minimal requirements which every State Party in an armed conflict is obligated to comply with and which are “at any time and in any place” are prohibited (in contrast with the scope of application of “grievous violations of rights”). According to the common article 3 (2) of the Geneva Conventions, the States Parties to a conflict may enter into force other provisions of the Conventions by separate agreement and, indeed, State Parties shall endeavour to do so. Thus, the punishment of the “grievous violations of rights” in article 3 requires a separate agreement.

But according to the International Court of Justice, the prohibitions registered in article 3 are based on “elementary consideration of humanity” and may not be breached in the course of any armed conflict, irrespective whether it is international or domestic in nature. *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J.4 (June 27) at 114 [See Case No. 153, ICJ, Nicaragua v. United States]. It is also

by reference to the definition of crimes against humanity that article 3 of the Conventions is invoked by the U.N. Report (para. 47) authorizing the creation of an International Tribunal for the prosecution of crimes committed in the territory of the former Yugoslavia.

Thus, the statute of limitation for the punishment of the activities enumerated in common article 3 of the Geneva Conventions does not expire either; in case these offenses do not fall within the category of war crimes defined by article I (a) of the New York Convention – either with respect to the scope of protected persons or because of the manner of the commission of the act – they would be unavoidably covered by the non-applicability of statutory limitations requirement imposed by article I (b) of the Convention on crimes against humanity.

- c) [...] The Constitutional Court points out that the appropriateness of classifying a specific criminal offense a war crime or crime against humanity is, in the last instance, supervised by the community of nations, in the event those cases are submitted to international human rights committees or tribunals.
- d) [...] Thus, whether the proclamation of the Geneva Conventions has properly taken place is of no moment, nor whether the obligation assumed by the Hungarian state to implement them had occurred prior to the date designated by the Law as the temporal limit of its scope (October 23, 1956, that is). The criminal liability of the commissioners remains by international law and subsequent domestic legislation may give effect to the full scope of liability.  
[...]

Budapest, 1993 October 12

[...]

## DISCUSSION

1. Art. 2 of the Hungarian law addresses crimes occurring in what type of conflict? Is the type of conflict relevant to the application of IHL? If so, how? Does the Court implicitly or explicitly qualify the events that occurred in 1956 in Hungary?
2.
  - a. In what type of conflict are the provisions on “grave breaches” as defined by the Geneva Conventions (or “grave violations of rights”, the phrase translated from Hungarian and used by the Court), applicable? (GC I-IV, Arts 50/51/130/147 respectively)
  - b. Does the concept of grave breaches also cover violations of Art. 3 common to the Geneva Conventions? If not, does the Hungarian law make this distinction? Does the Court? What does the Court mean when it says that “the Law conflates several regulations of the Geneva Conventions addressing different subject matters and categories of protected persons and creates a connection among them which does not appear in the Conventions?” (See section V.4.b. of the decision.)
3. According to the Court’s deliberations, to which classification of crimes are statutory limitations non-applicable? Are violations of common Art. 3 considered to be such crimes? If so, under which classification?

4. Are all violations of common Art. 3 crimes against humanity? [*See also Case No. 211*, ICTY, The Prosecutor v. Tadic [Part B., paras 626-659 and 700; Part C., paras 238-304]]
5. Under international law, is it obligatory to exclude certain crimes from application of a statute of limitations? (E.g. ECHR, Art. 7(2); ICCPR, Art. 15(2); 1968 New York Convention (Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity)) Does the obligation laid down in IHL to repress grave breaches preclude application of a statute of limitations? (CIHL, Rule 160)

**Case No. 109, ECHR, Korbely v. Hungary**

[Source: European Court of Human Rights, Case of *Korbely v. Hungary*, Application no. 9174/02, Judgement, 19 September 2008, available at [www.echr.coe.int](http://www.echr.coe.int). Footnotes omitted]

**CASE OF KORBELY v. HUNGARY**

(Application no. 9174/02)

**JUDGMENT**

**STRASBOURG**  
**19 September 2008**

[...]

**PROCEDURE**

1. The case originated in an application [...] against the Republic of Hungary lodged with the Court [...] by a Hungarian national, Mr János Korbely (“the applicant”), on 20 January 2002.
2. The applicant alleged that he had been convicted for an action which did not constitute any crime at the time when it had been committed. [...]

[...]

**THE FACTS**

**I. THE CIRCUMSTANCES OF THE CASE**

**A. The events in the town of Tata on 26 October 1956**

[...]

9. At the outbreak of the Hungarian Revolution in Budapest on 23 October 1956, the applicant, then a captain (*százados*), was serving as an officer in charge of a training course (*tanfolyam-parancsnok*) at the Tata military school for junior officers. Following the demonstrations, gunfight and uprising in the capital on 23 October 1956, on 24 October martial law was introduced, providing *inter alia* that any person bearing arms without authorisation was punishable by death. The applicant was aware of these provisions, which had been announced on national radio.
10. At dawn on 26 October 1956 insurgents unsuccessfully attacked the military school. During the exchange of gunfire, an officer was killed and another wounded. Shortly afterwards, the building of the local prison and prosecutor’s office was occupied by the insurgents. The applicant had the task of regaining control of the building. He managed to convince the insurgents, without using force, to leave the premises.

11. In a similar assignment, the applicant was subsequently ordered to disarm other insurgents who had taken control of the building of the local Police Department by force on the afternoon of 26 October 1956. Having overcome the resistance of the police forces, the insurgents, including a certain Tamás Kaszás, armed themselves with guns taken from the police. Among the insurgents, Tamás Kaszás and another person took command. Their intention was to execute the chief of the Police Department, but eventually they refrained from doing so. Tamás Kaszás and a smaller group of insurgents stayed behind in the building, in order to secure their position; Tamás Kaszás informally assumed their leadership.
12. As in his previous assignment, the applicant was specifically ordered to organise a group of officers, deploy them at the Police Department and regain control of that building, using force if necessary. Each member of the applicant's squad, composed of some fifteen officers, had a 7.62-mm submachine gun and a pistol; the group was, moreover, equipped with two 7.62-mm machine guns and some 25 hand grenades.
13. On their way to the Police Department, the applicant's squad met two young men, one of whom was carrying a submachine gun. The applicant's subordinates confiscated the gun and released the two individuals unharmed.
14. The applicant divided his men into two platoons, one of which stayed outside, near the entrance to the police building, while the other went inside. In the yard there were four or five disarmed police officers as well as five civilians, the latter belonging to the group of insurgents. On arrival, the officers in the applicant's platoon aimed their submachine guns at the insurgents. One of the insurgents, István Balázs, stated that they were unarmed. However, one of the disarmed police officers said that Tamás Kaszás had a gun. István Balázs asked the latter to surrender the weapon. Thereupon, a heated dispute, of unknown content, broke out between the applicant and Tamás Kaszás.
15. Finally, Tamás Kaszás reached towards a pocket in his coat and drew his handgun. The applicant responded by resolutely ordering his men to fire. Simultaneously, he fired his submachine gun at Tamás Kaszás, who was shot in his chest and abdomen and died immediately. One of the shots fired on the applicant's orders hit another person and three hit yet another person. A further insurgent was shot and subsequently died of his injuries. Two individuals ran out on to the street, where the other platoon of the applicant's men started to shoot at them. One of them suffered a non-lethal injury to his head; the other person was hit by numerous shots and died at the scene. As the applicant was subsequently driving away from the premises on a motorcycle, he was shot at by unidentified persons, fell off the motorcycle and suffered some injuries.

[...]

16. On 16 February 1993 Parliament passed an Act ("the Act") which provided *inter alia* that – having regard to the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (proclaimed in Hungary by Law-Decree no. 1 of 1971) – certain acts committed

during the 1956 uprising were not subject to statutory limitation. Subsequently, the President of the Republic initiated the review of the constitutionality of the Act prior to its promulgation.

17. On 13 October 1993 the Constitutional Court adopted a decision in the matter, laying down certain constitutional requirements concerning the prosecution of war crimes and crimes against humanity. It held that the statutory limitation on the punishability of a certain type of conduct could be removed by the lawmaker only if that conduct had not been subject to a time-limit for prosecution under Hungarian law at the time when it had been committed – the sole exception being if international law characterised the conduct as a war crime or a crime against humanity and removed its statutory limitation, and moreover if Hungary was under an international obligation to remove that limitation. Consequently, it declared section 1 of the Act unconstitutional, since that provision was aimed at the removal of the statutory limitation on the punishability of such conduct which did not fall within the category of war crimes.

[...]

#### **I. The [...] applicant's final conviction**

[...]

38. On the basis of the findings of fact thus established and relying on Article 3(1) of "the Geneva Convention", the court convicted the applicant of multiple homicide constituting a crime against humanity which he had committed as a perpetrator in respect of the killings inside the building and as an inciter in respect of the killing outside [...].

[...]

40. The fact that, in addition to the fatalities, two more persons had been wounded was deemed to be an aggravating factor [...].

[...]

### **THE LAW**

#### **I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION**

54. The applicant complained that he had been prosecuted for an act which had not constituted any crime at the time of its commission, in breach of Article 7 of the Convention, which reads as follows:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

#### **A. Submissions of those appearing before the Court**

##### *1. The applicant's arguments*

55. As to the relationship between Article 3 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War ("common Article 3") and the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts ("Protocol II"), the applicant stressed that the latter "developed and supplemented" the former; therefore, they could be applied only together. Should Article 3 have a wider field of application and include that of Protocol II, the latter would be superfluous. In the interests of defendants, Protocol II should be allowed to have retroactive effect, to restrict the scope of common Article 3. Such an approach did not reduce the level of protection of the civilian population, because in addition to the law of war, several other international instruments prohibited the extermination of civilians.
56. However, even if common Article 3 were applicable to the applicant's act, it must be concluded, in view of the Commentaries on the Geneva Conventions published by the International Committee of the Red Cross, that its field of application was not unlimited but subject to certain restrictions. In other words, it could not be broader than the scope assigned to the Conventions by their drafters. For example, simple acts of rioting or banditry did not fall within the scope of Article 3: for it to come into play, the intensity of the conflict must have reached a certain level. Whether or not this condition was met in the applicant's case should have been decided by relying on the opinions of the expert historians, which had infelicitously been discarded by the Supreme Court.
57. It was true, the applicant argued, that according to the Commentaries, the widest possible interpretation was to be pursued. This approach, however, could only be accepted with reservations, since it was set out in an instrument which was not law, but only a recommendation to States and since it served the purposes of the Red Cross, namely to apply the Geneva Conventions to the largest possible number of conflicts, thereby allowing for humanitarian intervention by the Red Cross. In the applicant's view, this approach – laudable as it might be in the context of humanitarian law – could not be accepted as being applicable in the field of individual criminal liability, where no extensive interpretation of the law was allowed.

[...]

59. Furthermore, as to the events which had taken place in the yard of the Tata Police Department, the applicant maintained that even if the civilians present, who had been guarding the police officers, had been unarmed, they could not be regarded as "persons taking no active part in the hostilities". To guard captured enemy

combatants was to take an active part in the hostilities. The disarmed police officers had been led to believe that their guards might have arms which they would use if they faced resistance. Tamás Kaszás had actually had a gun, which he had drawn after a quarrel; consequently, he could not be characterised as a non-combatant. In view of Tamás Kaszás's conduct, the applicant could not have been certain that the other insurgents present – including János Senkár, who had also been fatally wounded – had not had concealed firearms on them. In other words, the applicant had been convicted as a result of the incorrect classification of the victim as a non-combatant, although the latter had been armed. His conviction had been based on common Article 3 although not all its elements had been present.

60. Lastly, concerning the question of accessibility and in reply to the Government's assertion that the applicant, a training officer, was supposed to be familiar with the Geneva Conventions because they had been made part of the teaching materials used by him, he drew attention to the fact that the relevant instruction of the General Chief of Staff had been issued on 5 September 1956, less than two months before the events.

## 2. *The Government's arguments*

61. The Government emphasised at the outset that the October 1956 events in Hungary had amounted to a large-scale internal conflict and had not simply been an internal disturbance or tension characterised by isolated or sporadic acts of violence not constituting an armed conflict in the legal sense.

[...]

64. The Government also referred to Constitutional Court decision no. 53/1993 in which it was stated that common Article 3 was part of customary international law, and that acts in breach thereof were to be regarded as crimes against humanity. Consequently, the offence of which the applicant had been convicted constituted a criminal offence under international law. The Constitutional Court had held that international law alone was a sufficient ground for the punishment of such acts, and its rules would be devoid of any effect if the punishability of war crimes and crimes against humanity were subject to incorporation into domestic law.
65. As regards the issue of foreseeability and the relationship between common Article 3 and Protocol II, the Government drew attention to the fact that common Article 3 was regarded as a "convention in miniature" within the Geneva Conventions, containing the basic rules of humanity to be observed in all armed conflicts of a non-international character. Protocol II, which further developed and supplemented the "parent provision", was an additional instrument which was designed to set out more detailed rules and guarantees for a specific type of internal armed conflict, that is, for situations when insurgents exercised control over a territory of the State and were thereby able and expected to have the rules of war observed. It was clear that Protocol II had not been intended to leave the victims of all other types of internal armed conflicts unprotected. It was also evident from its wording and the commentaries on it published by the International Committee



of the Red Cross that Protocol II did not affect the scope of application of Article 3. Although they could not identify any international judicial interpretation on the issue, the Hungarian courts had taken those commentaries into account. In view of this, the Supreme Court's interpretation of common Article 3 – namely that it had a scope of application which could not be considered to have been retroactively restricted by Protocol II – had been reasonably foreseeable.

66. Concerning the domestic courts' characterisation of the victims as non-combatants although one had had a handgun, the Government pointed out that the offence with which the applicant was charged had not consisted of the shooting of a single person dressed in plain clothes and armed with a handgun, in which case the victim's characterisation as a civilian or combatant would have been highly relevant. On the contrary, the applicant had been charged with having ordered his squad to fire at a group of unarmed civilians, among whom there had been a person with a handgun in his pocket. That person – who at first sight must have appeared to be a civilian, since he had not been pointing his gun but hiding it in his pocket – did not in any case make the group a lawful military target. When applying international humanitarian law, the Hungarian courts had been concerned with the entire group rather than with characterising Tamás Kaszás as a civilian or a combatant.

[...]

## **B. The Court's assessment**

[...]

### **2. Merits**

#### **a. General principles**

[...]

71. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen [...].
72. Furthermore, the Court would reiterate that, in principle, it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention [...].

**b. Application of the above principles to the present case**

73. In the light of the above principles concerning the scope of its supervision, the Court notes that it is not called upon to rule on the applicant's individual criminal responsibility, that being primarily a matter for assessment by the domestic courts. Its function is, rather, to consider, from the standpoint of Article 7 § 1 of the Convention, whether the applicant's act, at the time when it was committed, constituted an offence defined with sufficient accessibility and foreseeability by domestic or international law [...].

*(i) Accessibility*

74. The Court observes that the applicant was convicted of multiple homicide, an offence considered by the Hungarian courts to constitute "a crime against humanity punishable under Article 3(1) of the Geneva Convention". It follows that the applicant's conviction was based exclusively on international law. Therefore, the Court's task is to ascertain, first, whether the Geneva Conventions were accessible to the applicant.

75. The Geneva Conventions were proclaimed in Hungary by Law-Decree no. 32 of 1954. It is true that the Law-Decree itself did not contain the text of the Geneva Conventions and its section 3 required the Minister of Foreign Affairs to ensure the publication of the official translation of the Geneva Conventions prior to their entry into force. However, in 1955 the Ministry of Foreign Affairs arranged for the official publication of a brochure containing the text. It is also to be noted that an order of the General Chief of Staff was published in the Military Gazette on 5 September 1956 on the teaching of the Conventions and was accompanied by a synopsis of them. In these circumstances, the Court is satisfied that the Geneva Conventions were sufficiently accessible to the applicant.

*(ii) Foreseeability*

[...]

77. Thus, the Court will examine (1) whether this act was capable of amounting to "a crime against humanity" as that concept was understood in 1956 and (2) whether it can reasonably be said that, at the relevant time, Tamás Kaszás [...] was a person who was "taking no active part in the hostilities" within the meaning of common Article 3.

α. The meaning of crime against humanity in 1956

78. It follows that the Court must satisfy itself that the act in respect of which the applicant was convicted was capable of constituting, at the time when it was committed, a crime against humanity under international law. The Court is aware that it is not its role to seek to establish authoritatively the meaning of the concept of "crime against humanity" as it stood in 1956. It must nevertheless examine whether there was a sufficiently clear basis, having regard to the state of international law as regards this question at the relevant time, for the applicant's conviction on the basis of this offence [...].

79. The Court notes that according to the Constitutional Court, “acts defined in Article 3 common to the Geneva Conventions constitute crimes against humanity”. In that court’s opinion, this provision contained “those minimum requirements which all the conflicting Parties must observe, at any time and in any place whatsoever”.

The Constitutional Court furthermore relied on the judgment of the International Court of Justice in the case of *Nicaragua v. United States of America* [See Case No. 153, ICJ, *Nicaragua v. United States*] and on a reference made to common Article 3 in the report by the Secretary-General of the United Nations on the Statute of the International Criminal Tribunal for the former Yugoslavia [...] [See Case No. 210, Statute of the ICTY]. The Court observes however that these authorities post-date the incriminated events. Moreover, no further legal arguments were adduced by the domestic courts dealing with the case against the applicant in support of their conclusion that the impugned act amounted to “a crime against humanity within the meaning of common Article 3”.

80. In addition, it is to be noted that none of the sources cited by the Constitutional Court characterises any of the actions enumerated in common Article 3 as constituting, as such, a crime against humanity. However, even if it could be argued that they contained some indications pointing in this direction, neither the Constitutional Court nor the courts trying the applicant appear to have explored their relevance as regards the legal situation in 1956. Instead, the criminal courts focused on the question whether common Article 3 was to be applied alone or in conjunction with Protocol II. Yet this issue concerns only the definition of the categories of persons who are protected by common Article 3 and/or Protocol II and the question whether the victim of the applicant’s shooting belonged to one of them; it has no bearing on whether the prohibited actions set out in common Article 3 are to be considered to constitute, as such, crimes against humanity.
81. [...] [T]he Court observes that the four primary formulations of crimes against humanity are to be found in Article 6(c) of the Charter of the International Military Tribunal annexed to the London Agreement (8 August 1945), Article 5 of the ICTY Statute (1993), Article 3 of the ICTR Statute (1994) and Article 7 of the ICC Statute (1998) [...]. All of them refer to murder as one of the offences capable of amounting to a crime against humanity. Thus, murder within the meaning of common Article 3 § 1 (a) could provide a basis for a conviction for crimes against humanity committed in 1956. However other elements also need to be present.
82. Such additional requirements to be fulfilled, not contained in common Article 3, are connected to the international-law elements inherent in the notion of crime against humanity at that time. In Article 6(c) of the Charter, which contains the primary formulation in force in 1956, crimes against humanity are referred to in connection with war. Moreover, according to some scholars, the presence of an element of discrimination against, and “persecution” of, an identifiable group of persons was required for such a crime to exist, the latter notion implying some form of State action or policy. In the Court’s view, one of these criteria – a link or nexus with an armed conflict – may no longer have been relevant by 1956 [...].

83. However, it would appear that others still were relevant, notably the requirement that the crime in question should not be an isolated or sporadic act but should form part of “State action or policy” or of a widespread and systematic attack on the civilian population [...].
84. [...] Admittedly, the Supreme Court’s review bench held that it was common knowledge that “the central power of the dictatorship made use of its armed forces against the unarmed population engaged in peaceful demonstrations and against armed revolutionary groups whose organisation was in progress... In practical terms, they waged war against the overwhelming majority of the population” [...]. However, the Supreme Court did not address the question whether the particular act committed by the applicant was to be regarded as forming part of this State policy, such as to bring it within the sphere of crimes against humanity, as this notion was to be understood in 1956.
85. In the Court’s opinion it is thus open to question whether the constituent elements of a crime against humanity were satisfied in the present case.
- β. Was Tamás Kaszás a person “taking no active part in the hostilities” within the meaning of common Article 3 according to prevailing international standards?”
86. In this respect the Court recalls that the applicant’s conviction was based on the finding that Tamás Kaszás was a non-combatant for purposes of common Article 3 of the Geneva Convention (see paragraph 48 above).
87. When applying common Article 3 to the applicant’s case, the various domestic courts took divergent views on the impact of Protocol II on this provision. In particular, in their respective decisions of 7 May and 5 November 1998, the Regional Court and the Supreme Court’s appeal bench took the view that common Article 3 and Article 1 of Protocol II were to be interpreted in conjunction with each other. The decision of the Supreme Court’s review bench of 28 June 1999 and the ensuing judgments reflected another approach, according to which Article 3 of the Geneva Conventions had an original scope of application which could not be considered to have been retroactively restricted by Protocol II. Consequently, any civilian participating in an armed conflict of a non-international character, irrespective of the level of intensity of the conflict or of the manner in which the insurgents were organised, enjoyed the protection of Article 3 of the Geneva Conventions. The Court will proceed on the basis that the above interpretation by the Supreme Court is correct from the standpoint of international law [...].
88. In his submissions to the Court the applicant has questioned whether Tamás Kaszás could be considered to be protected by common Article 3 which affords protection to “persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause”. He argued that Tamás Kaszás could not be regarded as a non-combatant since he had a gun (see paragraph 59 above).

89. At the outset, the Court observes that according to the facts as established by the domestic courts, Tamás Kaszás was the leader of an armed group of insurgents, who – after committing other violent acts – took control of a police building and confiscated the police officers' arms. In such circumstances he must be seen as having taken an active part in the hostilities (see paragraph 42 above).
90. The question therefore arises whether Tamás Kaszás was a member of the insurgent forces who had "laid down his arms" thereby taking no further part in the fighting. In this connection the Court finds it to be crucial that, according to the domestic court's finding, Tamás Kaszás was secretly carrying a handgun, a fact which he did not reveal when facing the applicant. When this circumstance became known, he did not seek to surrender in a clear manner. The Court notes that it is widely accepted in international legal opinion that in order to produce legal effects such as the protection of common Article 3, any intention to surrender in circumstances such as those in issue in the present case needs to be signalled in a clear and unequivocal way, namely by laying down arms and raising hands or at the very least by raising hands only (cf., for example, the Commentaries on Additional Protocol I to the Geneva Conventions, published by the International Committee of the Red Cross [...]; the proposed Rule 47 of the ICRC's study on customary international humanitarian law (2005) [See Case No. 43, ICRC, Customary International Humanitarian Law] [...]; and the UN Secretary-General's report on respect for human rights in armed conflict, UN Doc. A8052, 18 September 1970, § 107). For the Court, it is reasonable to assume that the same principles were valid in 1956.
91. However there is no element in the findings of fact established by the domestic courts which could lead to the conclusion that Tamás Kaszás expressed in such a manner any intention to surrender. Instead, he embarked on an animated quarrel with the applicant, at the end of which he drew his gun with unknown intentions. It was precisely in the course of this act that he was shot. In these circumstances the Court is not convinced that in the light of the commonly accepted international law standards applicable at the time, Tamás Kaszás could be said to have laid down his arms within the meaning of common Article 3.
92. The Court is aware of the Government's assertion (see paragraph 66 above) that the applicant's conviction was not based solely on his having shot Tamás Kaszás but on his having fired, and ordered others to fire, at a group of civilians, resulting in several casualties.
93. The Court observes, however, that the domestic courts did not specifically address the issue of the applicant's guilt in respect of the other fatality, János Senkár; rather, they focused on his conflict with Tamás Kaszás. Nor did those courts regard the injuries inflicted on István Balázs and Sándor Fasing as a constitutive element of the crime; instead, they characterised their occurrence as a mere aggravating factor (see paragraph 40 above). That being so, the Government's argument that the applicant's conviction was not primarily based on his reaction to Tamás Kaszás's drawing his handgun, but on his having shot, and ordered others to shoot, at a group of civilians, cannot be sustained.

94. The Court therefore is of the opinion that Tamás Kaszás did not fall within any of the categories of non-combatants protected by common Article 3. Consequently, no conviction for crimes against humanity could reasonably be based on this provision in the present case in the light of relevant international standards at the time.

**c. Conclusion**

95. In the light of all the circumstances, the Court concludes that it has not been shown that it was foreseeable that the applicant's acts constituted a crime against humanity under international law. As a result, there has been a violation of Article 7 of the Convention.

**DISCUSSION**

1.
  - a. What was the nature of the armed conflict at the time of the events? What is the law applicable to the events? Did Protocol II apply? Would it apply today?
  - b. How could one argue that it was an international armed conflict? If it had been an international armed conflict, would the conclusions of the Court have been different? Would the killing of a person directly participating in the hostilities have violated IHL?
  - c. (Para. 55) Why does the applicant wish to apply Protocol II to the events? With regard to the applicant's acts, what difference would it make together with a literal application of common Art. 3?
2.
  - a. (Para. 74) Do you agree with the Hungarian courts that the applicant's acts ought to be considered "a crime against humanity punishable under Article 3(1) of the Geneva Convention"? Does common Art. 3 criminalize the acts mentioned in its first paragraph?
  - b. (Paras 82, 84) Assuming that the applicant's act amounted to murder as defined in common Art. 3, could it also amount to a crime against humanity? Is murder as defined in common Art. 3 always a crime against humanity? What other elements are required for murder to be a crime against humanity?
3. (Para. 87)
  - a. What is the Court's conclusion regarding the relationship between common Art. 3 and Protocol II? Does it rule that common Art. 3's scope of application should always be interpreted in the light of Protocol II's scope of application? Would you agree with such a conclusion?
  - b. Could common Art. 3's scope of application be restricted by Protocol II in situations where Protocol II itself does not apply? Could common Art. 3's scope of application be retroactively restricted by Protocol II for armed conflicts which took place before 1977?
4.
  - a. (Para. 88) In your opinion, what is meant by "persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or by any other cause"? Has the meaning of the phrase changed since 1956? (GC I-IV, Art. 3(1))
  - b. (Paras 59 and 90) Does the mere fact of carrying a weapon automatically turn a civilian, in a non-international armed conflict, into a person directly participating in hostilities? At least if the civilian uses the weapon? Does the fact of guarding captured enemy fighters turn a civilian, in a non-international armed conflict, into a person directly participating in hostilities? [See also **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]

5. (*Paras 91, 94*)
  - a. Does the Court's conclusion, i.e. that Tamás Kaszás "could [not] be said to have laid down his arms within the meaning of common Article 3" and that he therefore "did not fall within any of the categories of non-combatants protected by common Article 3", correspond to the literal meaning of common Art. 3?
  - b. Would Tamás Kaszás today be considered as having assumed a "combatant" (or continuous fighting) function allowing for him to be killed at any time? Or would he be considered as a civilian directly participating in hostilities at the time when the applicant shot at him? [*See also Document No. 51*, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]
6.
  - a. Does the Court address the applicant's act of ordering his men to fire at the other insurgents? Had it done so, do you think the latter would have been considered as directly participating in hostilities? Were they protected by common Art. 3? [*See also Document No. 51*, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]
  - b. Could the presence of Tamás Kaszás be deemed to have turned the rest of the group into a legitimate target? Could the presence, among a group of civilians, of a "combatant" or a person directly participating in hostilities ever lead to the civilians losing their protection? Do you think the Court was right in not dealing with the order to fire at the other insurgents?
7. To come within the definition of a crime against humanity, could the attack on Tamás Kaszás be considered as part of an attack on a civilian population even if Tamás Kaszás, at the time when he was killed, was not protected as a civilian under IHL because he was directly participating in hostilities?

**Case No. 110, India, Rev. Mons. Monteiro v. State of Goa**

[Source: India, *Supreme Court Reports*, 87-102 (1970); footnotes omitted.]

**REV. MONS. SEBASTIAO FRANCISCO XAVIER DOS  
REMEDIOS MONTEIRO  
v.**

**STATE OF GOA**

**March 26, 1969**

[...]

The Judgment of the Court was delivered by

**Hidayatullah, C.J.** The appellant (Rev. Father Monteiro) is a resident of Goa. After the annexation of Goa by India, he had the choice of becoming an Indian national or retaining Portuguese nationality. He choose the latter and was registered as a foreigner. He also obtained a temporary residential permit [...]. The period of stay expired and he did not ask for its extension or renewal. He was ordered to leave India by the Lt. Governor of Goa. [...] Rev. Father Monteiro disobeyed the order, and in consequence was prosecuted [...]. He was convicted and sentenced [...]. He now appeals by special leave of this Court [...].

The defence of Rev. Father Monteiro was that he was protected by the Geneva Conventions Act, 1960, that the order of the Lt. Governor for his deportation was *ultra vires* the Act and that he had committed no offence. The Judicial Commissioner and the two courts below have held, for different reasons, that the Geneva Conventions ceased to apply after Goa became a part of India and that the Municipal Courts in India can give him no redress against an Act of State. In the appeal before us Mr. Edward Gardner Q. C. appeared for Rev. Father Monteiro with the leave of this Court.

To understand the case, a brief history of the annexation of Goa and what happened thereafter is necessary. Goa was a Portuguese colony for about 450 years, having been seized by force of arms. On December 19, 1961 Goa was occupied by the Indian Armed Forces following a short military action. It then came under Indian Administration [...], March 27 1962, the Constitution (Twelfth Amendment) Act, 1962 was enacted and deemed to have come into force on December 20, 1961. By this amendment Goa was included in Union Territories and a reference to Goa was inserted in Art. 240 of the Constitution. Many Acts in force in India were then extended to Goa and many Regulations and Orders were promulgated. [...]

At the outset it may be stated that Mr. Gardner [the defence attorney] concedes that he does not question the legality of the military action or the annexation. In fact, he is quite clear that we may consider the annexation to be legal. His contention, in brief, is that the order of the Lt. Governor is tantamount to deportation of Rev. Father Monteiro and the Geneva Conventions Act gives protection against such deportation



during occupation which has not validly come to an end, and, therefore, no offence was committed by him.

The argument overlooks one cardinal principle of International Law and it is this. Rev. Father Monteiro by his declaration retained his Portuguese nationality. His sojourn in India was subject to such laws as existed in India in general and in Goa in particular. It cannot be doubted that the reception and residence of an alien is a matter of discretion and every State has, by reason of its own territorial supremacy, not only the legal right but also the competence to exclude aliens from the whole or any part of its territory. [...]

This proposition being settled, Mr. Gardner sought support for his plea from the provisions of the Geneva Conventions Act of 1960. That Act was passed to enable effect to be given to the International Conventions done at Geneva in 1949. Both India and Portugal have signed and ratified the Conventions. Mr. Gardner relies on the provisions of the Fourth Schedule relative to the protection of certain persons in time of war. He refers in particular to Articles 1, 2, 4, 6, 8, 47 and 49. By Arts. 1 and 2 there is an undertaking to respect and ensure respect for the Conventions in all circumstances of declared war or any other armed conflict even if the state of war is not recognised by one of the parties and to all cases of partial or total occupation of the territory of a High Contracting Party even if the occupation meets with no armed resistance. Article 4 defines a protected person and the expression includes those who at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Article 6 then lays down the beginning and end of application of the Convention. The Convention applies from the outset of any conflict or occupation. In the territory of Parties to the conflict, the application of the Convention ceases on the general close of Military operations. In the case of occupied territories it ceases one year after the general close of military operations but the occupying Power is bound for the duration of occupation, to the extent that such Power exercises the functions of Government in such territory, by Arts. 1-12, 27, 29-34, 47, 49, 51, 52, 53, 59, 61-73 and 143.

We next come to Arts. 47 and 49 which are the crux of the matter and are relied upon for the protection. Mr. Gardner points out that under Art. 8 even protected persons may in no circumstance renounce in part or in entirety the rights secured to them by the Conventions. The case, therefore, depends on whether Arts. 47 and 49 apply here. We may now read Arts. 47 and 49:

“47. Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or Government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”

“49. Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to

that of any other country occupied or not, are prohibited, regardless of their motive. [...]”

The point of difference between the parties before us in relation to Art. 47 is whether the occupation continues, the annexation of the territory notwithstanding; and in relation to Art. 49 whether the order of the Lt. Governor amounts to deportation of a protected person.

Mr. Gardner’s submissions are: the order that has been made is a deportation order and it is therefore *ultra vires* the Geneva Conventions. These Conventions create individual rights which cannot even be waived. So long as occupation continues these rights are available and the Geneva Conventions must not be looked at in isolation but read in conjunction with International Law as part of the positive law. They should not be abandoned lightly. According to him, conquest was a method of acquiring territory in the past but after the Covenant of the League of Nations, the Charter of the United Nations and the General Treaty for the Renunciation of War, the acquisition of territory in International Law by the use of force does not confer any title. Occupation, therefore, can only be of *terra nullius*, not now possible. He [...] says that the history of the making of the Geneva Conventions shows that this was precisely the mischief sought to be met and the Conventions now become a part of the laws of India through Parliamentary Legislation. He concedes that the war of liberation of Goa and the annexation were lawful but he contends that annexation does not deprive protected persons of the protection. According to him, once there is military action and occupation, occupation cannot cease by a unilateral act of annexation by incorporating the territories of Goa with India. If India did not care to be bound by the Conventions, there was a method of denunciation in Art. 158 but since the Convention is registered under Art. 159 even denunciation at a late stage was not possible. He relies upon Art. 77 and says that “Liberated” means when the occupation comes to an end. The amendment of the Constitution only legalises annexation so far as India is concerned but in International Law the territory remains occupied. The occupation is not at an end and it cannot be brought about unilaterally. The words of Art. 47 themselves are clear enough to establish this. In short, the contention is that occupation does not come to end by annexation and, therefore, the protection continues till there is either cession of the territory or withdrawal of the Occupying Power from the territory, both of which events have not taken place. [...]

The contention on behalf of the State is that by occupation is meant occupation by armed forces or belligerent occupation and occupation comes to an end by conquest followed by subjugation. [...] We have to decide between these two submissions.

This is the first case of this kind [...]. We are of opinion that the pleas of Mr. Gardner that the Geneva Conventions Act makes punishable the conduct of Rev. Father Monteiro, must fail.

To begin with, the Geneva Conventions Act gives no specific right to any one to approach the Court. [...] What method an aggrieved party must adopt to move the Municipal Court is not very clear but we need not consider the point because of

our conclusions on the other parts of the case. We shall consider the Conventions themselves. [...]

[T]he Geneva Conventions Act of 1960 [...] is divided into five Chapters. [...] The Act then sets out the Conventions in its schedules and the Conventions which are four in number are set out in as many Schedules to the Act.

It will thus be seen that the Act by itself does not give any special remedy. It does give indirect protection by providing for penalties for breaches of Convention. The Conventions are not made enforceable by Government against itself nor does the Act give a cause of action to any party for the enforcement of Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population but there is no right created in favour of protected persons which the Court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless [...].

The appellant has, however, sought the aid of the Geneva Conventions to establish that he could not be compelled to leave Goa and thus committed no offence. We may, therefore, say a few words about the Geneva Conventions, particularly Schedule IV, which deals with the protection of civilian persons in time of war. In the past protection of civilian population was inadequately provided in Conventions and treaties. [...] The Fourth Hague Convention of 1907 contained Arts. 42-56, but this protection was restricted to occupation by an enemy army. The Regulations merely stated the principles and enjoined maintenance of law and order and regard for family rights, lives of persons and private property, and prohibited collective punishments. In effect, these were confined to the 'forward areas of war' and did not apply when 'total war' took place and the civilian population was as much exposed to the dangers of war as the military. [...]

[...] The 1949 Conventions are additional to the Regulations and it is expressly so laid down in Art. 154 of the Geneva Conventions.

The Hague Regulations, Arts. 42-56, contained some limited and general rules for the protection of inhabitants of occupied territory. The Regulations are supplementary. Regulations 43 and 55 which have no counter-part in the Geneva Conventions must be read. They are not relevant here. Similarly, as there is no definition of 'occupation' in the Geneva Conventions, Art. 42 of the Regulation must be read as it contains a definition:

"42. A territory is considered as occupied when it finds itself in fact placed under authority of a hostile army".

The Regulations further charge the authority having power over the territory to take all measures to establish and assure law and order. The Regulations generally charged the occupying power to respect the persons and property of the inhabitants of the occupied territory. There was no provision showing when occupation commenced and when it came to an end. It is because of this omission that is claimed in this case that occupation continues so long as there is no cession of the territory by the conquered or withdrawal by the conqueror and that till then the protection of the Geneva

Conventions [...] [continues]. However Art. 6 which provides about the beginning and end of the application of the Conventions throws some light on this matter.

The question thus remains, what is meant by occupation? This is, of course, not occupation of *terra nullius* but something else. Since there is no definition of occupation in the Geneva Conventions, we have to turn to the definition in the Hague Regulations, Article 154 of the 4<sup>th</sup> Schedule [...].

The definition of 'occupation' in the Regulations must be read since the Regulations are the original rules and the Conventions only supplement the Regulations. We have already quoted the definition and it shows that a territory is considered as occupied when it finds itself in fact placed under the authority of a hostile army. This means that occupation is by military authorities. In the *Justice* case it was stated that the laws of belligerent occupation apply only to an occupation during the course of actual warfare and that once the enemy has been totally defeated those laws do not apply to the ensuing occupation.

The question thus resolves itself into this: Is occupation in Art. 47 belligerent occupation or occupation which continues after the total defeat of the enemy? In this connection courts must take the Facts of State from the declaration of State authorities. Military occupation is a temporary *de facto* situation which does not deprive the Occupied Power of its sovereignty nor does it take away its statehood. All that happens is that *pro tempore* the Occupied Power cannot exercise its rights. In other words, belligerent occupation means that the Government cannot function and authority is exercised by the occupying force.

Annexation, on the other hand, occurs when the Occupying Power acquires and makes the occupied territory as its own. Annexation gives a *de jure* right to administer the territory. Annexation means that there is not only possession but uncontested sovereignty over the territory. [...] [M]ilitary occupation must be distinguished from subjugation, where a territory is not only conquered, but annexed by the conqueror.

There is, however, a difference between true annexation on the one hand and premature annexation, or as it is sometimes called anticipated annexation, on the other. Jurists regard annexation as premature so long as hostilities are continuing and there is an opposing army in the field even if the Occupied Power is wholly excluded from the territory. Anticipated annexation by unilateral action is not true annexation. True annexation is only so when the territory is conquered and subjugated [...].

The Conventions rightly lay down that annexation has no effect on the protection. But they speak of premature or anticipated annexation. Premature or anticipated annexation has no effect. Such a plea was negatived for the same reason by the Nuremberg Tribunal. In fact, when the Convention itself was being drafted the experts were half-inclined to add the word 'alleged' before 'annexation' in Art. 47 to distinguish between annexation following conquest and subjugation and annexation made while hostilities are going on. Subjugation puts an end to the state of war and destroys the source of authority of the existing Government. In subjugation, which is recognised as one of the modes of acquiring title, not only the *de facto* but also the *de jure* title

passes to the conqueror. After subjugation the inhabitants must obey the laws such as are made and not resist them.

Thus the principle which is accepted is that the Occupying Power must apply the Convention even when it claims *during conflict* to have annexed the occupied territory. However, when the conflict is over and there is no hostile army in the field, annexation has the effect of creating a title to the territory. It may be asked why does Art. 6 then mention a period of one year ? The reason given is that if the Occupied Power turns victorious the land would be freed in one year and if the Occupying Power remains victorious, as hostilities cease, strong measures against the civilian population are no longer necessary. In this, as in other laws, a line is drawn arbitrarily and it is at the end of one year. Otherwise also, occupation, which means belligerent occupation comes to an end when hostilities cease and the territory becomes a part of the Occupying Power. [...]

The question, when does title to the new territory begin, is not easy to answer. [...] [A]lthough the United Nations Charter includes the obligation that force would not be used against the territorial integrity of other States (Art. 2 para. 4), events after the Second World War have shown that transfer of title to territory by conquest is still recognised. [...] If cession after defeat can create title, occupation combined with absence of opposition must lead to the same kind of title.

In the present case the facts are that the military engagement was only a few hours' duration and then there was no resistance at all. [...] The occupation on December 20, 1961 was neither belligerent occupation nor anticipated occupation, but true annexation by conquest and subjugation. It must be remembered that Mr. Gardner concedes that the annexation was lawful. Therefore, since occupation in the sense used in Art. 47 had ceased, the protection must cease also. We are, therefore, of opinion that in the present case there was no breach of the Geneva Conventions. [...]

The Geneva Conventions ceased to apply after December 20, 1961. The Indian Government offered Rev. Father Monteiro Indian nationality and citizenship which he refused and retained his Portuguese nationality. As a Portuguese national he could only stay in India on taking out a permit. He was therefore, rightly prosecuted under the law applicable to him. Since no complaints is made about the trial as such; the appeal must fail. It will be dismissed.

G.C.

*Appeal dismissed.*

## DISCUSSION

1. When is territory considered occupied? What definition of occupation do the Geneva Conventions use? (HR, Art. 42; GC IV, Art. 154)
2. a. What is the distinction between "belligerent occupation" and "occupation"? Why is this distinction relevant in the Court's analysis of Article 47?

- b. Does IHL prohibit the annexation of an occupied territory by the occupying power? Under IHL does annexation of a territory end its occupied status and thus the applicability of the Conventions? Does it matter whether it is “true annexation” or “premature annexation”? Does Art. 47 of Convention IV make a distinction between types of annexation, e.g., specifying application only to “premature annexations”?
    - c. Does the appellant’s concession regarding the legality of annexation actually undermine his argument? Would the Court’s decision have been different if the appellant had not conceded that the annexation was legal?
  3.
    - a. Does the Court’s argument incorporating distinctions between “occupation” and “belligerent occupation” and between “true annexation” and “premature annexation” effectively address the appellant’s contention that “occupation continues so long as there is no cession of the territory by the conquered or withdrawal by the conqueror and that till then the protection of the Geneva Conventions [continues]”? How can the applicability of Convention IV end in an occupied territory? Is Art. 2 common to the Conventions consistent with the Court’s use of the distinction between “occupation” and “belligerent occupation” in determining the applicability of the Conventions?
    - b. If one does not follow the Court’s argument but that of the appellant, when would Convention IV cease to apply in Goa? What are the advantages and disadvantages of such an interpretation?
  4. Does the Court provide an adequate answer to the question it posed regarding the period of one year (mentioned in Art. 6 of Convention IV) for continued application of the Conventions after the general close of military operations?
  5. Is an occupying power free to regulate the presence of aliens in an occupied territory? The presence of nationals of the occupied State? That of other aliens? Under IHL, what are the possibilities and limits of an occupying power in this regard? (HR, Art. 43; GC IV, Arts 4, 48, 49 and 64)
  6.
    - a. Is the prohibition of deportations out of occupied territories “self-executing”? In the Indian legal system, does it matter whether it is or not? Has Art. 49 of Convention IV been incorporated into Indian legislation? Why can’t the appellant invoke it before the Indian Supreme Court?
    - b. Does an act incorporating the Geneva Conventions into domestic law “give no specific right to any one to approach the Court” to seek remedy against a violation? Aren’t the Conventions made enforceable through such an act “by Government against itself”? Should not a defendant in a criminal court be at least entitled to claim that his alleged crime is justified by the incorporated international treaty?
    - c. What other purposes could the Act then have? According to the Court, how should the Act have been formulated in order to permit courts to enforce the Geneva Conventions?

**Case No. 111, Cuba, Status of Captured “Guerrillas”**

[Source: Chappelle, D., “How Castro Won,” in Greene, T.N. (ed.), *The Guerrilla – And How to Fight Him: Selections from the Marine Corps Gazette*, 1965, p. 233. Also cited in Walzer, M., *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, New York, Basic Books, 1977, 360 pp.]

That same evening, I watched the surrender of hundreds of *Batistianos* from a small-town garrison. They were gathered within a hollow square of rebel Tommy-gunners and harangued by Raul Castro:

“We hope that you will stay with us and fight against the master who so ill-used you. If you decide to refuse this invitation – and I am not going to repeat it – you will be delivered to the custody of the Cuban Red Cross tomorrow. Once you are under Batista’s orders again, we hope that you will not take arms against us. But, if you do, remember this:

“We took you this time. We can take you again. And when we do, we will not frighten or torture or kill you ... If you are captured a second time or even a third ... we will again return you exactly as we are doing now.”

**DISCUSSION**

1. Under IHL, do those participating in hostilities in a non-international armed conflict, if captured, receive prisoner-of-war status? What could Raul Castro have done with those captured here? May they be convicted for having fought for the wrong cause?
2. Is what he did lawful? Do his actions even go beyond the law applicable in international armed conflicts?
3.
  - a. Does IHL protect a prisoner of war’s duty of allegiance towards the power on which he depends? May a Detaining Power allow a prisoner of war to violate this duty? May it encourage him to do so? (GC III, Art. 87)
  - b. If a prisoner of war changes his allegiance and professes, of his own free will, allegiance to the Detaining Power, does he lose his rights under Convention III? May he be allowed to enroll in the armed forces of the (former) Detaining Power? (GC III, Arts 7, 23, 52 and 130)
4. According to IHL, may prisoners of war again take up arms once they have been repatriated? (GC I, Art. 14; GC III, Art. 117) If they do so, what is their fate if they are recaptured?
5. What are the risks and advantages of doing what Raul Castro did? Will it facilitate his victory?
6. Is the role assigned here to the Cuban Red Cross appropriate? Would it have been more appropriate for the International Committee of the Red Cross to perform this function? Why? (Statutes of the International Red Cross and Red Crescent Movement, Arts 3 and 5 [See **Document No. 31**, Statutes of the International Red Cross and Red Crescent Movement])

**Case No. 112, ICRC Report on Yemen, 1967**

[Source: *Annual Report 1967*, ICRC, pp. 15-17]

**Yemen**

**The ICRC's medical activity in North Yemen.** Giving medical assistance to the wounded and sick in the part of the Yemen under Royalist control was the ICRC's main action in that area during 1967. [...]

This mission's work was, however, rendered extremely difficult by several incidents. First of all there was that of Ketaf in the Jauf in January, when about 120 persons, many of them women and children, were killed as a result of an air raid on the village on January 5, 1967.

As a result of this attack, the ICRC made the following appeal on January 31 to the belligerents:

[“]The International Committee of the Red Cross in Geneva is extremely concerned about the air-raids against the civilian population and the alleged use of poisonous gas recently in the Yemen and the neighbouring regions.

In view of the suffering thereby caused, the ICRC earnestly appeals to all authorities involved in this conflict for respect in all circumstances of the universally recognized humanitarian rules of international morality and law.

The ICRC depends on the understanding and support of all the powers involved in order to enable its doctors and delegates in the Yemen to continue under the best conditions possible to carry out their work of impartial assistance to the victims of this conflict.

The ICRC takes the opportunity to affirm that, in the interest of the persons in need of its assistance, it has adopted as a general rule to give no publicity to the observations made by its delegates in the exercise of their functions. Nevertheless, these observations are used to back up the appropriate negotiations which it unflinchingly undertakes whenever necessary.[”]

A further raid on May 12 having caused 75 deaths, an ICRC medical mission went to give its aid there, after having itself been attacked from the air. On June 2 a report, drawn up by the doctors of the ICRC, was sent to the governments parties to the conflict giving their observations and engaging them in no circumstances to resort to methods of fighting prohibited by the Geneva Protocol of 1925.

Since then, no further incident of this kind has been reported to the ICRC.

At the end of June, one of the ICRC delegates was the victim of a serious accident. Mr. Laurent Vust who was accompanying a consignment of medicines in the aircraft on the Najran-Gizan line was seriously hurt after a crash landing. He was the only survivor and suffering from bad burns. Mr. Vust was still undergoing treatment at the end of December 1967.



Another accident befell this mission. On August 26 an ICRC convoy was ambushed by Bedouins in the Jauf desert. A young doctor, Dr. Frédéric de Bros was hit by a bullet in the left arm causing an open fracture and resulted in partial paralysis in that limb.

In the autumn, as a result of agreements concluded in Khartoum, the ICRC had, in principle, arranged to terminate its medical action by the end of the year.

However, in December fighting again broke out around Sanaa. Consequently, the medical action had to be continued in the rear of the Royalist positions. After a journey of 600 kilometres on tracks between Najran and Jihanah with all the difficulties involved, an ICRC medical team was installed in the town of Jihanah which worked at night and took cover in case during the day. In Jihanah where it expected to find only a small number of wounded, the ICRC team discovered some thirty wounded abandoned and in indescribable conditions of distress of whom about twenty were seriously wounded, most of them women and children, and savagely mutilated.

In such conditions, it can be understood that the task of the ICRC doctors was one of the utmost difficulty, if one adds the fact that medical teams protected by the red cross emblem were twice bombed and attacked during the course of 1967. The courage of their members deserves high praise for risking their lives for others.

Finally, in view of the renewal of the fighting, a second appeal made by the ICRC in the last days of 1967 to the two parties in conflict for them to respect the fundamental humanitarian principles contained in the Geneva Conventions.

## DISCUSSION

1. a. Does every attack wilfully killing and wounding civilians violate IHL? If not, in which cases is IHL violated? Are the conditions different under the IHL of international conflicts and the IHL of non-international conflicts? What if such attacks are designed to scare the civilian population? (P I, Art. 51(2); P II, Art. 13(2); CIHL, Rule 2) Does every attack directed at civilians violate either Protocol I or II? (HR, Art. 25; P I, Art. 51; P II, Art. 13)
- b. Must not women and children be given special protection under the IHL of non-international armed conflicts? (P II, Art. 4(2)(e) and (3); CIHL, Rules 134 and 135) Is this protection relevant in the present case?
2. a. What protection does the IHL of non-international conflict provide to the sick and wounded? To what care are they entitled? (GC I-IV, Art. 3(2); P II, Art. 7; CIHL, Rules 109-111) Does the IHL of non-international armed conflicts offer as extensive protection and care to the sick and wounded as does the IHL of international armed conflicts?
- b. Which findings by the ICRC delegates in Yemen concerning the wounded correspond to clear violations of IHL? If only Art. 3 common to the Conventions is applicable? If the IHL of international armed conflicts is applied?
- c. What protection does IHL provide to those caring for the sick and wounded or those providing relief? (P II, Arts 11 and 18; CIHL, Rules 25-30) If hospitals and medical personnel are frequently attacked, as were ICRC units and personnel here, when should a humanitarian organization pull out? Particularly when it is clear that the emblem is not respected? (P II, Art. 12) What if that means that no one remains to aid the victims?

3.
  - a. Was the use of chemical weapons in 1967 prohibited by customary international law? Or purely through treaty-based law? (HR, Art. 23(a) and (e); P I, Arts 35 and 51; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare [See **Document No. 9**, The Geneva Chemical Weapons Protocol]; CIHL, Rule 74) Yet do those provisions apply in this situation? Why is the IHL of non-international armed conflicts so vague regarding prohibited weapons? Because customary IHL prohibits such weapons? Because this prohibition can be derived from the Martens Clause and somehow through Art. 3 common to the Conventions? Or does Protocol II expect reference to be made to the IHL of international armed conflicts? In all respects? If only in some respects, which ones? (HR, Art. 23(a) and (e); GC I-IV, Arts 63(4)/62(4)/142(4)/158(4) respectively; P I, Arts 1(2) and 35(2); P II, Preamble, para. 4)
  - b. Regardless of the origin of the rule, is not Yemen as a State party to the 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare [See **Document No. 9**, The Geneva Chemical Weapons Protocol] prohibited from using chemical weapons?
4.
  - a. Does a public ICRC appeal mean that in certain situations the normal and specific mechanisms for the implementation of IHL do not function?
  - b. What criteria would you suggest to the ICRC for deciding whether to issue a public appeal to the parties to a conflict on violations in a specific situation? Is such an appeal in fact an appeal to all States Parties to “ensure respect” for IHL?
  - c. Did the appeal in this case respect the Red Cross principles of neutrality and impartiality? Was it necessary for the ICRC under those principles to criticize the belligerents? Because of continuing violations? Under those two principles, may the ICRC never criticize only one side in an armed conflict?
  - d. Why has the ICRC, as a general rule, adopted the policy of not publicizing the observations made by its delegates? Does it stem from the Red Cross principles of neutrality and impartiality? Or is it simply a working modality?

**Case No. 113, Malaysia, Public Prosecutor v. Oie Hee Koi**

[Source: Levie, H.S. (ed.), *International Law Studies: Documents on Prisoners of War*, Naval War College, R.I., Naval War College Press, vol. 60, Document No. 155, 1979, pp. 737-744]

**PUBLIC PROSECUTOR V. OIE HEE KOI  
(AND ASSOCIATED APPEALS)  
Privy Council, December 4, 1967**

**1 All E.R.419 [1968], A.C. 829 [1968], 42 ILR 441 (1971)**

[...]

LORD HODSON: In these associated appeals the main question is whether the accused were entitled to be treated as protected prisoners of war by virtue of the Geneva Conventions Act, 1962, to which the Geneva Conventions of 1949 are scheduled.

The accused are so-called Chinese Malays either born or settled in Malaysia but in no case was it shown whether or not they were of Malaysian nationality. [...]

They were captured during the Indonesian confrontation campaign. All but two were dropped in Malaysia by parachute as members of an armed force of paratroopers under the command of Indonesian Air Force officers. The main party was dropped in Johore wearing camouflage uniform. Each man carried a fire-arm, ammunition, two hand grenades, food rations and other military equipment. Of the main party thirty-four out of forty-eight were Indonesian soldiers and fourteen Chinese Malays which included twelve of the accused. One was dropped from a different plane similarly equipped. The remaining two accused landed later by sea and were captured and tried. One of these likewise claimed the protection of the Geneva Convention.

All the accused were convicted of offences under the Internal Security Act, 1960 of the Federation of Malaya and sentenced to death. [...]

\* \* \* \*

All the accused appealed against their convictions [...] and their appeals were dismissed by the Federal Court of Malaysia save in two cases namely that of Oie Hee Koi (Appeal No. 16 of 1967) and that of Ooi Wan Yui (Appeal No. 17 of 1967) in both of which the appeals were allowed on the ground that the accused were prisoners of war within the meaning of the Geneva Conventions Act, 1962, of the Federation of Malaya (herein referred to as "the Act of 1962") and as such were entitled to protection under the Geneva Convention relative to the treatment of prisoners of war (Sch. 3 to the Act of 1962).

In these two cases the public prosecutor appeals by special leave from the decision of the Federal Court. In the remaining cases the accused appeal by special leave against the decisions of the Federal Court upholding their convictions.

\* \* \* \*

[...]

Article 5 [of the 1949 Convention] so far as material provides:

“... Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in art. 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” [...]

Article 5 of the Convention is directed to a person of the kind described in art. 4 about whom “a doubt arises” whether he belongs to any of the categories enumerated in art. 4. By virtue of art. 5 such a person is given the protection of the Convention for the time being, i.e., until such time as his “status has been determined by a competent tribunal”. [...]

In the two cases in which the public prosecutor is appellant that is to say that of Oie Hee Koi and that of Ooi Wan Yui, [...], the Federal Court, on the point being taken on appeal from the trial judge, held that the accused were entitled to protection. By decision of the Federal Court in the other cases where the convictions were upheld, [...] no point had been raised at the trial, and therefore no “doubt arose” so as to bring s. 4 into operation.

Their lordships are of the opinion that on the hearing of their appeals by the Federal Court no burden lay on the prosecution to prove that those of the accused who had raised no doubt at their trials as to the correctness of the procedure followed were not entitled to be treated as protected prisoners of war. Although the burden of proof of guilt is always on the prosecution, this does not mean that a further burden is laid on it to prove that an accused person has no right to apply for postponement of his trial until certain procedural steps have been taken. Until “a doubt arises” art. 5 does not operate, and the court is not required to be satisfied whether or not this safeguard should be applied. Accordingly where the accused did not raise a doubt no question of mistrial arises.

The only authority to which their lordships’ attention was drawn which supports the view that the Geneva Convention, or rather its predecessor which used similar language, applied so to speak automatically without the question of protection or no protection being raised is the case of *R. v. Guiseppe*. Twelve Italian prisoners of war were tried by a magistrate and convicted on a charge of theft, no notice having been given to the representative of the protecting power as required by the Convention. It was held on an application for review at the special request of the Crown that the conviction and sentences should be set aside. Thus it appears that the Crown asked for review in a case where the prisoners of war were nationals of the opposing forces and plainly entitled to the protection of the Convention. Their lordships do not regard this decision as good authority for the proposition that there was a mistrial in the cases under review.

\* \* \* \*

[...]

It was not proved that the accused were citizens of Malaysia nor that they owed allegiance to Malaysia, though in many cases there was evidence which, if the issue had directly arisen, might have suggested that they did; but further findings of fact would have been required to decide either question. Except in the one case where the accused claimed the protection of the Convention at the trial there was no mistrial in proceedings without the notices required by s. 4 [of the Act of 1962] having been given. There was nothing to show that the accused were protected prisoners of war or to raise a doubt whether they were or were not. The mere fact that they landed as part of the Indonesian armed forces did not raise a doubt and no claim was made to provide any basis for the court, before whom the accused were brought for trial, applying s. 4 of the Act except in the one case.

In this single case, that of *Teo Boon Chai v. The Public Prosecutor* (No. 15 of 1967), it appears from the record that the accused's counsel claimed that his client was not a Malaysian citizen, and not an Indonesian citizen either, and that he should therefore be treated as a prisoner of war under the Geneva Convention. The claim was brushed aside on the wrong basis, videlicet that jurisdiction was in question. In the Federal Court the point was taken that it was for the accused to prove that he was entitled to protection and that he did not do so. The claim, having been made to the court before whom the accused was brought up for trial in the circumstances already stated, was in their lordships' opinion sufficient to raise a doubt whether he was a prisoner of war protected by the Convention. The court should have treated him as a prisoner of war for the time being and either proceeded with the determination whether he was or was not protected, or refrained from continuing the trial in the absence of notices. In this case only their lordships consider that there was a mistrial and that justice requires that the appeal be allowed and the convictions quashed and the case remitted for retrial.

In the remaining cases there was no mistrial by reason of the absence of the notices required by s. 4. [...]

\* \* \* \*

Their lordships accordingly reported to the Head of Malaysia that the [Holding] appeals in Nos. 16 and 17 of 1967 be allowed; [...] that the appeal in case No. 15 be allowed. [...]

## DISCUSSION

1. According to IHL, must the accused affirmatively claim prisoner-of-war status and the protection of the Conventions in order to be accorded them? (GC III, Art. 5) If so, in all cases? Only in those where no "doubt arose"?
2.
  - a. Which standard should be used to assess whether "doubt arose" or perhaps should have arisen to a court's attention? Should not the fact of membership in the enemy armed forces always raise the doubt to which Art. 5(2) of Convention III refers? Or even lead to the presumption of prisoner-of-war status?
  - b. Do you agree that the facts of this case raise no doubt as to the status of the accused? Particularly the circumstances of their capture?

**Case No. 114, Malaysia, Osman v. Prosecutor**

[Source: *Law Reports*, vol. 1, 1969, Appeal Cases, pp.430-455 (P.C.)]

**HOUSE OF LORDS  
[PRIVY COUNCIL]  
OSMAN BIN HAJI MOHAMED ALI  
AND ANOTHER  
APPELLANTS  
AND  
THE PUBLIC PROSECUTOR  
RESPONDENT  
ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA**

[...]

On March 10, 1965, two girl secretaries at a bank in Singapore were killed by an explosion caused by a bag containing 25lb. of nitroglycerine, placed by the two appellants on the stairs of the building. The appellants were not wearing uniform and they had no identification papers nor were they wearing uniform when arrested. They were charged under the Penal Code with the murder of the two girl secretaries and of another person injured by the explosion who died later, and tried in the High Court of Singapore [...]. The appellants claimed to be members of the Indonesian armed forces and entitled to the protection of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949. The trial judge ruled that they were not entitled to the status of prisoners of war and convicted them. [...]

[It was argued for the appellants:]

Thirdly, the appellants were prisoners of war within the Geneva Convention and were accordingly entitled to the protection of the Convention, and as there was no evidence that the notification required by article 104 of the Geneva Convention and section 4 of the Geneva Convention Act, 1962, had been given there was a mistrial and the appellants' convictions ought to be quashed. The propositions in support of this submission are:

**A.** [...] This appeal must proceed on the basis that the Convention applied to Singapore [at that time part of Malaysia] and that at the relevant time there was a state of armed conflict between Indonesia and Malaysia.

**B.** If a "doubt" about status arises, an inquiry into status as distinct from a trial can be held without service of a notice. [...] Unless status is determined or notice is given, the trial cannot proceed: article 5 of the Convention. A "doubt" as to status arose on the very day the appellants were arrested and claimed to be members of the Indonesian armed forces. A "doubt" arises within the meaning of article 5 where there is an armed conflict and the accused on capture claim to be members of the armed forces. There may be circumstances which make it obvious that the claim to status is obviously untrue but the circumstances of this case were sufficient

to raise a "doubt" that the appellants may be able to obtain the protection of the Convention. There was nothing in the circumstances which made it obvious that the appellants were not members of the armed forces of Indonesia. Article 5 is a holding provision, and the court will give it a wider interpretation. It is wrong to say that the "doubt" did not arise until counsel claimed the protection of the Convention. Accordingly, there was a mistrial as no notice was served and the status of the appellants was not determined. "A belligerent act" within article 5 is any act in the course of war, lawful or unlawful. It is not confined to only a legitimate act of war. It cannot be decided summarily by the authority on the spot. "Status" within article 5 would depend on questions which only a competent tribunal could determine. In any case a "doubt" did arise when the protection of the Convention was claimed by counsel at the commencement of the trial, and the trial court rightly held an inquiry as to status and found the appellants not entitled to the protection of the Convention. That finding on the preliminary issue has been proved to be wrong; accordingly the trial court was not justified in proceeding with the trial without notices being served. By reason of the new evidence only now available and which was not available at the time of the trial, there should be a new trial. If the trial was not adjourned under article 104, then it was a mistrial and the appellants' convictions cannot be allowed to stand.

C. Under article 4A (1) members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces are in the category of "prisoners of war", and this applies equally to members of the armed forces captured out of uniform. The requirements of article 4A (2) are not to be read by implication into article 4A (1). The absence of a distinctive sign does not prevent members of the armed forces not in uniform from claiming the protection of the Convention. Under the Convention the identification mark is limited to the possession of an identity card. The questions contemplated by article 17 were never put to the appellants. Article 85 of the Convention applies to prisoners of war convicted of war crimes, so that they are entitled to the status and protection of the Convention even after conviction of a war crime; a fortiori they are entitled to that protection before conviction and while suspected and accused. [...]

Fourthly, sabotage is a mere species of war crime. Saboteurs are not to be equated with spies. A member of the armed forces in civilian clothes is to be treated as a war criminal, if his acts are to be regarded as unlawful. A spy is one who is secretly gathering information in disguise and is in a special position and has no protection on capture, whereas a member of the armed forces out of uniform and civilian clothes is liable to be tried for a hostile act destroying life or property as having committed a crime contrary to the laws of war and not contrary to domestic law. The Convention of 1949 in contrast to the Convention of 1929 expressly gives protection and status of prisoners of war to members of guerrilla forces. The tendency of law is to extend the protection of the Convention. It is a branch of law developing very rapidly. There is no distinction between an attack on military buildings and on civilian buildings. Indiscriminate bombing does not involve breach of the laws of war. It is impossible to find any principle by which an attack on civilian buildings can now be regarded as a breach of the laws of war in conditions of modern warfare. Unprivileged belligerency

is something that is done which is not permitted by the rules of war; but treatment as privileged, or unprivileged, belligerent cannot be at the pleasure of the captor. [...]

[It was argued for the respondent:]

First, assuming that the appellants were members of the Indonesian armed forces, they had forfeited any right to treatment as prisoners of war under the protection of the Geneva Convention in that (a) they divested themselves of their uniforms; (b) they assumed civilian clothing; (c) they attacked a civilian target; and (d) they caused death and injury to peaceful civilians. The authorities on the Convention support the following propositions: (1) Members of the armed forces who divest themselves of their uniform for hostile purposes are not entitled to the status of "prisoner of war" under article 4A of the Convention or otherwise. (2) Spies and saboteurs out of uniform are within the above category and so are not entitled to the status of "prisoner of war" on capture. (3) Spies and saboteurs out of uniform are not guilty of war crimes properly so called by being out of uniform for hostile purposes. (4) Spies and saboteurs out of uniform are subject to trial and punishment under the municipal law of the captor state. (5) The killing of peaceful civilians and attacking non-military buildings is contrary to the laws and customs of war. (6) Indiscriminate bombing and the use of V1 and V2 weapons is contrary to the laws and customs of war. (7) Saboteurs may be (a) ordinary civilian volunteers, (b) members of militias or volunteer corps organisations engaged in sabotage, and (c) members of armed forces under orders to commit sabotage. (8) The conditions prerequisite in article 4A (2) are also prerequisite in article 4A (1) by necessary implication. [...]

The judgement of their Lordships was delivered by VISCOUNT DILHORNE.

On October 20, 1965, the appellants were convicted in the High Court of Singapore under Penal Code of the murder of three civilians and sentenced to death. Their appeals to the Federal Court of Malaysia were dismissed on October 5, 1966, and they now appeal by special leave. [...]

[T]he appellants were rescued from the sea some distance from Singapore by a bumboat man. He saw them in the sea clinging to a plank. [...] He swore that neither of the appellants was wearing uniform and that one of them was bare bodied and wearing a pair of darkish trousers and the other a sports shirt and pair of long trousers. [...]

At 2.35 p.m. the same day the first appellant was charged with the murder of the three persons killed by the explosion. He was again cautioned and he then made a statement saying that he had come to Singapore at 11 a.m. on March 10, that he had gone with the second appellant to look for a target, than he and the second appellant had placed "two bundles of explosives on stairs before reaching the first floor", that the second appellant had lit the fuse and that after that they had left and taken a bus. [...]

At 6.15 p.m., the first appellant had an interview with Mr. Yeo, then Fourth Magistrate. He told him that he was a member of the Indonesian Army and that he had come to give the magistrate information with regard to the duties he had been instructed to perform by his superiors. [...]



At the opening of the trial counsel for the appellants asserted that they were both members of the Indonesian armed forces and that they were entitled to the protection of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949. In 1962 the Geneva Conventions Act was passed in the Federation of Malaya to give effect to this, among other, Conventions.

Section 4 (1) of this Act provides, *inter alia*, that the court before which a protected prisoner of war is brought up for trial for any offence shall not proceed with the trial until it is proved to the satisfaction of the court that a notice giving the full name and description of the accused and other details about him including the offence with which he is charged and the court before which the trial is to take place and the time and place of trial has been served not less than three weeks previously on the protecting power and on the accused and the prisoner's representative.

In support of this contention the first appellant gave evidence that he was a member of the Indonesian armed forces, a corporal in the "Korps Kommando Operasi" regular force. He swore that when they has been rescued from the sea, he and the second appellant had been wearing uniform. He said that his and the second appellant's identity cards had been in plastic bags which were lost when their sampan sank. The second appellant also gave evidence that he was a member of the "Korps Kommando Operasi" and that he was wearing military uniform when he was rescued. He also said that he had not been allowed by his commander to wear his identity disk. After hearing evidence from the bumboat man and the other witnesses who had seen the appellants shortly after their rescue as to the appellants' clothing, the learned judge ruled that the appellants were not entitled to the status of prisoners of war. He said that the evidence was overwhelming that when they were rescued they were not wearing uniform. He also found that they first claimed to be fishermen while later on one claimed to be a farmer. [...]

He added that if they were members of the Indonesian armed forces, they were not in his opinion entitled to the status of prisoners of war.

"In my view" he said "members of enemy armed forces who are combatants and who come here with the assumption of the semblance of peaceful pursuits divesting themselves of the character or appearance of soldiers and are captured, such persons are not entitled to the privileges of prisoners of war."

After hearing of the appeal by the Federal Court affidavits were filed on behalf of the appellants sworn by two officers of the Indonesian Army, stating that the appellants had since March, 1965, been members of the Indonesian armed forces and serving in units under the "Kommando Mandala Siaga" and documents purporting to be their personal military records were produced. [...]

Mr. Le Quesne also argued that the appellants were prisoners of war within the Geneva Convention and that the requirements of that Convention were not complied with, with the result that there was a mistrial.

Article 2 of the Convention provides that it shall apply to all cases of declared war or of any armed conflict which may arise between two or more of the High Contracting

Parties, even if the state of war is not recognised by one of them. At the commencement of the trial Crown Counsel submitted that there was no state of war or armed conflict between Indonesia and Malaysia at the time but when Chua J. said that in his view there was a state of armed conflict, Crown counsel did not pursue the matter. [...]

The appeal was therefore heard on the basis that the Convention applied to Singapore and that at the time there was a state of armed conflict between Indonesia and Malaysia.

The issue to be determined is whether in the circumstances of this case, the appellants were entitled to the protection of the Convention. The view of Chua J. on this has already been stated. The Federal Court held that there could not

“be the least doubt that the explosion at MacDonald House was not only an act of sabotage but one totally unconnected with the necessities of war”.

They went on to say:

“It seems to us clear beyond doubt that under International Law a member of the armed forces of a party to the conflict who, out of uniform and in civilian clothing, sets off explosives in the territory of the other party to the conflict in a non-military building in which civilians are doing work unconnected with any war effort forfeits his right on capture to be treated as a prisoner of war.”

They consequently held that the appellants were not prisoners of war within the meaning of the Convention.

It is first necessary to consider the regulations annexed to the Hague Convention concerning the Laws and Customs of War on Land of 1907. The first section of those regulations is headed “Of Belligerents” and article 1 is the first article in that section and in the chapter headed “The Status of Belligerents.” It reads as follows:

“The laws, rights, and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions: (1) They must be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive sign recognisable at a distance; (3) To carry arms openly; and (4) They must conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination ‘army’.”

Chapter II of this section is headed “Prisoners of War.” The regulations do not in terms say that a person with the status of belligerent is on capture entitled to be treated as a prisoner of war but that is clearly implied. As Dr. Jean Pictet said in the “Commentary on the Geneva Convention” published by the Red Cross in 1960 [The Geneva Conventions, Commentary, published under the direction of Jean S. Pictet, III: The Geneva Convention Relative to the Treatment of Prisoners of War, ICRC; Geneva, 1958; available on <http://www.icrc.org/ihl>] at p. 46;

“Once one is accorded the status of a belligerent, one is bound by the obligations of the laws of war, and entitled to the rights which they confer. The most important of these is the right, following capture, to be recognised as a prisoner of war.”

Article 29 of the regulations reads as follows:

"A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Accordingly, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies..."

Article 31 says:

"A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war..."

These two articles show that soldiers who spy and are captured when wearing a disguise are not entitled to be treated as prisoners of war. [...]

Article 4 of the Geneva Convention added a number of new categories of persons entitled to treatment as prisoners of war. It is only necessary to refer to Article 4A, sub-paragraphs (1), (2) and (3). They read as follows:

"A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces; (2) Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognisable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war; (3) Members of regular armed forces who profess allegiance to a government or an authority not recognised by the detaining power."

The wording of sub-paragraphs (1) and (2) is clearly modelled on article 1 of the Hague Regulations. The conditions which have to be fulfilled by militias and volunteer corps not forming part of the army or armed forces are the same.

There is no indication in the Convention that its intention was to extend the protection given to soldiers beyond that given by the regulations; and in the *Manual of Military Law*, Part III (1958), in paragraph 96 it is stated:

"Should *regular* combatants fail to comply with these four conditions, they may in certain cases become unprivileged belligerents. This would mean that they would not be entitled to the status of prisoners of war upon their capture. Thus regular members of the armed forces who are caught as spies are not entitled to be treated as prisoners of war."

On this basis the conclusion must be drawn that it does not suffice in every case to establish membership of an armed force to become entitled on capture to treatment as a prisoner of war.

In neither the Hague Regulations nor in the Geneva Convention is it expressly stated that a member of the armed forces has to be wearing uniform when captured to be entitled to be so treated. In the case of certain militias and volunteer corps certain conditions have to be fulfilled in relation to those bodies for a member of them to be entitled to treatment as a prisoner of war. It is not, however, stated that such a member must at the time of his capture be wearing "a fixed distinctive sign recognisable at a distance".

International law, however, recognises the necessity of distinguishing between belligerents and peaceful inhabitants. "The separation of armies and peaceful inhabitants" wrote Spaight in *War Rights on Land* at p. 37, "is perhaps the greatest triumph of international law. Its effect in mitigating the evils of war has been incalculable". Although paragraph 86 of the Manual of Military Law recognises that the distinction has become increasingly blurred, it is still the case that each of these classes has distinct rights and duties.

For the "fixed distinctive sign to be recognisable at a distance" to serve any useful purpose, it must be worn by members of the militias or volunteer corps to which the four conditions apply. It would be anomalous if the requirement for recognition of a belligerent, with its accompanying right to treatment as a prisoner of war, only existed in relation to members of such forces and there was no such requirement in relation to members of the armed forces. All four conditions are present in relation to the armed forces of a country or, as Professor Lauterpacht in Oppenheim's *International Law*, 7<sup>th</sup> ed. (1952), volume II, at p. 259, calls them "the organised armed forces." In *War Rights on Land* Mr. Spaight says, at p. 56, in relation to article 1 of the Regulations: "The four conditions must be united, to secure recognition of belligerent status." Pictet in the Commentary on the Geneva Convention says, at p. 48: "The qualification of belligerent is subject to these four conditions being fulfilled," and, at p. 63, in relation to sub-paragraph (3) of Article 4A:

"These 'regular armed forces' have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1): they wear uniform, they have an organised hierarchy and they know and respect the laws and customs of war."

In relation to troops landed behind enemy lines, Professor Lauterpacht in Oppenheim's *International Law* says, at p. 259, that so long as they

"...are members of the organised forces of the enemy and wear uniform, they are entitled to be treated as regular combatants even if they operate singly."

Thus considerable importance attaches to the wearing of uniform or a fixed distinctive sign when engaging in hostilities. [...]

In this appeal it is not necessary to attempt to define all the circumstances in which a person coming within the terms of article 1 of the Regulations and of article 4 of the Convention as a member of an army or armed force ceases to enjoy the right to be

treated as a prisoner of war. The question to be decided is whether members of such a force who engage in sabotage while in civilian clothes and who are captured so dressed are entitled to be treated as protected by the Convention.

In paragraph 96 of the Manual of Military Law it is stated that: "Members of the armed forces caught in civilian clothing while acting as saboteurs in enemy territory are in a position analogous to that of spies." And in paragraph 331:

"If they are disguised in civilian clothing or in the uniform of the army by which they are caught or that of an ally of that army, they are in the same position as spies. If caught in their own uniform, they are entitled to be treated as prisoners of war."

In *The Law of Land Warfare* (1956) the American equivalent to the *Manual of Military Law*, the following paragraph appears:

"74. Necessity of Uniform. Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces."

In *Ex parte Quirin* [See Case No. 99, United States, *Ex Parte Quirin et al.*], the United States Supreme Court had to consider motions for leave to file petitions for writs of habeas corpus.

[Footnote 2 reads: (1942) 317 U.S. 1.] The case related to a number of Germans who during the course of the last war landed in uniform on the shores of the United States with explosives for the purpose of sabotage. On landing they put on civilian clothes. They were captured. In the course of delivering the judgment of the Supreme Court, Chief Justice Stone said: [footnote 3 reads: (1942) 317 U.S. 1, 31.]

"The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war..."

and: [footnote 4 reads: Ibid, 37.]

"By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment."

In the light of the passages cited above, their lordships are of the opinion that under international law it is clear that the appellants, if they were members of the Indonesian armed forces, were not entitled to be treated on capture as prisoners of war under the Convention when they had landed to commit sabotage and had been dressed in civilian clothes both when they had placed the explosives and lit them and when they were arrested. [...]

Mr. Le Quesne further contended that the appellants' act in placing the explosives was a legitimate act of war and that they could not therefore be tried for murder. The Federal Court in rejecting the appellants' plea, appear to have done so partly on the ground that placing the explosives in MacDonald House "a non-military building in which civilians are doing work unconnected with any war effort" was not a legitimate act of war. "The immunity of non-combatants from direct attack is one of the fundamental rules of the International Law of war" and "Non-combatants are not, under existing International Law, a legitimate military objective" (Professor Lauterpacht in *Oppenheim*, at p. 524 and 525).

As, if they were members of the Indonesian armed forces, in their Lordships' opinion, they forfeited their right under the Convention by engaging in sabotage in civilian clothes, it is not necessary to consider whether they also forfeited them by breach of the laws and customs of war by their attack on a non-military building in which there were civilians. Having forfeited their rights, there was in their lordships' view no room for the application of article 5 of the Convention and, not being entitled to protection under the Convention, the appellants' conviction for murder committed by them when dressed as civilians and within the jurisprudence of Singapore cannot be invalidated.

For these reasons, their Lordships were of the opinion that the appeal should be dismissed. [...]

## DISCUSSION

1. Did an international armed conflict exist between Indonesia and the Federation of Malaysia (to which Singapore then belonged)? Was the sole fact that members of Indonesian armed forces carried out attacks in Singapore, under orders of their superiors, sufficient to make IHL applicable? (GC I-IV, Art. 2)
2.
  - a. Under the Geneva and Hague Conventions, must members of regular armed forces permanently distinguish themselves from the civilian population? May they be punished for failing to do so? Must they be punished for failing to do so? Do they lose combatant status if they fail to do so? How does the situation change with the applicability of Protocol I? (HR, Art. 1; GC III, Art. 4(A); P I, Arts 44(3)-(4) and 85; CIHL, Rule 106)
  - b. May a member of regular armed forces attack civilian targets? May such individuals be punished if they do? Must they be punished if they do? Do they lose combatant status if they do so? (HR, Arts 23(g), 25 and 27; GC III, Art. 85; GC IV, Arts 146-147; P I, Arts 44(2), 48, 51, 52, 57 and 85)
  - c. If the appellants had worn uniforms at the time of attack, could they have been sentenced? In what way would their legal situation have been different?
  - d. Could this decision have been rendered if Protocol I had been applicable? Would the result have been different? Which part of the Court's reasoning would have been different? (PI, Art. 44)
3. Should the appellants have benefited from the presumption provided for in Art. 5(2) of Convention III? What would the consequence of that presumption have been for their trial? Was Art. 104 of Convention III applicable?

**Case No. 115, Belgium, Public Prosecutor v. G.W.**

[Source: Brussels War Council 18 May 1966, partially reported in *Revue Juridique du Congo*, 1970, p. 236 and in *Revue de Droit Pénal et de Criminologie*, "Chronique annuelle de Droit pénal militaire", 1970, p. 806; original in French, unofficial translation.]

**BRUSSELS,  
CONSEIL DE GUERRE****in re Public Prosecutor v. G.W., May 18, 1966**

[...]

**JUDGMENT**

[...]

**II. Facts**

On 5 October 1965 the accused, G.W., a senior member of the Belgian staff providing assistance to the Democratic Republic of the Congo, was driving in a jeep in the company of M. and M., soldiers belonging to the Congolese national army, coming from a checkpoint set up on Opala road and going towards Lubunga, an outlying district of Stanleyville [...].

The jeep had just left an area out of bounds to civilians and entered a non-forbidden zone, when the vehicle's occupants saw [...] two Congolese crossing the road, carrying "Beretta" submachine-guns [...].

A Congolese woman, Z.S., appeared on the threshold of the hut from which, according to W., the second rebel had come out; the accused interrogated her, with the help of his driver, N., but got no intelligible reply [...].

The accused – as he himself stated – then started to push the woman; he knocked her over, she fell on her side; he lifted her head with his foot because she persisted in turning her head to face the ground; he did not actually kick her, but he put his foot on her head and pressed down.

The accused declares that he then ordered her to accompany him to the camp; the woman rolled on the ground without obeying him. He ordered the two soldiers, as he himself said, to put her in the jeep, which they did not manage to do; as soon as he heard the engine start – the jeep being out of sight – he fired a revolver shot into the head of the victim, who was lying at his feet. The accused then went back to the camp and informed the Congolese and Belgian authorities of what had happened and asked that a patrol be sent out to look for the rebels.

The autopsy showed that the victim had two bullet wounds, one of them [...] in the head. [...]

The material facts of the case against the accused have been established beyond doubt. It has also been established that the accused fired the shot into the victim's head with intent to kill.

### **III. On grounds for justification [...]**

#### **(a) Order from higher authority**

The accused invokes the order issued by Major O. to "shoot all suspect elements on sight" in the area forbidden to civilians.

Elements of the file show, and this is not disputed by the accused, that the victim was not in the forbidden zone; the order invoked by the accused was therefore not applicable in the case in point.

The accused maintains however that there being no clear demarcation of the zone in question, he was convinced that he was inside the forbidden zone [...].

Moreover, the order [invoked by the accused] certainly does not have the scope attributed to it by the accused, namely "the order to take no prisoners and to 'kill' everything we come across in there".

The file and the investigation carried out during the hearing show that in fact it was an "authorization" to shoot suspect elements on sight, without warning, but definitely not an order to take no prisoners or to kill prisoners.

As interpreted by the accused in practice – viz. the right or even the obligation to kill an unarmed person in his power – the order was patently illegal. Executing or causing to be executed without prior due trial a suspect person or even a rebel fallen into the hands of the members of his battalion was obviously outside the competence of Major O., and such an execution was a manifest example of voluntary manslaughter. The illegal nature of the order thus interpreted was not in doubt and the accused had to refuse to carry it out. [...]

The act perpetrated by the accused constitutes not only murder within the meaning of Articles 43 and 44 of the Congolese Criminal Code and Articles 392 and 393 of the Belgian Criminal Code, but is also a flagrant violation of the laws and customs of war and of the laws of humanity.

From the legal, military and human standpoint such an act was inadmissible and unjustifiable.

### **ON THESE GROUNDS**

The Court-martial, ruling after due hearing of both parties, [...]

finds G.W. guilty of the charges brought against him,

sentences him to five years' imprisonment. [...]



**DISCUSSION**

1. Did the acts of the defendant violate IHL independently of whether the Belgian operations in Congo were subject to the laws of international or non-international armed conflict? (GC I-IV, Art. 3; GC IV, Arts 27 and 32)
2. Is it lawful to prohibit a zone to civilians? What might the defendant lawfully have done with a civilian found in such a zone? Was the order as interpreted by the Court, giving permission to fire within the prohibited zone at “all suspect elements on sight”, lawful according to international humanitarian law if we retroactively apply Protocols I and II? (P I, Arts 50(1) and 51(2); P II, Art. 4(1)) If we do not apply those instruments? (HR, Art. 23(d)) Is it lawful to fire at combatants on sight? Would the defendant’s conduct have been lawful within the “prohibited zone” with regard to a person positively identified as a combatant? (P I, Arts 40 and 41)
3. When may a superior order provide a defence against charges of a violation of IHL? When does a superior order prevent punishment for such a violation? When does it reduce punishment for such a violation?

**Case No. 116, United States, Screening of Detainees in Vietnam**

[Source: Levie, H.S. (ed.), *International Law Studies: Documents on Prisoners of War*, Naval War College, R.I., Naval War College Press, vol. 60, Document No. 155, 1979, pp. 748-751]

**UNITED STATES MILITARY ASSISTANCE COMMAND, VIETNAM.  
DIRECTIVES NO. 381-46, MILITARY INTELLIGENCE:  
COMBINED SCREENING OF DETAINEES  
(27 December 1967)**

**SOURCES**

**National Archives of the United States  
62 AJIL 766 (Annex only)  
12 Santa Clara Law. 236 (1972) (Annex only)  
12 Wm. & Mary L. Rev. 798 (1971) (Annex only)**

[...]

1. **PURPOSE** This directive provides policy guidance for the combined screening of detainees, and for the activation, as required, of Combined Tactical Screening Centers (CTSC).
2. **GENERAL**
  - a. The forces that capture or detain suspect personnel are responsible for the prompt screening and classification of detainees.
  - b. Criteria for determination of status and classification of detainees is contained in paragraphs 3 and 4 of Annex A.
  - c. Disposition of detained personnel who have been classified will be made in accordance with paragraph 5 of Annex A.

[...]

4. **DISCUSSION** [...] All detainees must be classified into one of the following categories:
  - a. Prisoners of War.
  - b. Non-Prisoners of War.
    - (1) Civil Defendants.
    - (2) Returnees.
    - (3) Innocent Civilians.

**5. CONCEPT**

[...]

- b. Combined screening of detainees will be conducted at the lowest echelon of command practical; normally at the brigade or division Prisoner of War (PW)

collecting points. Screening centers should be located near sector/sub-sector headquarters for ease of access to both military and civilian files.

- c. The mission of the CTSC is to optimize the screening and classification of a large number of detained personnel to permit effective exploitation of knowledgeable sources for immediate tactical information and to expedite the proper disposition of PW's and Non-Prisoners of War.

\* \* \* \* \*

## **8. SCREENING PROCEDURES**

- a. The detaining unit will insure that the proper documentation is initiated and maintained on every individual detained. It is imperative that data reflect circumstances of capture and whether documents [or] weapons were found on the detainee.
- b. Maximum use must be made of interrogators and interpreters to conduct initial screening and segregation at the lowest possible level. Participation in the initial screening by all agencies represented in CTSC is encouraged. However, the sole responsibility for determining the status of persons detained by US forces rests with the representatives of the United States Armed Forces.
- c. Detainees will be classified in accordance with the criteria established in Annex A. [...]
- d. To preclude rejection by the PW camp commanders of PW's of questionable status, evidence gathered to substantiate the determination that the detainee is entitled to PW status must be forwarded with the prisoner. Improperly documented PW's will not be evacuated to PW camps.

\* \* \* \* \*

## **ANNEX A**

### **CRITERIA FOR CLASSIFICATION AND DISPOSITION OF DETAINEES**

1. **PURPOSE** To establish criteria for the classification of detainees which will facilitate rapid, precise screening, and proper disposition of detainees.

#### **2. DEFINITIONS**

- a. Detainees. Persons who have been detained but whose final status has not yet been determined. Such persons are entitled to humane treatment in accordance with the provision of the Geneva Conventions.
- b. Classification. The systematic assignment of a detainee in either PW or Non-Prisoner of War category.
- c. Prisoners of War. All detainees who qualify in accordance with paragraph 4a, below.

- d. Non-Prisoners of War. All detainees who qualify in accordance with paragraph 4b, below.

### **3. CATEGORIES OF FORCES**

- a. Viet Cong (VC) Main Force (MF). [...]
- b. Viet Cong (VC) Local Force (LF). [...]
- c. North Vietnamese Army (NVA) Unit. [...]
- d. Irregulars. Organized forces composed of guerrilla, self-defense, and secret self-defense elements subordinate to village and hamlet level VC organizations. These forces perform a wide variety of missions in support of VC activities, and provide a training and mobilization base for maneuver and combat support forces.
  - (1) Guerrillas. Full-time forces organized into squads and platoons which do not necessarily remain in their home village or hamlet. Typical missions for guerrillas include propaganda, protection of village party committees, terrorist, and sabotage activities.
  - (2) Self-Defense Force. A VC paramilitary structure responsible for the defense of hamlet and village in VC controlled areas. These forces do not leave their home area, and they perform their duties on a part-time basis. Duties consist of constructing fortifications, serving as hamlet guards, and defending home areas.
  - (3) Secret Self-Defense Force. A clandestine VC organization which performs the same general function in Government of Vietnam (GVN) controlled areas. Their operations involve intelligence collection, as well as sabotage and propaganda activities.

### **4. CLASSIFICATION OF DETAINEES**

- a) Detainees will be classified PW's when determined to be qualified under one of the following categories:
  - (1) A member of one of the units listed in paragraph 3a, b, or c, above.
  - (2) A member of one of the units listed in paragraph 3d, above, who is captured while actually engaging in combat or a belligerent act under arms, other than an act of terrorism, sabotage, or spying.
  - (3) A member of one of the units listed in paragraph 3d, above, who admits or for whom there is a proof of his having participated or engaged in combat or a belligerent act under arms other than an act of terrorism, sabotage, or spying.
- b) Detainees will be classified as Non-Prisoners of War when determined to be one of the following categories:
  - (1) Civil Defendants
    - (a) A detainee who is not entitled to PW status but is subject to trial by GVN for offenses against GVN law.

- (b) A detainee who is a member of one of the units listed in paragraph 3d, above, and who was detained while not engaged in actual combat or a belligerent act under arms, and there is no proof that the detainee ever participated in actual combat or belligerent act under arms.
- (c) A detainee who is suspected of being a spy, saboteur, or terrorist.
- (2) Returnees (Hoi Chanh). All persons regardless of past membership in any of the units listed in paragraph 3, above, who voluntarily submit to GVN control.
- (3) Innocent Civilians. Persons not members of any units listed in paragraph 3, above, and not suspected of being civilian defendants.

## **5. DISPOSITION OF CLASSIFIED DETAINEES**

- a. Detainees who have been classified will be processed as follows:
  - (1) US captured PW's and those PW's turned over to the US by FWMAF will be detained in US Military channels until transferred to the ARVN PW Camp.
  - (2) Non-Prisoners of War who are suspected as civilian defendants will be released to the appropriate GVN civil authorities.
  - (3) Non-Prisoners of War who qualify as returnees will be transferred to the appropriate Chieu Hoi Center.
  - (4) Non-Prisoners of War determined to be innocent civilians will be released and returned to the place of capture.

\* \* \* \* \*

## **DISCUSSION**

1. a. Are the criteria stipulated in this directive for determining prisoner-of-war status consistent with Convention III? Who qualifies for prisoner-of-war treatment under IHL? For which category of detainees does the directive go beyond what Convention III stipulates? (HR, Art. 1; GC I, Art. 28(2); GC III, Art. 4; P I, Art. 44(5))
  - b. Are the persons who are classified as non-prisoners of war protected by Convention IV? (GC IV, Arts 4 and 5)
  - c. Are the dispositions of the various classified detainees in section 5 of the above document consistent with IHL? May some or all of those detainees be handed over to the government of South Vietnam? (GC III, Art. 12; GC IV, Arts 4, 5 and 45)
2. a. Why does Art. 5(2) of Convention III exist? Why must a "competent tribunal" decide on a detained person's status? What constitutes a "competent" tribunal? Does a military tribunal qualify?
  - b. Is the status of persons to whom the directive denies prisoner-of-war status to be determined by a competent tribunal under Art. 5(2) of Convention III?
3. Is the implementation of this directive consistent with Art. 5(2) of Convention III? May States Parties create such directives? Must they? Does a screening centre such as the Combined Tactical Screening Centers meet the requirements of Art. 5(2) of Convention III? Does failing to provide a tribunal hearing for the determination of a person's status constitute a violation of the Conventions? Is it considered a "grave breach"? (GC I-IV, Arts 49/50/130/146 respectively; GC III, Art. 5(2))

4. While an individual's status is being determined, to what kind of treatment is that person entitled? Only humane treatment as stated above in Annex A, para. 2(a)? Or prisoner-of-war treatment until the status is determined or even proven by a competent tribunal, even though the person may not qualify as such? What does Art. 5(2) of Convention III mean by "the protection of the present Convention"?
5. If Protocol I was applicable, which elements of the directive would comply with or violate the Protocol? Does this directive contribute to making certain aspects of Protocol I customary international law? (GC III, Arts 4 and 5; P I, Arts 43-45)

**Case No. 117, United States, United States v. William L. Calley, Jr.**

[Source: Levie, H.S. (ed.), *International Law Studies, Documents on Prisoners of War*, Naval War College, R.I., Naval War College, vol. 60, Document No. 171, 1979, pp. 804-811]

**UNITED STATES v. WILLIAM L. CALLEY, JR.**  
**(U.S. Court of Military Appeals, 21 December 1973)**

**SOURCES**

**22 USCMA 534 (1973)**

**48 CMR 19 (1973)**

**(Habeas corpus granted sub. nomine CALLEY v. CALLOWAY, 382 F. Supp. 650 (1974); rev'd 519 F.2d. 184 (1975); cert. den. sub. nomine CALLEY v. HOFFMAN, 425 U.S. 911 (1976))**

[...]

**EXTRACTS**  
**OPINION**

**QUINN, Judge:**

First Lieutenant Calley stands convicted of the premeditated murder of 22 infants, children, women, and old men, and of assault with intent to murder a child of about 2 years of age. All the killings and the assault took place on March 16, 1968 in the area of the village of My Lai in the Republic of South Vietnam. The Army Court of Military Review affirmed the findings of guilty and the sentence, which, as reduced by the convening authority, includes dismissal and confinement at hard labor for 20 years. The accused petitioned this Court for further review, alleging 30 assignments of error. We granted three of these assignments.

Lieutenant Calley was a platoon leader in C Company, a unit that was part of an organization known as Task Force Barker, whose mission was to subdue and drive out the enemy in an area in the Republic of Vietnam known popularly as Pinkville. Before March 16, 1968, this area, which included the village of My Lai 4, was a Viet Cong stronghold. C Company had operated in the area several times. Each time the unit had entered the area it suffered casualties by sniper fire, machine gun fire, mines, and other forms of attack. Lieutenant Calley had accompanied his platoon on some of the incursions.

On March 15, 1968, a memorial service for members of the company killed in the area during the preceding weeks was held. After the service Captain Ernest L. Medina, the commanding officer of C Company, briefed the company on a mission in the Pinkville area set for the next day. C Company was to serve as the main attack formation for Task Force Barker. [...] Intelligence reports indicated that the unit would be opposed by a veteran enemy battalion, and that all civilians would be absent from the area. The objective was to destroy the enemy. Disagreement exists as to the instructions on the specifics of destruction.

Captain Medina testified that he instructed his troops that they were to destroy My Lai 4 by "burning the hootches, to kill the livestock, to close the wells and to destroy the food crops." Asked if women and children were to be killed, Medina said he replied in the negative, adding that, "You must use common sense. If they have a weapon and are trying to engage you, then you can shoot back, but you must use common sense." However, Lieutenant Calley testified that Captain Medina informed the troops they were to kill every living thing – men, women, children, and animals – and under no circumstances were they to leave any Vietnamese behind them as they passed through the villages enroute to their final objective. Other witnesses gave more or less support to both versions of the briefing.

On March 16, 1968, the operation began with interdicting fire. C Company was then brought to the area by helicopters. Lieutenant Calley's platoon was on the first lift. [...] The unit received no hostile fire from the village.

Calley's platoon passed the approaches to the village with his men firing heavily. Entering the village, the platoon encountered only unarmed, unresisting men, women, and children. The villagers, including infants held in their mother's arms, were assembled and moved in separate groups to collection points. Calley testified that during this time he was radioed twice by Captain Medina, who demanded to know what was delaying the platoon. On being told a large number of villagers had been detained, Calley said Medina ordered him to "waste them." Calley further testified that he obeyed the orders because he had been taught the doctrine of obedience throughout his military career. Medina denied that he gave any such order.

One of the collection points for the villagers was in the southern part of the village. There, Private First Class Paul D. Meadlo guarded a group of between 30 to 40 old men, women, and children. Lieutenant Calley approached Meadlo and told him, "'You know what to do,'" and left. He returned shortly and asked Meadlo why the people were not yet dead. Meadlo replied he did not know that Calley had meant that they should be killed. Calley declared that he wanted them dead. He and Meadlo then opened fire on the group, until all but a few children fell. Calley then personally shot these children. He expended 4 or 5 magazines from his M-16 rifle in the incident.

Lieutenant Calley and Meadlo moved from this point to an irrigation ditch on the east side of My Lai 4. There, they encountered another group of civilians being held by several soldiers. Meadlo estimated that this group contained from 75 to 100 persons. Calley stated, "'We got another job to do, Meadlo,'" and he ordered the group into the ditch. When all were in the ditch, Calley and Meadlo opened fire on them. Although ordered by Calley to shoot, Private First Class James J. Dursi refused to join in the killings, and Specialist Four Robert E. Maples refused to give his machine gun to Calley for use in the killings. Lieutenant Calley admitted that he fired into the ditch, with the muzzle of his weapon within 5 feet of people in it. He expended between 10 to 15 magazines of ammunition on this occasion.

With the radio operator, Private Charles Sledge, Calley moved to the north end of the ditch. There, he found an elderly Vietnamese monk, whom he interrogated. Calley struck the man with his rifle butt and then shot him in the head. Other testimony



indicates that immediately afterwards a young child was observed running toward the village. Calley seized him by the arm, threw him into the ditch, and fired at him. Calley admitted interrogating and striking the monk, but denied shooting him. He also denied the incident involving the child.

Appellate defense counsel contend that the evidence is insufficient to establish the accused's guilt. They do not dispute Calley's participation in the homicides, but they argue that he did not act with the malice of *mens rea* essential to a conviction of murder; that the orders he received to kill everyone in the village were not palpably illegal; that he was acting in ignorance of the laws of war; that since he was told that only "the enemy" would be in the village, his honest belief that there were no innocent civilians in the village exonerates him of criminal responsibility for their deaths; and, finally, that his actions were in the heat of passion caused by reasonable provocation.

\* \* \* \* \*

The testimony of Meadlo and others provided the court members with ample evidence from which to find that Lieutenant Calley directed and personally participated in the intentional killing of men, women, and children, who were unarmed and in the custody of armed soldiers of C Company. If the prosecution's witnesses are believed, there is also ample evidence to support a finding that the accused deliberately shot the Vietnamese monk whom he interrogated, and that he seized, threw into a ditch, and fired on a child with the intent to kill.

Enemy prisoners are not subject to summary execution by their captors. Military law has long held that the killing of an unresisting prisoner is murder. [...]

Conceding for the purposes of this assignment of error that Calley believed the villagers were part of "the enemy," the uncontradicted evidence is that they were under the control of armed soldiers and were offering no resistance. In his testimony, Calley admitted he was aware of the requirement that prisoners be treated with respect. He also admitted he knew that the normal practice was to interrogate villagers, release those who could satisfactorily account for themselves, and evacuate the suspect among them for further examination. Instead of proceeding in the usual way, Calley executed all, without regard to age, condition, or possibility of suspicion. On the evidence, the court-martial could reasonably find Calley guilty of the offences before us.

At the trial, Calley's principal defense was that he acted in execution of Captain Medina's order to kill everyone in My Lai 4. [...] Captain Medina denied that he issued any such order [...]. Resolution of the conflict between his testimony and that of the accused was for the triers of the facts. [...]

\* \* \* \* \*

We turn to the contention that the judge erred in his submission of the defense of superior orders to court. After fairly summarizing the evidence, the judge gave the following instructions pertinent to the issue: [...]

I [...] instruct you, as a matter of law, that if unresisting human beings were killed at My Lai (4) while within the effective custody and control of our military forces, their

deaths cannot be considered justified, and any order to kill such people would be, as a matter of law, an illegal order. Thus, if you find that Lieutenant Calley received an order directing him to kill unresisting Vietnamese within his control or within the control of his troops, *that order would be an illegal order.*

A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the order [*sic*] hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of *ordinary sense and understanding* would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.

\* \* \* \* \*

[...]

Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful, you must proceed to determine whether, under the circumstances, *a man of ordinary sense and understanding would have known the order was unlawful. Your deliberations on this question do not focus on Lieutenant Calley and the manner in which he perceived the legality of the order found to have been given him. The standard is that of a man of ordinary sense and understanding under the circumstances.*

[...]

Appellate defense counsel contend that these instructions are prejudicially erroneous [...]. They urge us to adopt as the governing test whether the order is so palpably or manifestly illegal that a person of "the commonest understanding" would be aware of its illegality. They maintain the standard stated by the judge is too strict and unjust; that it confronts members of the armed forces who are not persons of ordinary sense and understanding with the dilemma of choosing between the penalty of death for disobedience of an order in time of war on the one hand and the equally serious punishment for obedience on the other. Some thoughtful commentators on military law have presented much the same argument. [...]

In the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgment and be held criminally responsible if he guesses wrong on a question as to which there may be considerable disagreement. But there is no disagreement as to the illegality of the order to kill in this case. For 100 years, it has been a settled rule of American law that even in war the summary killing of an enemy, who has submitted to, and is under, effective physical control, is murder. Appellate

defense counsel [...] say that Lieutenant Calley should not be held accountable for the men, women and children he killed because the court-martial could have found that he was a person of “commonest understanding” and such a person might not know what our law provides; that his captain had ordered him to kill these unarmed and submissive people and he only carried out that order as a good disciplined soldier should.

Whether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam, or the most intelligent, he must be presumed to know that he could not kill the people involved here. [...]

Consequently, the decision of the Court of Military Review is affirmed. [...]

### DISCUSSION

1. a. Which law applies in this case? The IHL of international or non-international armed conflicts?
- b. Does the determination of whether the IHL of international or non-international armed conflicts applies have a great impact on this case? Are not the actions of Lieutenant Calley prohibited under both bodies of law? Does it matter whether the victims were innocent villagers, had previously supported the Vietcong, or were (lawful or unlawful) Vietcong fighters before they fell into the hands of Calley and his soldiers? (HR, Art. 23(c)-(d); GC I-IV, Art. 3 and Arts 50/51/130/147 respectively; P I, Arts 11, 40, 41, 51, 75, 77 and 85; P II, Arts 4, 6(2) and 13)
2. a. When may a superior order provide a defence against charges of a violation of IHL? When does a superior order prevent punishment for such a violation? When does it reduce punishment for such a violation?
- b. Was the standard which the Court instructed the jury to use in determining when a superior order provides a defence for a violation of IHL consistent with IHL? If not, was the standard suggested by the defence? Neither of them?
- c. With which standard should the Court instruct the jury? Which standard, an objective standard or a more subjective standard, provides the fairest outcome? Which standard more effectively restrains violations of IHL? Are these the same?
- d. Does the fact that soldiers are indoctrinated to obey orders and are aware that disobedience carries a grave punishment support the application of a more subjective standard? Also when assessing blatantly illegal orders?
- e. If a private, such as Private First Class James J. Dursi, grasps the unlawfulness of an order and chooses to disobey, should not a lieutenant certainly do likewise? Is a lieutenant an unsophisticated soldier? Does ignorance of the laws of war provide an excuse? Even for a lieutenant? If soldiers are ignorant of the laws of war, is not the State then also responsible for not having properly instructed its combatants? (P I, Arts 82, 83 and 87(2); CIHL, Rules 139, 141-142, 153)
- f. What strength does the argument have that if every subordinate questioned the legality of the commander's orders and each decided whether to obey or not, the structure of the armed forces would be undermined and all crucial moments for action in conflict would be missed while they debate the issue? Are there no manifestly clear cases when an order should be disobeyed? Was the above situation not such a case? Or is it much easier to judge with hindsight? Can an intense combat situation really be fairly assessed in retrospect?

**Case No. 118, United States, Former Prisoner of War on a Mission to Hanoi**

[Source: Cloud, D.S., *Chicago Tribune*, April 15, 1997, at N1]

**Former POW on a Mission to Hanoi;  
U.S. Ambassador Seeks Reconciliation**

There was a time when Pete Peterson never imagined returning to Vietnam, certainly not to live and work.

An Air Force pilot shot down on a bombing mission in 1966, Peterson endured 6 ½ years of torture and isolation, living on grass soup and rice in the dank North Vietnamese prisoner-of-war camp known as the Hanoi Hilton.

Freed in 1973, he vowed to leave Vietnam and its torment buried in his past. It was a conscious act of self-preservation, like preparing for another mission, Peterson says.

"I had enough hate in my life for (the) 6 ½ years that I sat in a cell," he said in a recent interview. "Had it continued, I would not have been able to function. I essentially put it behind me on the day I walked out of that cell."

Peterson, 61, will be going back to Hanoi, where he once was taken in shackles, as the first U.S. ambassador since the war.

The Senate approved his nomination last Thursday, ending a year-long delay that left Peterson in limbo while lawmakers squabbled over restoring ties with a former enemy.

The U.S. has never had an ambassador in Hanoi, capital of reunited Vietnam. On April 29, Peterson will be sworn in and he will assume his post in early May.

President Clinton's choice of the ex-POW and three-term Florida congressman has been widely praised by veterans groups that oppose normalization of relations, by career diplomats at the State Department and even by Vietnam's communist leaders.

The support is recognition that it may take someone like Peterson, who has every reason to harbor hatred, to be the agent for reconciliation between former enemies.

"The experience that he went through led him in the direction of healing and reconciliation, as it did in my case," said Sen. John McCain (R-Ariz), who spent six years in the same POW camp.

Peterson is "the only person we would have supported for the job, and the reason is that he's been there and he knows the issues that affect Vietnam veterans," said George Duggins, national president of Vietnam Veterans of America.

The last American ambassador in Vietnam, Graham Martin, made a frantic helicopter departure from Saigon, capital of the south, barely ahead of the North Vietnamese troops encircling the city. It was an ignominious close to America's involvement in the conflict, one of many painful images burned in the national psyche.

Peterson's hand sometimes still goes numb, and his elbows bear the scars of rope burns inflicted by his torturers. But he is determined to leave a different mark.

"I really hope that I can use this relationship to bind the hurt that still exists in the populations of both countries," he said. "We're not the only ones who were hurt here. The Vietnamese lost whole age groups of men."

Peterson's first priority is to make further progress in dozens of unresolved cases of U.S. prisoners of war and those listed as missing in action. The Vietnam Veterans of America opposed Clinton's decision to normalize relations last July, saying it would remove leverage in Hanoi for full disclosure.

Peterson disagrees with critics of normalization. He notes that many of the dozens of remaining cases involve servicemen who were operating in mountainous jungle or other remote parts of Vietnam along the border with neighbouring Laos. Hanoi is cooperating, he says, adding that his presence will help speed the identification of remains.

He insists that Hanoi will not get what it really wants – U.S. investment and full commercial ties – unless there is progress.

Despite his years of captivity, Douglas "Pete" Peterson never set out to become an advocate for POWs.

Peterson was piloting his 67<sup>th</sup> bombing mission Sept. 10, 1966, when his F-4 Phantom was hit by a surface-to-air missile. After ejecting, he landed in a tree, with injuries to his right arm, shoulder and leg. Captured by local militiamen, Peterson was taken to Hoa Lo prison, known as the Hanoi Hilton.

Denied shoes, adequate food, medical treatment and contact with other American prisoners, he was kept in a 12-by-20 foot cell with a board to sleep on. Torture sessions were regular and brutal. Peterson kept his sanity by focusing on imaginary projects, like building a house.

He was transferred twice during his imprisonment.

Peterson's wife and three children waited three years for word of his fate. Then they saw him on a propaganda film released by Hanoi during Christmas 1969. In a package of his belongings the Air Force sent to Peterson's family, there was a jade bracelet and carved wooden cat that Peterson had intended to give his daughter, Paula Blackburn, after returning from his tour. [...]

Now Peterson has a new challenge – bringing the war that he once submerged in his subconscious to a more satisfying conclusion for the country.

Discussing his motivations for accepting the job with his daughter, Peterson said he "could not be a free man without knowing what happened to the other MIAs [missing in action] who did not come home."

## DISCUSSION

1. Were the conditions in which Ambassador Peterson was described as living while a prisoner of war consistent with the provisions of IHL? (GC III, Arts 22, 25, 26 and 29) Was the treatment to which he was subjected? (GC III, Arts 13, 17(4), 87(3) and 130; P I, Art. 85(2)) Did the family have a right to

be notified of his whereabouts and state of health? Did he have a right to receive correspondence? (GC III, Arts 70 and 71)

2. What responsibilities under IHL do States Parties have with regard to prisoners of war and the missing – thus in aiding Ambassador Peterson in his first priority of resolving cases of US prisoners of war and those still missing? What action does IHL require of States party to the Conventions regarding those missing? (GC I, Arts 15-17; GC III, Arts 118, 120, 122 and 123; GC IV, Arts 26 and 136-140; P I, Arts 32-34)
3.
  - a. Should the US refuse to normalize relations with Vietnam if it believes that full disclosure about prisoners of war and the missing has not been made? Even after over twenty years? Would reconciliation perhaps facilitate disclosure? Does reconciliation often depend upon the efforts of former victims? Does reconciliation impact the obligations under IHL of States Parties with respect to prisoners of war and those missing?
  - b. Does application and enforcement of IHL provisions depend upon individuals with experiences and insight such as Ambassador Peterson's? Is such an outlook typical of a victim? Does the strength of IHL depend upon such individuals?

**Case No. 119, Nigeria, Operational Code of Conduct**

[Source: Greene, K., *Crisis and Conflict in Nigeria, A Documentary Sourcebook*, vol. I, 1966-69, pp.455-457]

**OPERATIONAL CODE OF CONDUCT FOR THE NIGERIAN ARMY**

[Footnote 1 reads: Not dated, but issued early in July 1967. Reproduced by courtesy of a Nigerian soldier. The English version promised a translation into Hausa, Ibo, Yoruba, Efik, and Ijaw. Tiv was not mentioned.]

**RESTRICTED**

**DIRECTIVE  
TO ALL OFFICERS AND MEN OF THE ARMED FORCES  
OF THE FEDERAL REPUBLIC OF NIGERIA  
ON CONDUCT OF MILITARY OPERATIONS**

1. As your Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, I demand from all officers and men the two most important qualities of a fighting soldier – *loyalty and discipline*. Nigerian Armed Forces, especially the Army, have established a very high international reputation for high discipline and fighting efficiency since their establishment until the events of 15<sup>th</sup> January, 1966 spoilt that reputation. Since then it has become most necessary to demand the highest sense of discipline and patriotism amongst all ranks of the Armed Forces. Success in battle depends to a large extent on this discipline and loyalty of the officers and men and their sense of patriotism.
2. You are all aware of the rebellion of Lt.-Col. C. Odumegwu-Ojukwu of the East Central State and his clique against the Government of the Federal Republic of Nigeria. In view of this defiance of authority, it has become inescapable to use the force necessary to crush this rebellion. The hardcore of the rebels are Ibos. The officers and men of the minority areas (Calabar, Ogoja and Rivers and even some Ibos) do not support the rebellions acts of Lt.-Col. C. Odumegwu-Ojukwu. During the operations of Federal Government troops against the rebel troops many soldiers and civilians will surrender. You should treat them fairly and decently in accordance with these instructions.
3. You must all bear in mind at all times that other nations in Africa and the rest of the world are looking at us to see how well we can perform this task which the nation demands of us. You must also remember that you are not fighting a war with a foreign enemy. Nor are you fighting a religious war or Jihad. You are only subduing the rebellion of Lt.-Col. Odumegwu-Ojukwu and his clique. You must not do anything that will endanger the future unity of the country. We are in honour bound to observe the rules of the Geneva Convention in whatever action you will be taking against the rebel Lt.-Col. Odumegwu-Ojukwu and his clique.
4. I direct all officers and men to observe strictly the following rules during operations. (These instructions must be read in conjunction with the Geneva Convention):
  - a. Under no circumstances should pregnant women be illtreated or killed.

- b. Children must not be molested or killed. They will be protected and cared for.
  - c. Youths and school children must not be attacked unless they are engaged in open hostility against Federal Government Forces. They should be given all protection and care.
  - d. Hospitals, hospital staff and patients should not be tampered with or molested.
  - e. Soldiers who surrender will not be killed. They are to be disarmed and treated as prisoners of war. They are entitled in all circumstances to humane treatment and respect for their person and their honour.
  - f. No property, building, etc, will be destroyed maliciously.
  - g. Churches and Mosques must not be desecrated.
  - h. No looting of any kind. (A good soldier will never loot).
  - i. Women will be protected against any attack on their person, honour and in particular against rape or any form of indecent assault.
  - j. Male civilians who are hostile to the Federal Forces are to be dealt with firmly but fairly. They must be humanely treated.
  - l. All military and civilians wounded will be given necessary medical attention and care. They must be respected and protected in all circumstances.
  - m. Foreign nationals on legitimate business will not be molested, but mercenaries will not be spared: they are the worst of enemies.
5. To be successful in our tasks as soldiers these rules must be carefully observed. I will not be proud of any member of the Armed Forces under my command who fails to observe them. He does not deserve any sympathy or mercy and will be dealt with ruthlessly. You will fight a clean fight, an honourable fight in defence of the territorial integrity of your nation – Nigeria.
6. You must remember that some of the soldiers Lt.-Col. Ojukwu has now forced to oppose you were once your old comrade at arms and would like to remain so. You must therefore treat them with respect and dignity except anyone who is hostile to you.

Good luck.

MAJOR-GENERAL YAKUBU GOWON,  
*Head of the Federal Military Government,  
Commander-in-Chief of the Armed Forces  
of the Federal Republic of Nigeria.*

*Note.* – To be read and fully explained to every member of the Armed Forces. Sufficient copies will be made available to all members of the Armed Forces and Police. It will be carried by all troops at all times.



**DISCUSSION**

1.
  - a. On which issues does this Code go beyond Art. 3 common to the Conventions? Beyond Protocol II?
  - b. Which issues dealt with in Art. 3 common to the Conventions are not mentioned in this Code? What are the reasons and possible justifications for those omissions? Which issues subsequently dealt with in Protocol II are not contained in this Code?
2.
  - a. Does this Code instruct soldiers to apply the IHL of international armed conflicts? Does it provide for prisoner-of-war status for captured rebel soldiers? Does it imply a recognition of belligerency for the rebels?
  - b. Is the instruction that mercenaries shall not be spared compatible with today's IHL? Do mercenaries benefit from any protection? Under the law of international armed conflict? Under Art. 3 common to the Conventions? (GC I-IV, Art. 3; GC IV, Arts 4 and 5; P I, Arts 47 and 75; CIHL, Rule 108)
3. By what means does this Code try to make sure that it is respected by governmental forces? Do any terms risk undermining its chances of being respected? Do you find its language appropriate?
4. Do you see any reason why this Code is labeled "restricted"? Do you see any reasons for instructions on the implementation of IHL not to be known to the enemy?

**Case No. 120, Nigeria, Pius Nwaoga v. The State**

[Source: *ILR*, 1972, pp.494-497]

**PIUS NWAOGA v. THE STATE**

**Nigeria, Supreme Court**

**March 3, 1972**

[...]

The appellant was charged with another, for the murder on 20<sup>th</sup> day of July, 1969, at Ibagwa Nike, of Robert Ngwu. He was convicted and sentenced to death whilst the 2<sup>nd</sup> accused was discharged. This is an appeal from the conviction.

The incident which led up to the killing of the deceased happened during the civil war in the country. The appellant joined the rebel forces known as Biafran Army. He joined as a private and later became a lieutenant. He was attached to the BOFF (Biafran Organisation of Freedom Fighters). He was deployed to Nike and at the time Nike was in the hands of the Federal troops.

The deceased was also a soldier in the rebel forces; he and the appellant were both natives of Ibagwa Nike and well-known to each other. Before July 1969, the appellant was posted in command of a rebel company to a town called Olo, near Ibagwa Nike, with the operational headquarters of his brigade at Atta. In July 1969, the appellant was summoned to Atta. There he was instructed to lead Lieutenant Ngwu and Lieutenant Ndu to Ibagwa Nike and to point out the deceased to them. He was told that as he knew the area well and also knew the deceased, his duty was to identify the deceased to the two lieutenants who would eliminate him. His offence was that the deceased was given £800 to re-open and operate the Day Spring Hotel in Enugu for the benefit of the members of the BOFF, but he had diverted the money to the operation of his contract business and had indeed undertaken a contract with the Federal Government to carry out repairs to the Enugu Airfield which had been damaged by rebel aircraft. [...]

[...] [W]e direct our minds to the following facts.

1. That the appellant and those with him were rebel officers.
2. That they were operating inside the Federal Territory as the evidence shows that the area was in the hands of the Federal Government and Federal Army.
3. That the appellant and those with him were operating in disguise in the Federal Territory, as saboteurs.
4. That the appellant and those with him were not in the rebel army uniform but were in plain clothes, appearing to be members of the peaceful private population.

On these facts, if any of these rebel officers, as indeed the appellant did, commits an act which is an offence under the Criminal Code, he is liable for punishment, just like any civilian would be, whether or not he is acting under orders.

We are fortified in this view by a passage from Oppenheim's *International Law*, 7<sup>th</sup> Edition, Volume II, at page 575, dealing with War Treason, which says:

"Enemy soldiers – in contradistinction to private enemy individuals – may only be punished for such acts when they have committed them during their stay within a belligerent's lines under disguise. If, for instance, two soldiers in uniform are sent to the rear of the enemy to destroy a bridge, they may not, when caught, be punished for 'war treason', because their act was one of legitimate warfare. But if they exchanged their uniforms for plain clothes, and thereby appear to be members of the peaceful private population, they are liable to punishment."

In the footnote under this paragraph, Oppenheim refers to a remarkable case during the Russo-Japanese War in 1904, where two Japanese officers disguised in Chinese clothes were caught attempting to destroy with dynamite a railway bridge in Manchuria. They were tried, found guilty and shot.

We apply the above case to the matter before us. To our mind, deliberate and intentional killing of an unarmed person living peacefully inside the Federal Territory as in this case is a crime against humanity, and even if committed during a civil war is in violation of the domestic law of the country, and must be punished.

In the event, the conviction of the appellant is upheld and this appeal is dismissed.

[Report: [1972] 1 All Nigeria Law Reports (Part 1), p. 149.]

## DISCUSSION

1. Does the court qualify the civil war in Nigeria? Does it apply the IHL of international armed conflict to the case?
2. Did the order to execute the deceased, and its carrying out by the accused, as such violate the IHL of non-international armed conflicts? The IHL of international armed conflicts? (HR, Art. 23(b); GC I-IV, common Art. 3(1); P I, Art. 51(2); CIHL, Rules 1, 5-6)
3. Did the way the execution was carried out violate the IHL of international armed conflicts? The IHL of non-international armed conflicts? Would your answer be different if the execution had been carried out in rebel-controlled territory? If the accused had worn a uniform? (HR, Art. 1; GC III, Art. 4(A); P I, Arts 43, 44 and 46)

**Case No. 121, Bangladesh/India/Pakistan, 1974 Agreement**

[Source: *ILM*, vol. 74, 1974, pp. 501-505]

**BANGLADESH – INDIA – PAKISTAN:  
AGREEMENT ON THE REPATRIATION OF  
PRISONERS OF WAR AND CIVILIAN INTERNEES  
[Done at New Delhi, April 9, 1974]**

**BANGLADESH, INDIA, PAKISTAN,  
AGREEMENT SIGNED IN NEW DELHI ON APRIL 9, 1974**

[...]

3. The humanitarian problems arising in the wake of the tragic events of 1971 constituted a major obstacle in the way of reconciliation and normalisation among the countries of the sub-continent. In the absence of recognition, it was not possible to have tripartite talks to settle the humanitarian problems as Bangladesh could not participate in such a meeting except on the basis of sovereign equality. [...]
4. On April 17, 1973, India and Bangladesh [...] jointly proposed that the problem of the detained and stranded persons should be resolved on humanitarian considerations through simultaneous repatriation of all such persons except those Pakistani prisoners of war who might be required by the Government of Bangladesh for trial on certain charges.
5. Following the Declaration there were a series of talks between India and Bangladesh and India and Pakistan. These talks resulted in an agreement at Delhi on August 28, 1973 between India and Pakistan with the concurrence of Bangladesh which provided for a solution of the outstanding humanitarian problems.
6. In pursuance of this Agreement, the process of three-way repatriation commenced on September 19, 1973. So far nearly 300'000 persons have been repatriated which has generated an atmosphere of reconciliation and paved the way for normalisation of relations in the sub-continent.
7. In February 1974, recognition took place thus facilitating the participation of Bangladesh in the tripartite meeting envisaged in the Delhi Agreement, on the basis of sovereign equality. Accordingly, His Excellency Dr. Kamal Hossain, Foreign Minister of the Government of Bangladesh, His Excellency Sardar Swaran Singh, Minister of External Affairs, Government of India and His Excellency Mr. Aziz Ahmed, Minister of State for Defence and Foreign Affairs of the Government of Pakistan, met in New Delhi from April 5 to April 9, 1974 and discussed the various issues mentioned in the Delhi Agreement, in particular the question of the 195 prisoners of war and the completion of the three-way process of repatriation involving Bangalees in Pakistan, Pakistanis in Bangladesh and Pakistani prisoners of war in India. [...]

9. The Ministers also considered steps that needed to be taken in order expeditiously to bring the process of the three-way repatriation to a satisfactory conclusion.
10. The Indian side stated that the remaining Pakistani prisoners of war and civilian internees in India to be repatriated under the Delhi Agreement, numbering approximately 6,500, would be repatriated at the usual pace of a train on alternate days. [...] It was thus hoped that the repatriation of prisoners of war would be completed by the end of April, 1974.
11. The Pakistan side stated that the repatriation of Bangladesh nationals from Pakistan was approaching completion. The remaining Bangladesh nationals in Pakistan would also be repatriated without let or hindrance.
12. In respect of non-Bangalees in Bangladesh, the Pakistan side stated that the Government of Pakistan had already issued clearances for movement to Pakistan in favour of those non-Bangalees who were either domiciled in former West Pakistan, were employees of the Central Government and their families or were members of the divided families, irrespective of their original domicile. The issuance of clearances to 25,000 persons who constitute hardship cases was also in progress. The Pakistan side reiterated that all those who fall under the first three categories would be received by Pakistan without any limit as to numbers. In respect of persons whose application had been rejected, the Government of Pakistan would, upon request, provide reasons why any particular case was rejected. Any aggrieved applicant could, at any time, seek a review of his application provided he was able to supply new facts or further information to the Government of Pakistan in support of his contention that he qualified in one or other of the three categories. The claims of such persons would not be time-barred. In the event of the decision of review of a case being adverse the Governments of Pakistan and Bangladesh might seek to resolve it by mutual consultation.
13. The question of 195 Pakistani prisoners of war was discussed by the three Ministers, in the context of the earnest desire of the Governments for reconciliation, peace and friendship in the sub-continent. The Foreign Minister of Bangladesh stated that the excesses and manifold crimes committed by these prisoners of war constituted, according to the relevant provisions of the U.N. General Assembly Resolutions and International Law, war crimes, crimes against humanity and genocide, and that there was universal consensus that persons charged with such crimes as the 195 Pakistani prisoners of war should be held to account and subjected to the due process of law. The Minister of State for Defence and Foreign Affairs of the Government of Pakistan said that his Government condemned and deeply regretted any crimes that may have been committed.
14. In this connection the three Ministers noted that the matter should be viewed in the context of the determination of the three countries to continue resolutely to work for reconciliation. The Ministers further noted that following recognition, the Prime Minister of Pakistan had declared that he would visit Bangladesh in response to the invitation of the Prime Minister of Bangladesh and appealed to the people of Bangladesh to forgive and forget the mistakes of the past, in order to

promote reconciliation. Similarly, the Prime Minister of Bangladesh had declared with regard to the atrocities and destruction committed in Bangladesh in 1971 that he wanted the people to forget the past and to make a fresh start, stating that the people of Bangladesh knew how to forgive.

15. In the light of the foregoing and, in particular, having regard to the appeal of the Prime Minister of Pakistan to the people of Bangladesh to forgive and forget the mistakes of the past, the Foreign Minister of Bangladesh stated that the Government of Bangladesh had decided not to proceed with the trials as an act of clemency. It was agreed that the 195 prisoners of war may be repatriated to Pakistan along with the other prisoners of war now in the process of repatriation under the Delhi Agreement. [...]

### DISCUSSION

1.
  - a. When should the prisoners of war have been repatriated under IHL? Was there a need for an agreement between the parties to implement this repatriation? Was the absence of recognition of Bangladesh by Pakistan an obstacle under IHL to the repatriation of the prisoners of war? (GC III, Art. 118; CIHL, Rule 128(A))
  - b. Did Bangladesh have the right not to repatriate prisoners of war who were charged with grave breaches of IHL? Is its decision “not to proceed with the trials as an act of clemency” compatible with its IHL obligation to prosecute or extradite persons alleged to have committed grave breaches? (GC I-IV, Arts 49/50/129/146 and 51/52/131/148 respectively; GC III, Art. 119(5); CIHL, Rule 128)
2. When should the civilian internees have been repatriated under IHL? Was there a need for an agreement between the parties to implement this repatriation? Was the absence of recognition of Bangladesh by Pakistan an obstacle under IHL to the repatriation of the civilian internees? (GC IV, Arts 133 and 134; P I, Art. 85(4)(b); CIHL, Rule 128(B))
3.
  - a. Did non-Bangalees in Bangladesh have the right to leave Bangladesh? Those domiciled in former West Pakistan? Those employed by the Central Government of Pakistan? Those who were members of divided families? (GC IV, Arts 26, 35 and 134)
  - b. Did Pakistan have an obligation to accept the repatriation of non-Bangalees from Bangladesh who were domiciled in former West Pakistan? Those who were employees of the Central Government of Pakistan? Those who were members of divided families? Was an agreement concerning those repatriations necessary? (GC IV, Arts 26, 35 and 134)

## Document No. 122, ICRC Appeals on the Near East

**A. October 1973 Appeal**

[Source: *IRRC*, no. 152, 1973, pp. 583-583]

**Appeals to belligerents**

On 9 October 1973, the ICRC issued the following appeal on behalf of the civilians to the parties to the conflict:

*The International Committee of the Red Cross is extremely concerned at the extent of the new outbreak of violence in the Middle East and especially at its effects in densely populated areas. This tragic turn of events, confirmed by reliable sources and by the protests which it has received from various parties to the conflict, has led the ICRC to repeat its pressing overtures of twenty-four hours previously to the Governments involved, urging them to abide by the four Geneva Conventions of 12 August 1949. It stresses the necessity of sparing the civilian population in all circumstances.*

On 11 October, in view of the alarming news reaching it on the plight of the civilian population, the ICRC urged all the belligerents (Iraq, Israel, Arab Republic of Egypt and Syrian Arab Republic) to observe forthwith the provisions of Part IV ("Civilian Populations") of the draft Additional Protocol to the Geneva Conventions of 12 August 1949 for the protection of victims of international armed conflicts, in particular Article 46 ("Protection of the Civilian Population"), Article 47 ("General Protection of Civilian Objects") and Article 59 ("Precautions in Attack"). [Corresponding respectively to Articles 51, 52 and 57 of Protocol I of 1977.]

The Government of the Syrian Arab Republic and Iraq replied favourably to the ICRC, as did the Government of the Arab Republic of Egypt, the latter provided that Israel did the same.

Israel replied thus on 19 October: "In response to the ICRC appeal, the Government of Israel states that it has strictly respected and will continue to do so to respect the provisions of public international law which prohibit attacks on civilians and civilian objects."

As the ICRC considered that this statement did not answer the question it had asked, on 1 November the Government of Israel – through Mr. R. Kidron, *Political Advisor to the Minister for Foreign Affairs* – supplemented its reply as follows:

"As you are aware following the extensive conversations which we held on 30 and 31 October, the Government of Israel was both surprised and disappointed by the negative ICRC reaction to its statement. I explained that the ICRC proposal was examined in Jerusalem with the utmost seriousness

and attention, and that the statement reproduced above was formulated after most careful consideration.

However, in order to remove any doubts as to its attitude on this matter, I am instructed to state that it is the view of the Government of Israel that the statement of its position transmitted to the ICRC on 19 October 1973 includes and goes well beyond the obligations of Articles 46, 47 and 50 of the Draft Additional Protocol mentioned in the ICRC note of 11 October 1973 in that it comprises the entire body of public international law, both written and customary, relative to the protection of civilians and civilian objects from attack in international armed conflicts.

I trust that this explanation of my Government's position will be accepted by the ICRC in the positive spirit in which it is made, and that the record will be corrected accordingly."

## **B. November 2000 Appeal**

[Source: ICRC, Press Release 00/42, 21 November 2000; available on <http://www.icrc.org/eng/resources/documents/misc/57jqr.htm>]

### **ICRC appeal to all involved in violence in the Near East**

Geneva (ICRC) – The International Committee of the Red Cross (ICRC) is extremely concerned about the consequences in humanitarian terms of the persisting violence in the Near East. Since the end of September, the ICRC has repeatedly called upon all those involved in the violence to observe the restraints imposed by international humanitarian law and its underlying principles and, in particular, to ensure respect for civilians, for the wounded, for medical personnel and for those who are no longer taking part in the hostilities. To date, the intense clashes have left more than 200 people dead and thousands wounded. The ICRC is particularly worried about the large number of casualties among unarmed civilians and even children during clashes and the high proportion of wounds caused by live ammunition and rubber or plastic-coated bullets.

In the context of the Palestinian uprising against Israel as the Occupying Power, the ICRC stresses the fact that the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War remains fully applicable and relevant.

The ICRC once more reminds all those taking an active part in the violence that whenever force is used the choice of means and methods is not unlimited. It reiterates its appeal to all those involved in the violence or in a position to influence the situation to respect and to ensure respect for international humanitarian law and its underlying principles in all circumstances. Terrorist acts are absolutely and unconditionally prohibited, as are reprisals against the civilian population, indiscriminate attacks and attacks directed against the civilian population.

To avoid endangering the civilian population, those bearing weapons and all those who take part in violence must distinguish themselves from civilians. Armed and



security forces must spare and protect all civilians who are not or are no longer taking part in the clashes, in particular children, women and the elderly. The use of weapons of war against unarmed civilians cannot be authorized.

The wounded and sick must be collected and cared for regardless of the party to which they belong. Ambulances and members of the medical services must be respected and protected. They must be allowed to circulate unharmed so that they can discharge their humanitarian duties. All those who take part in the confrontations must respect the medical services, whether deployed by the armed forces, civilian facilities, the Palestine Red Crescent Society or the *Magen David Adom* in Israel.

To date, dozens of Palestine Red Crescent ambulances and many of its staff have come under fire while conducting their medical activities in the occupied territories. Ambulances belonging to the *Magen David Adom* have also been attacked. The ICRC once again calls on all those involved in the violence to respect medical personnel, hospitals and other medical establishments, and also ambulances, other medical transports and supplies.

Any misuse of the emblems protecting the medical services is a violation of international humanitarian law and puts the personnel working under those emblems at risk. The ICRC calls on all persons involved in violence to refrain from misuse of the protective emblems and calls on all the authorities concerned to prevent or repress such practices.

All persons arrested must be respected and protected against any form of violence. The detaining authority must authorize the ICRC to have access to such persons, wherever they may be, so that its delegates may ascertain their well-being and forward news to their families.

The ICRC is increasingly concerned by the consequences in humanitarian terms of the presence of Israeli settlements in the occupied territories, which is contrary to the Fourth Geneva Convention, and by the effects of curfews and the sealing-off of certain areas by the Israeli Defense Forces. As an Occupying Power, Israel may restrict the freedom of movement of the resident population, but only when and in so far as military necessity so dictates. Restrictions on movement by means of curfews or the sealing-off of areas may in no circumstances amount to collective penalties, nor should they severely hinder the daily life of the civilian population or have dire economic consequences. Moreover, the Occupying Power has the duty to ensure an adequate level of health care, including free access to hospitals and medical services, and may not obstruct the circulation of food supplies. All institutions devoted to the care and education of children must be allowed to function normally. Religious customs must be respected, which implies access to places of worship to the fullest extent possible.

Lastly, the ICRC calls upon the authorities concerned and all those involved in the violence to facilitate the work of the volunteers of the Palestine Red Crescent Society, the *Magen David Adom* in Israel, its own delegates and those of the International Federation. Despite tremendous difficulties, these volunteers and delegates have worked tirelessly to bring assistance to the victims of the clashes, often at great risk to their own lives.

## C. ICRC Declaration of 5 December 2001

[Source: Official Statement of the International Committee of the Red Cross, made at the Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, available on <http://www.icrc.org/eng>]

### **Statement by the International Committee of the Red Cross, Geneva, 5 December 2001**

1. Pursuant to the relevant provisions of international humanitarian law and to the mandate conferred on it by the States party to the 1949 Geneva Conventions, the International Committee of the Red Cross (ICRC) established a permanent presence in Israel, the neighbouring Arab countries and the occupied territories in 1967 with a view to carrying out its humanitarian tasks in the region and to working for the faithful application of international humanitarian law.
2. In accordance with a number of resolutions adopted by the United Nations General Assembly and Security Council and by the International Conference of the Red Cross and Red Crescent, which reflect the view of the international community, the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem. This Convention, ratified by Israel in 1951, remains fully applicable and relevant in the current context of violence. As an Occupying Power, Israel is also bound by other customary rules relating to occupation, expressed in the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907.
3. In general terms, the Fourth Geneva Convention protects the civilian population of occupied territories against abuses on the part of an Occupying Power, in particular by ensuring that it is not discriminated against, that it is protected against all forms of violence, and that despite occupation and war it is allowed to live as normal a life as possible, in accordance with its own laws, culture and traditions. While humanitarian law confers certain rights on the Occupying Power, it also imposes limits on the scope of its powers. Being only a temporary administrator of occupied territory, the Occupying Power must not interfere with its original economic and social structures, organization, legal system or demography. It must ensure the protection, security and welfare of the population living under occupation. This also implies allowing the normal development of the territory, if the occupation lasts for a prolonged period of time.
4. More precisely, the Fourth Geneva Convention sets out rules aimed at safeguarding the dignity and physical integrity of persons living under occupation, including detainees. It prohibits all forms of physical and mental ill-treatment and coercion, collective punishment, and reprisals against protected persons or property. It also prohibits the transfer of parts of the Occupying Power's civilian population into the occupied territory, forcible transfer or deportation of protected persons from the occupied territory, and destruction of real or personal property, except when such destruction is rendered absolutely necessary by military operations.

5. In the course of its activities in the territories occupied by Israel, the ICRC has repeatedly noted breaches of various provisions of international humanitarian law, such as the transfer by Israel of parts of its population into the occupied territories, the destruction of houses, failure to respect medical activities, and detention of protected persons outside the occupied territories. Certain practices which contravene the Fourth Geneva Convention have been incorporated into laws and administrative guidelines and have been sanctioned by the highest judicial authorities. While acknowledging the facilities it has been granted for the conduct of its humanitarian tasks, the ICRC has regularly drawn the attention of the Israeli authorities to the suffering and the heavy burden borne by the Palestinian population owing to the occupation policy and, in line with its standard practice, has increasingly expressed its concern through bilateral and multilateral representations and in public appeals. In particular, the ICRC has expressed growing concern about the consequences in humanitarian terms of the establishment of Israeli settlements in the occupied territories, in violation of the Fourth Geneva Convention. The settlement policy has often meant the destruction of Palestinian homes, the confiscation of land and water resources and the parcelling out of the territories. Measures taken to extend the settlements and to protect the settlers, entailing the destruction of houses, land requisitions, the sealing-off of areas, roadblocks and the imposition of long curfews, have also seriously hindered the daily life of the Palestinian population. However, the fact that settlements have been established in violation of the provisions of the Fourth Geneva Convention does not mean that civilians residing in those settlements can be the object of attack. They are protected by humanitarian law as civilians as long as they do not take an active part in fighting.
6. The ICRC has also drawn the attention of the Israeli authorities to the effects of prolonged curfews and the sealing-off of certain areas by the Israel Defense Forces. The resulting restrictions on movements have disastrous consequences for the entire Palestinian population. They hamper the activities of emergency medical services as well as access to health care, workplaces, schools and places of worship, and have a devastating effect on the economy. They also prevent, for months on end, Palestinian families from visiting relatives detained in Israel. The concern caused by these practices has grown considerably during the past 14 months as measures taken to contain the upsurge of violence have led to a further deterioration in the living conditions of the population under occupation.
7. The ICRC has reminded all those taking part in the violence that whenever armed force is used the choice of means and methods employed is not unlimited. Today, in view of the sharp increase in armed confrontations, the ICRC has to stress that Palestinian armed groups operating within or outside the occupied territories are also bound by the principles of international humanitarian law. Apart from the Fourth Geneva Convention, which relates to the protection of the civilian population, there are other universally accepted rules and principles of international humanitarian law that deal with the conduct of military operations. They stipulate in particular that only military objectives may be attacked. Thus indiscriminate attacks, such as bomb attacks by Palestinian individuals or armed

groups against Israeli civilians, and acts intended to spread terror among the civilian population are absolutely and unconditionally prohibited. The same applies to targeted attacks on and the killing of Palestinian individuals by the Israeli authorities while those individuals are not directly taking part in the hostilities or immediately endangering human life. Reprisals against civilians and their property are also prohibited. When a military objective is targeted, all feasible precautions must be taken to minimize civilian casualties and damage to civilian property. To avoid endangering the civilian population, those bearing weapons and those taking part in armed violence must distinguish themselves from civilians.

8. Demonstrations against the occupying forces by the civilian population under occupation or stand-offs between them are not acts of war. They should therefore not be dealt with by military methods and means. When faced with the civilian population, Israeli forces must exercise restraint: any use of force must be proportionate, all necessary precautions must be taken to avoid casualties, and the lethal use of firearms must be strictly limited to what is unavoidable as an immediate measure to protect life.
9. Access to emergency medical services for all those in need is also of paramount importance in the current situation. Such access must not be unduly delayed or denied. Ambulances and medical personnel must be allowed to move about unharmed and must not be prevented from discharging their medical duties. All those taking part in the violence must respect and assist the medical services, whether deployed by the armed forces, civilian organizations, the Palestine Red Crescent Society, the *Magen David Adom*, the ICRC, the International Federation of Red Cross and Red Crescent Societies or other humanitarian organizations.
10. Article 1 common to the four Geneva Conventions stipulates that the “High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances”. This conference is to be viewed within that context. The ICRC has always welcomed all individual and joint efforts made by States party to the Geneva Conventions to fulfil this obligation and ensure respect for international humanitarian law. These efforts are all the more vital as violations of humanitarian law are far too common around the globe.
11. The means used to meet these legal and political responsibilities are naturally a matter to be decided upon by States. Whatever the means chosen, however, the ICRC wishes to emphasize that any action States may decide to take at international level must be aimed at achieving practical results and at ensuring application of and compliance with international humanitarian law, in the interests of the protected population.
12. Beyond all legal considerations and in view of the current humanitarian situation, the ICRC again calls upon all parties concerned to make every possible effort to spare civilian lives and preserve a measure of humanity.
13. For its part, the ICRC will continue to do its utmost to assist and protect all victims in accordance with its mandate and with the principles of neutrality, impartiality and independence which govern its humanitarian work. It counts on the full support

of the parties concerned in promoting compliance with the humanitarian rules and facilitating humanitarian activities, which may also help pave the way towards the establishment of peace between all peoples and nations in the region.

14. The steady deterioration of the humanitarian situation over the last few months and, in particular, the tragic events of the past few days have highlighted the need to break the spiral of violence and restore respect for international humanitarian law.

## D. ICRC Call of 13 December 2007

[Source: ICRC, News Release 07/134, 13 December 2007; available on <http://www.icrc.org/eng/resources/documents/news-release/palestine-news-131207.htm>]

### **ICRC calls for immediate political action to contain deep crisis**

The Palestinian population living in the occupied territories is facing a worsening humanitarian crisis as a result of the drastic deterioration of the situation there.

The International Committee of the Red Cross (ICRC) is particularly concerned about the impact of the severe restrictions on the movement of people and goods that exacerbate economic hardship and affect every aspect of life.

"The measures imposed by Israel come at an enormous humanitarian cost, leaving the people living under occupation with just enough to survive, but not enough to live a normal and dignified life," said Béatrice Mégevand Roggo, the ICRC's head of operations for the Middle East and North Africa. "The Palestinian people are paying an exceedingly high price for the continuing hostilities between Israel and Palestinian factions. Their situation is made even more difficult by intra-Palestinian rivalries. The Palestinian population has effectively become a hostage to the conflict."

The situation in the Gaza Strip is alarming. The Strip has been progressively sealed off since June: imports are restricted to the bare minimum and essential infrastructure, including medical facilities and water and sanitation systems, is in an increasingly fragile state. Substantial cuts in fuel supplies further add to the hardship experienced by the population. In the West Bank, stringent restrictions on the movement of people continue to severely hamper the economic and social life of the Palestinian population.

"Israel's right to address its legitimate security concerns must be balanced against the Palestinians' right to live a normal and dignified life," said Ms Mégevand Roggo. "In the current situation, humanitarian assistance alone is insufficient. It cannot and should not be a substitute for political action."

[...] [T]he ICRC therefore appeals for immediate political steps to be taken to improve the humanitarian situation in Gaza and the West Bank. Moreover, it calls on Israel to respect its obligations under international humanitarian law, to ease restrictions on movement in the Gaza Strip and the West Bank and to lift the retaliatory measures that are paralysing life in Gaza. The ICRC also calls on the Palestinian factions to stop targeting civilian areas and endangering the lives of civilians.

## **E. Joint Public Statement by the International Red Cross and Red Crescent Movement**

[Source: ICRC, News Release, 13 January 2009; available on <http://www.icrc.org/eng/resources/documents/news-release/palestine-news-130109.htm>]

The International Red Cross and Red Crescent Movement is extremely concerned about the hostilities in Gaza and the tragic impact on its population. Hundreds of civilians are dead and many more are injured; others have had to flee their homes but are caught in the fighting. The Movement deplores the fact that many wounded people have been abandoned and left to suffer alone, unable to reach hospitals and inaccessible to ambulances and medical workers. Some wounded have even died because ambulances did not receive the required clearances to reach them in time.

We call on the involved parties, in particular Israel, to remove restrictions on medical teams so they can do their life-saving work. We would like to reaffirm that under international humanitarian law all parties concerned have a duty to collect, care for and evacuate the wounded, without delay or discrimination.

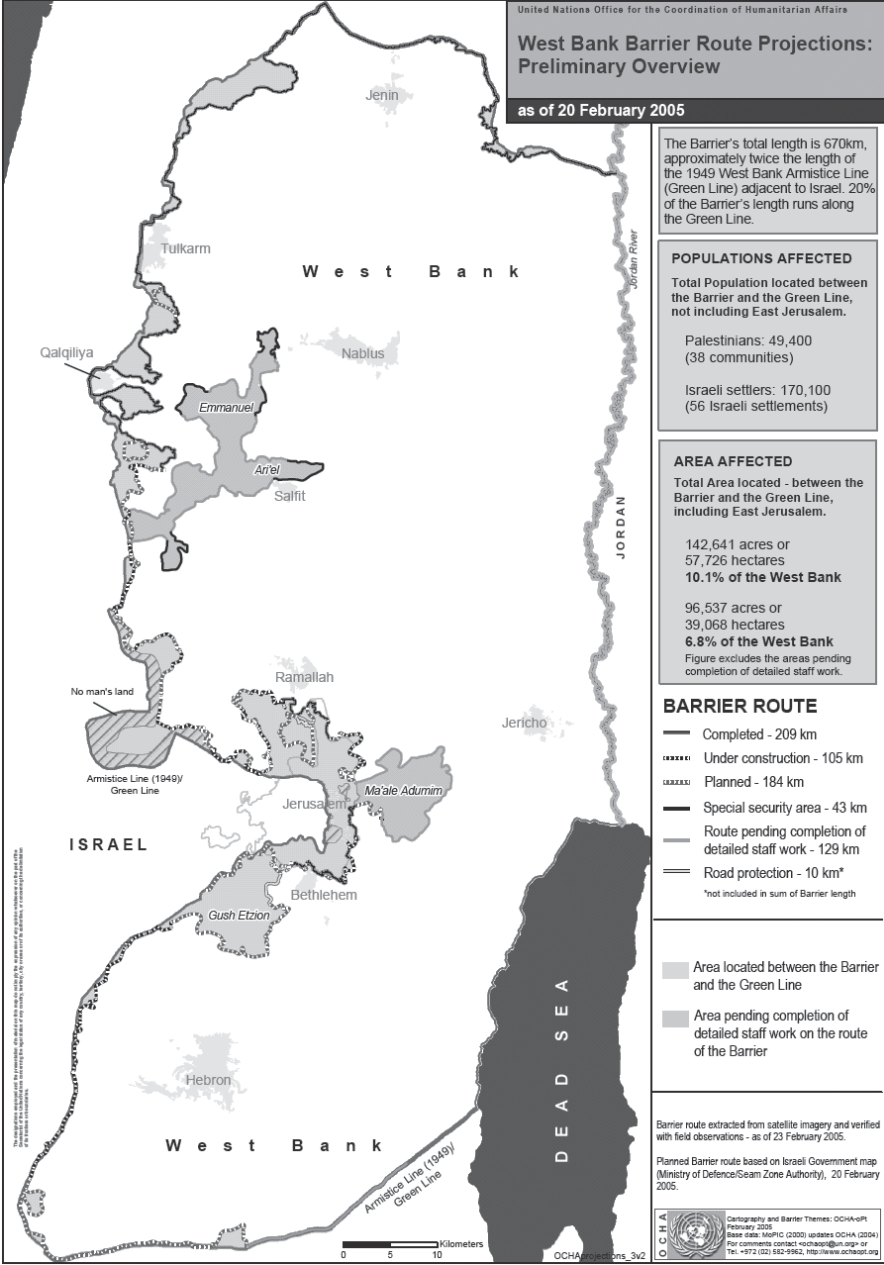
The International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (IFRC) and National Red Cross and Red Crescent Societies salute the determination and courage of the staff and volunteers of the Palestine Red Crescent Society (PRCS) whose tireless efforts have saved countless lives. PRCS staff have been wounded and shot at in the course of their duties and their ambulances and properties have been severely damaged. This has dramatically reduced the PRCS' ability to deliver humanitarian services to the Gaza population.

The Movement deplores the lack of respect and protection given to medical teams, including PRCS personnel and facilities, which are clearly identified by the protective emblem of the Red Crescent. We call on the parties to the conflict to fully meet their obligation under international humanitarian law to facilitate the work of the PRCS and other neutral, independent and impartial humanitarian organizations. We welcome all efforts to achieve a cessation of hostilities, and we call for the establishment of a safe passage for humanitarian assistance in order to secure the provision of relief and the provision of medical care and treatment for the victims of the conflict.

[...]

**Case No. 123, ICJ/Israel, Separation Wall/Security Fence  
in the Occupied Palestinian Territory**

[N.B.: This map was created by the UN Office for the Coordination of Humanitarian Affairs (OCHA) in February 2005; see online: <http://domino.un.org/unispal.nsf>]



## A. ICJ, Legal Consequences of the Construction of a Wall

[Source: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 July 2004, <http://www.icj-cij.org>]

### INTERNATIONAL COURT OF JUSTICE, 9 JULY 2004, LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY

[...]

#### ADVISORY OPINION

[...]

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution ES-10/14 adopted by the General Assembly of the United Nations (hereinafter the "General Assembly") on 8 December 2003 at its Tenth Emergency Special Session. [...] The resolution reads as follows:

*"The General Assembly,*

[...]

*Guided by the principles of the Charter of the United Nations,*

*Aware of the established principle of international law on the inadmissibility of the acquisition of territory by force,*

*Aware also that developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples is among the purposes and principles of the Charter of the United Nations,*

*Recalling relevant General Assembly resolutions, including resolution 181 (II) of 29 November 1947, which partitioned mandated Palestine into two States, one Arab and one Jewish,*

[...]

*Reaffirming the applicability of the Fourth Geneva Convention [...] as well as Additional Protocol I to the Geneva Conventions [...] to the Occupied Palestinian Territory, including East Jerusalem,*

*Recalling the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1907 [...],*

*Welcoming the convening of the Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, at Geneva on 15 July 1999,*

*Expressing its support for the declaration adopted by the reconvened Conference of High Contracting Parties at Geneva on 5 December 2001,*



*Recalling* in particular relevant United Nations resolutions affirming that Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, are illegal and an obstacle to peace and to economic and social development as well as those demanding the complete cessation of settlement activities,

*Recalling* relevant United Nations resolutions affirming that actions taken by Israel, the occupying Power, to change the status and demographic composition of Occupied East Jerusalem have no legal validity and are null and void,

*Noting* the agreements reached between the Government of Israel and the Palestine Liberation Organization in the context of the Middle East peace process,

*Gravely concerned* at the commencement and continuation of construction by Israel, the occupying Power, of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure from the Armistice Line of 1949 (Green Line) and which has involved the confiscation and destruction of Palestinian land and resources, the disruption of the lives of thousands of protected civilians and the *de facto* annexation of large areas of territory, and underlining the unanimous opposition by the international community to the construction of that wall,

*Gravely concerned* also at the even more devastating impact of the projected parts of the wall on the Palestinian civilian population and on the prospects for solving the Palestinian-Israeli conflict and establishing peace in the region,

*Welcoming* the report of 8 September 2003 of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 [E/CN.4/2004/6], in particular the section regarding the wall,

*Affirming* the necessity of ending the conflict on the basis of the two-State solution of Israel and Palestine living side by side in peace and security based on the Armistice Line of 1949, in accordance with relevant Security Council and General Assembly resolutions,

*Having received with appreciation* the report of the Secretary-General, submitted in accordance with resolution ES-10/13 [A/ES-10/248],

*Bearing in mind* that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences,

*Decides*, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to urgently render an advisory opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

[...]

67. As explained in paragraph 82 below, the “wall” in question is a complex construction, so that that term cannot be understood in a limited physical sense. However, the other terms used, either by Israel (“fence”) or by the Secretary-General (“barrier”), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.

The Court notes furthermore that the request of the General Assembly concerns the legal consequences of the wall being built “in the Occupied Palestinian Territory, including in and around East Jerusalem”. As also explained below (see paragraphs 78-84 below), some parts of the complex are being built, or are planned to be built, on the territory of Israel itself; the Court does not consider that it is called upon to examine the legal consequences arising from the construction of those parts of the wall.

[...]

71. In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which “*Recommends* to the United Kingdom ... and to all other Members of the United Nations the adoption and implementation ... of the Plan of Partition” of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as well as the creation of a special international régime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May 1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.
72. [...] [G]eneral armistice agreements were concluded in 1949 between Israel and the neighbouring States [...]. In particular, one such agreement was signed in Rhodes on 3 April 1949 between Israel and Jordan. Articles V and VI of that Agreement fixed the armistice demarcation line between Israeli and Arab forces (often later called the “Green Line” owing to the colour used for it on maps; hereinafter the “Green Line”). [...] It was agreed in Article VI, [...] that “the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto”. [...]
73. In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).
74. On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized the inadmissibility of acquisition of territory by war

and called for the “Withdrawal of Israel armed forces from territories occupied in the recent conflict”, and “Termination of all claims or states of belligerency”.

75. From 1967 onwards, Israel took a number of measures in these territories aimed at changing the status of the City of Jerusalem. The Security Council, after recalling on a number of occasions “the principle that acquisition of territory by military conquest is inadmissible”, condemned those measures and, by resolution 298 (1971) of 25 September 1971, confirmed in the clearest possible terms that:

“all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status”.

Later, following the adoption by Israel on 30 July 1980 of the Basic Law making Jerusalem the “complete and united” capital of Israel, the Security Council, by resolution 478 (1980) of 20 August 1980, stated that the enactment of that Law constituted a violation of international law and that “all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem . . . are null and void”. It further decided “not to recognize the ‘basic law’ and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem”.

76. Subsequently, a peace treaty was signed on 26 October 1994 between Israel and Jordan. That treaty fixed the boundary between the two States “with reference to the boundary definition under the Mandate as is shown in Annex I (a) ... without prejudice to the status of any territories that came under Israeli military government control in 1967” (Article 3, paragraphs 1 and 2). [...]
77. Lastly, a number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organization imposing various obligations on each party. Those agreements *inter alia* required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration. Such transfers have taken place, but, as a result of subsequent events, they remained partial and limited.
78. The Court would observe that, under customary international law as reflected (see paragraph 89 below) in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter “the Hague Regulations of 1907”), territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.

The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under

customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.

[...]

80. The report of the Secretary-General states that "The Government of Israel has since 1996 considered plans to halt infiltration into Israel from the central and northern West Bank ..." (Para. 4.) According to that report, a plan of this type was approved for the first time by the Israeli Cabinet in July 2001. Then, on 14 April 2002, the Cabinet adopted a decision for the construction of works, forming what Israel describes as a "security fence", 80 kilometres in length, in three areas of the West Bank.

The project was taken a stage further when, on 23 June 2002, the Israeli Cabinet approved the first phase of the construction of a "continuous fence" in the West Bank (including East Jerusalem). On 14 August 2002, it adopted the line of that "fence" for the work in Phase A, with a view to the construction of a complex 123 kilometres long in the northern West Bank [...]. [...]

81. According to the Written Statement of the Secretary-General, the first part of these works (Phase A), which ultimately extends for a distance of 150 kilometres, was declared completed on 31 July 2003. It is reported that approximately 56,000 Palestinians would be encompassed in enclaves. During this phase, two sections totalling 19.5 kilometres were built around Jerusalem. In November 2003 construction of a new section was begun along the Green Line to the west of the Nazlat Issa-Baqa al-Sharqiya enclave, which in January 2004 was close to completion at the time when the Secretary-General submitted his Written Statement.

[...]

The Written Statement of the Secretary-General further states that Phase C of the work, which runs from the terminus of Phase A, near the Elkana settlement, to the village of Nu'man, south-east of Jerusalem, began in December 2003. This section is divided into three stages. In Stage C1, between *inter alia* the villages of Rantis and Budrus, approximately 4 kilometres out of a planned total of 40 kilometres have been constructed. Stage C2, which will surround the so-called "Ariel Salient" by cutting 22 kilometres into the West Bank, will incorporate 52,000 Israeli settlers. Stage C3 is to involve the construction of two "depth barriers"; one of these is to run north-south, roughly parallel with the section of Stage C1 currently under construction between Rantis and Budrus, whilst the other runs east-west along a ridge said to be part of the route of Highway 45, a motorway under construction. If construction of the two barriers were completed, two enclaves would be formed, encompassing 72,000 Palestinians in 24 communities. [...]

As at 25 January 2004, according to the Written Statement of the Secretary-General, some 190 kilometres of construction had been completed, covering Phase A and the greater part of Phase B. Further construction in Phase C had begun in certain areas of the central West Bank and in Jerusalem. Phase D, planned for the southern part of the West Bank, had not yet begun.

The Israeli Government has explained that the routes and timetable as described above are subject to modification. In February 2004, for example, an 8-kilometre section near the town of Baqa al-Sharqiya was demolished, and the planned length of the wall appears to have been slightly reduced.

82. According to the description in the report and the Written Statement of the Secretary-General, the works planned or completed have resulted or will result in a complex consisting essentially of:

- (1) a fence with electronic sensors;
- (2) a ditch (up to 4 metres deep);
- (3) a two-lane asphalt patrol road;
- (4) a trace road (a strip of sand smoothed to detect footprints) running parallel to the fence;
- (5) a stack of six coils of barbed wire marking the perimeter of the complex.

The complex has a width of 50 to 70 metres, increasing to as much as 100 metres in some places. "Depth barriers" may be added to these works. The approximately 180 kilometres of the complex completed or under construction as of the time when the Secretary-General submitted his report included some 8.5 kilometres of concrete wall. These are generally found where Palestinian population centres are close to or abut Israel (such as near Qalqiliya and Tulkarm or in parts of Jerusalem).

83. According to the report of the Secretary-General, in its northernmost part, the wall as completed or under construction barely deviates from the Green Line. It nevertheless lies within occupied territories for most of its course. The works deviate more than 7.5 kilometres from the Green Line in certain places to encompass settlements, while encircling Palestinian population areas. A stretch of 1 to 2 kilometres west of Tulkarm appears to run on the Israeli side of the Green Line. Elsewhere, on the other hand, the planned route would deviate eastward by up to 22 kilometres. In the case of Jerusalem, the existing works and the planned route lie well beyond the Green Line and even in some cases beyond the eastern municipal boundary of Jerusalem as fixed by Israel.
84. On the basis of that route, approximately 975 square kilometres (or 16.6 per cent of the West Bank) would, according to the report of the Secretary-General, lie between the Green Line and the wall. This area is stated to be home to 237,000 Palestinians. If the full wall were completed as planned, another 160,000 Palestinians would live in almost completely encircled communities, described as enclaves in the report. As a result of the planned route, nearly 320,000 Israeli

settlers (of whom 178,000 in East Jerusalem) would be living in the area between the Green Line and the wall.

85. Lastly, it should be noted that the construction of the wall has been accompanied by the creation of a new administrative régime. Thus in October 2003 the Israeli Defence Forces issued Orders establishing the part of the West Bank lying between the Green Line and the wall as a "Closed Area". Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. According to the report of the Secretary-General, most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit. Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods.
86. The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. However, doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments. The Court will now consider these various questions.

[...]

89. As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. The Court observes that, in the words of the Convention, those Regulations were prepared "to revise the general laws and customs of war" existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the "rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war" [...]. The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 256, para. 75). The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court.

The Court also observes that, pursuant to Article 154 of the Fourth Geneva Convention, that Convention is supplementary to Sections II and III of the Hague Regulations. Section III of those Regulations, which concerns "Military authority over the territory of the hostile State", is particularly pertinent in the present case.

90. Secondly, with regard to the Fourth Geneva Convention, differing views have been expressed by the participants in these proceedings. Israel, contrary to the

great majority of the other participants, disputes the applicability *de jure* of the Convention to the Occupied Palestinian Territory. In particular, in paragraph 3 of Annex I to the report of the Secretary-General, entitled “Summary Legal Position of the Government of Israel”, it is stated that Israel does not agree that the Fourth Geneva Convention “is applicable to the occupied Palestinian Territory”, citing “the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt” and inferring that it is “not a territory of a High Contracting Party as required by the Convention”.

91. The Court would recall that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention. Jordan has also been a party thereto since 29 May 1951. Neither of the two States has made any reservation that would be pertinent to the present proceedings.

Furthermore, Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention. Switzerland, as depositary State, considered that unilateral undertaking valid. It concluded, however, that it “[was] not as a depositary in a position to decide whether” “the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the ‘State of Palestine’ to accede” *inter alia* to the Fourth Geneva Convention “can be considered as an instrument of accession”.

92. Moreover, for the purpose of determining the scope of application of the Fourth Geneva Convention, it should be recalled that under common Article 2 of the four Conventions of 12 August 1949:

[the Court reproduces the text of common Article 2 to the Conventions]

93. After the occupation of the West Bank in 1967, the Israeli authorities issued an order No. 3 stating in its Article 35 that: “the Military Court ... must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail.”

Subsequently, the Israeli authorities have indicated on a number of occasions that in fact they generally apply the humanitarian provisions of the Fourth Geneva Convention within the occupied territories. However, according to Israel’s position as briefly recalled in paragraph 90 above, that Convention is not applicable *de jure* within those territories because, under Article 2, paragraph 2, it applies only in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict. Israel explains that Jordan was admittedly a party to the Fourth Geneva Convention in 1967, and that an armed conflict broke out at that time between Israel and Jordan, but it goes on to observe that the territories occupied by Israel subsequent to that conflict had not previously fallen under Jordanian sovereignty. It infers from this that that Convention is not applicable *de jure* in those territories. According however to the great majority of other participants in the proceedings, the Fourth Geneva



Convention is applicable to those territories pursuant to Article 2, paragraph 1, whether or not Jordan had any rights in respect thereof prior to 1967.

94. The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Article 32 provides that:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 ... leaves the meaning ambiguous or obscure; or ... leads to a result which is manifestly obscure or unreasonable.” [...]

95. The Court notes that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satisfied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties.

The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power. Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.

That interpretation is confirmed by the Convention's *travaux préparatoires*. The Conference of Government Experts convened by the International Committee of the Red Cross (hereinafter, “ICRC”) in the aftermath of the Second World War for the purpose of preparing the new Geneva Conventions recommended that these conventions be applicable to any armed conflict “whether [it] is or is not recognized as a state of war by the parties” and “in cases of occupation of territories in the absence of any state of war” (*Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*, Geneva, 14-26 April 1947, p. 8). The drafters of the second paragraph of Article 2 thus had no intention, when they inserted that paragraph into the Convention, of restricting



the latter's scope of application. They were merely seeking to provide for cases of occupation without combat, such as the occupation of Bohemia and Moravia by Germany in 1939.

96. The Court would moreover note that the States parties to the Fourth Geneva Convention approved that interpretation at their Conference on 15 July 1999. They issued a statement in which they "reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem". Subsequently, on 5 December 2001, the High Contracting Parties, referring in particular to Article 1 of the Fourth Geneva Convention of 1949, once again reaffirmed the "applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem". They further reminded the Contracting Parties participating in the Conference, the parties to the conflict, and the State of Israel as occupying Power, of their respective obligations.
97. Moreover, the Court would observe that the ICRC, whose special position with respect to execution of the Fourth Geneva Convention must be "recognized and respected at all times" by the parties pursuant to Article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention. In a declaration of 5 December 2001, it recalled that "the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem".
98. The Court notes that the General Assembly has, in many of its resolutions, taken a position to the same effect. [...]
99. The Security Council, for its part, [...] [i]n resolution 446 (1979) of 22 March 1979, [...] affirmed "*once more* that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem". [...]

On 20 December 1990, the Security Council, in resolution 681 (1990), urged "the Government of Israel to accept the *de jure* applicability of the Fourth Geneva Convention ... to all the territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the Convention". It further called upon "the High Contracting Parties to the said Fourth Geneva Convention to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof".

Lastly, in resolutions 799 (1992) of 18 December 1992 and 904 (1994) of 18 March 1994, the Security Council reaffirmed its position concerning the applicability of the Fourth Geneva Convention in the occupied territories.

100. The Court would note finally that the Supreme Court of Israel, in a judgment dated 30 May 2004, also found that:

"The military operations of the [Israeli Defence Forces] in Rafah, to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 ... and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949."

101. In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.
102. The participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory. Annex I to the report of the Secretary-General states:

“4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.”

Of the other participants in the proceedings, those who addressed this issue contend that, on the contrary, both Covenants are applicable within the Occupied Palestinian Territory.

103. On 3 October 1991 Israel ratified both the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 and the International Covenant on Civil and Political Rights of the same date, as well as the United Nations Convention on the Rights of the Child of 20 November 1989. It is a party to these three instruments.

[...]

105. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had occasion to address the first of these issues in relation to the International Covenant on Civil and Political Rights. In those proceedings certain States had argued that “the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict” (*I.C.J. Reports 1996 (I)*, p. 239, para. 24).

The Court rejected this argument, stating that:

[The Court reproduces para. 25 of the *Nuclear Weapons Advisory Opinion* – See **Case No. 62**, ICJ, *Nuclear Weapons Advisory Opinion*]

106. More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship

between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

107. It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances.
108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, [...]”

This provision can be interpreted as covering only individuals who are both present within a State’s territory and subject to that State’s jurisdiction. It can also be construed as covering both individuals present within a State’s territory and those outside that territory but subject to that State’s jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos v. Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego v. Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero v. Uruguay*).

The *travaux préparatoires* of the Covenant confirm the Committee’s interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations,

*Official Records of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Chap. V, para. 4 (1955)).*

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.

In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question “whether individuals resident in the occupied territories were indeed subject to Israel’s jurisdiction” for purposes of the application of the Covenant (CCPR/C/SR.1675, para. 21). Israel took the position that “the Covenant and similar instruments did not apply directly to the current situation in the occupied territories” (*ibid.*, para. 27).

The Committee, in its concluding observations after examination of the report, expressed concern at Israel’s attitude and pointed “to the long-standing presence of Israel in [the occupied] territories, Israel’s ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein” (CCPR/C/79/Add.93, para. 10). In 2003 in face of Israel’s consistent position, to the effect that “the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza...”, the Committee reached the following conclusion:

“in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law” (CCPR/CO/78/ISR, para. 11).

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.
112. The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. [...].

It is not without relevance to recall in this regard the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights. In its initial report to the Committee of 4 December 1998, Israel provided “statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the occupied Territories”. The Committee noted that, according to Israel, “the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant” (E/C.12/1/Add. 27, para. 8). [...] its concern in this regard [...]. [...] In view of these observations, the

Committee reiterated its concern about Israel's position and reaffirmed "its view that the State party's obligations under the Covenant apply to all territories and populations under its effective control" (E/C.12/1/Add.90, paras. 15 and 31).

For the reasons explained in paragraph 106 above, the Court cannot accept Israel's view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

113. As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an Article 2 according to which "States Parties shall respect and ensure the rights set forth in the ...Convention to each child within their jurisdiction.. " That Convention is therefore applicable within the Occupied Palestinian Territory.
114. Having determined the rules and principles of international law relevant to reply to the question posed by the General Assembly, and having ruled in particular on the applicability within the Occupied Palestinian Territory of international humanitarian law and human rights law, the Court will now seek to ascertain whether the construction of the wall has violated those rules and principles.
115. In this regard, Annex II to the report of the Secretary-General, entitled "Summary Legal Position of the Palestine Liberation Organization", states that "The construction of the Barrier is an attempt to annex the territory contrary to international law" and that "The *de facto* annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination." This view was echoed in certain of the written statements submitted to the Court and in the views expressed at the hearings. [...] In this connection, it was in particular emphasized that "The route of the wall is designed to change the demographic composition of the Occupied Palestinian Territory, including East Jerusalem, by reinforcing the Israeli settlements" illegally established on the Occupied Palestinian Territory. [...]
116. For its part, Israel has argued that the wall's sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank. Furthermore, Israel has repeatedly stated that the Barrier is a temporary measure (see report of the Secretary-General, para. 29) [...] emphasizing that "[the fence] does not annex territories to the State of Israel", and that Israel is "ready and able, at tremendous cost, to adjust or dismantle a fence if so required as part of a political settlement". [...]
117. The Court would recall that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of "the inadmissibility of the acquisition of territory by war" (see paragraphs 74 and 87 above). [...]

118. As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a "Palestinian people" is no longer in issue. [...]
119. The Court notes that the route of the wall as fixed by the Israeli Government includes within the "Closed Area" (see paragraph 85 above) some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent from an examination of the map mentioned in paragraph 80 above that the wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).
120. As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited.

The Security Council has thus taken the view that such policy and practices "have no legal validity". It has also called upon "Israel, as the occupying Power, to abide scrupulously" by the Fourth Geneva Convention and:

"to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories" (resolution 446 (1979) of 22 March 1979).

The Council reaffirmed its position in resolutions 452 (1979) of 20 July 1979 and 465 (1980) of 1 March 1980. Indeed, in the latter case it described "Israel's policy and practices of settling parts of its population and new immigrants in [the occupied] territories" as a "flagrant violation" of the Fourth Geneva Convention.

The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

121. Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature (see paragraph 116 above), it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudice the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction

of the wall and its associated régime create a “*fait accompli*” on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.

122. [...] In other terms, the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council (see paragraphs 75 and 120 above). There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing, as will be further explained in paragraph 133 below, to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right.
123. The construction of the wall also raises a number of issues in relation to the relevant provisions of international humanitarian law and of human rights instruments.
124. With regard to the Hague Regulations of 1907, the Court would recall that these deal, in Section II, with hostilities and in particular with “means of injuring the enemy, sieges, and bombardments”. Section III deals with military authority in occupied territories. Only Section III is currently applicable in the West Bank and Article 23 (g) of the Regulations, in Section II, is thus not pertinent.

Section III of the Hague Regulations includes Articles 43, 46 and 52, which are applicable in the Occupied Palestinian Territory. Article 43 imposes a duty on the occupant to “take all measures within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country”. Article 46 adds that private property must be “respected” and that it cannot “be confiscated”. Lastly, Article 52 authorizes, within certain limits, requisitions in kind and services for the needs of the army of occupation.

125. A distinction is also made in the Fourth Geneva Convention between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation. It thus states in Article 6:

[Here the Court reproduces the text of Article 6]

Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory.

126. These provisions include Articles 47, 49, 52, 53 and 59 of the Fourth Geneva Convention.

[Here the Court reproduces the text of the aforementioned Articles]

127. The International Covenant on Civil and Political Rights also contains several relevant provisions. Before further examining these, the Court will observe



that Article 4 of the Covenant allows for derogation to be made, under various conditions, to certain provisions of that instrument. Israel made use of its right of derogation under this Article by addressing the following communication to the Secretary-General of the United Nations on 3 October 1991:

“Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.

[...]

The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision.”

The Court notes that the derogation so notified concerns only Article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory.

128. Among these mention must be made of Article 17, paragraph 1 of which reads as follows: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

Mention must also be made of Article 12, paragraph 1, which provides: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

129. In addition to the general guarantees of freedom of movement under Article 12 of the International Covenant on Civil and Political Rights, account must also be taken of specific guarantees of access to the Christian, Jewish and Islamic Holy Places. [...] In signing the General Armistice Agreement, Israel thus undertook, as did Jordan, to guarantee freedom of access to the Holy Places. The Court considers that this undertaking by Israel has remained valid for the Holy Places which came under its control in 1967. This undertaking has further been confirmed by Article 9, paragraph 1, of the 1994 Peace Treaty between Israel and Jordan, by virtue of which, in more general terms, “Each party will provide freedom of access to places of religious and historical significance.”



130. As regards the International Covenant on Economic, Social and Cultural Rights, that instrument includes a number of relevant provisions, namely: the right to work (Articles 6 and 7); protection and assistance accorded to the family and to children and young persons (Article 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right “to be free from hunger” (Art. 11); the right to health (Art. 12); the right to education (Arts. 13 and 14).
131. Lastly, the United Nations Convention on the Rights of the Child of 20 November 1989 includes similar provisions in Articles 16, 24, 27 and 28.
132. From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.
133. That construction, the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto). Such restrictions are most marked in urban areas, such as the Qalqiliya enclave or the City of Jerusalem and its suburbs. They are aggravated by the fact that the access gates are few in number in certain sectors and opening hours appear to be restricted and unpredictably applied. For example, according to the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, “Qalqiliya, a city with a population of 40,000, is completely surrounded by the Wall and residents can only enter and leave through a single military checkpoint open from 7 a.m. to 7 p.m.” (Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A and entitled “Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine”, E/CN.4/2004/6, 8 September 2003, para. 9).

There have also been serious repercussions for agricultural production, as is attested by a number of sources. According to the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories “an estimated 100,000 dunums [approximately 10,000 hectares] of the West Bank’s most fertile agricultural land, confiscated by the Israeli Occupation Forces, have been destroyed during the first phase of the wall construction, which involves the disappearance of vast amounts of property, notably private agricultural land and olive trees, wells, citrus grows and hothouses upon which tens of thousands of Palestinians rely for their survival” (Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, A/58/311, 22 August 2003, para. 26).

Further, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that "Much of the Palestinian land on the Israeli side of the Wall consists of fertile agricultural land and some of the most important water wells in the region" and adds that "Many fruit and olive trees had been destroyed in the course of building the barrier." (E/CN.4/2004/6, 8 September 2003, para. 9.) The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights states that construction of the wall "cuts off Palestinians from their agricultural lands, wells and means of subsistence" (Report by the Special Rapporteur of the United Nations Commission on Human Rights, Jean Ziegler, "The Right to Food", Addendum, Mission to the Occupied Palestinian Territories, E/CN.4/2004/10/Add.2, 31 October 2003, para. 49). In a recent survey conducted by the World Food Programme, it is stated that the situation has aggravated food insecurity in the region, which reportedly numbers 25,000 new beneficiaries of food aid (report of the Secretary-General, para. 25).

It has further led to increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water. This is also attested by a number of different information sources. Thus the report of the Secretary-General states generally that "According to the Palestinian Central Bureau of Statistics, so far the Barrier has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks." (Report of the Secretary-General, para. 23.) The Special Rapporteur of the United Nations Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that "Palestinians between the Wall and Green Line will effectively be cut off from their land and workplaces, schools, health clinics and other social services." (E/CN.4/2004/6, 8 September 2003, para. 9.) In relation specifically to water resources, the Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights observes that "By constructing the fence Israel will also effectively annex most of the western aquifer system (which provides 51 per cent of the West Bank's water resources)." (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) Similarly, in regard to access to health services, it has been stated that, as a result of the enclosure of Qalqiliya, a United Nations hospital in that town has recorded a 40 per cent decrease in its caseload (report of the Secretary-General, para. 24).

At Qalqiliya, according to reports furnished to the United Nations, some 600 shops or businesses have shut down, and 6,000 to 8,000 people have already left the region (E/CN.4/2004/6, 8 September 2003, para. 10; E/CN.4/2004/10/Add.2, 31 October 2003, para. 51). The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights has also observed that "With the fence/wall cutting communities off from their land and water without other means of subsistence, many of the Palestinians living in these areas will be forced to leave." (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) In this respect also the construction of the wall would effectively deprive a significant number of Palestinians of the "freedom to choose [their] residence". In addition, however, in the view of the Court, since a significant number of Palestinians have already

been compelled by the construction of the wall and its associated régime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements mentioned in paragraph 120 above, is tending to alter the demographic composition of the Occupied Palestinian Territory.

134. To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above.
135. The Court would observe, however, that the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances.

Neither Article 46 of the Hague Regulations of 1907 nor Article 47 of the Fourth Geneva Convention contain any qualifying provision of this type. With regard to forcible transfers of population and deportations, which are prohibited under Article 49, paragraph 1, of the Convention, paragraph 2 of that Article provides for an exception in those cases in which “the security of the population or imperative military reasons so demand”. This exception however does not apply to paragraph 6 of that Article, which prohibits the occupying Power from deporting or transferring parts of its own civilian population into the territories it occupies. As to Article 53 concerning the destruction of personal property, it provides for an exception “where such destruction is rendered absolutely necessary by military operations”.

The Court considers that the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.

136. The Court would further observe that some human rights conventions, and in particular the International Covenant on Civil and Political Rights, contain provisions which States parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. In this respect, the Court would however recall that the communication notified by Israel to the Secretary-General of the United Nations under Article 4 of the International

Covenant on Civil and Political Rights concerns only Article 9 of the Covenant, relating to the right to freedom and security of person (see paragraph 127 above); Israel is accordingly bound to respect all the other provisions of that instrument.

The Court would note, moreover, that certain provisions of human rights conventions contain clauses qualifying the rights covered by those provisions. There is no clause of this kind in Article 17 of the International Covenant on Civil and Political Rights. On the other hand, Article 12, paragraph 3, of that instrument provides that restrictions on liberty of movement as guaranteed under that Article “shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant”. As for the International Covenant on Economic, Social and Cultural Rights, Article 4 thereof contains a general provision as follows:

“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

The Court would observe that the restrictions provided for under Article 12, paragraph 3, of the International Covenant on Civil and Political Rights are, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1. In addition, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they “must conform to the principle of proportionality” and “must be the least intrusive instrument amongst those which might achieve the desired result” (CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para. 14). On the basis of the information available to it, the Court finds that these conditions are not met in the present instance.

The Court would further observe that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel’s construction of the wall, fail to meet a condition laid down by Article 4 of the International Covenant on Economic, Social and Cultural Rights, that is to say that their implementation must be “solely for the purpose of promoting the general welfare in a democratic society”.

137. To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various

of its obligations under the applicable international humanitarian law and human rights instruments.

138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex I to the report of the Secretary-General states that, according to Israel: “the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)”. More specifically, Israel’s Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that “the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter”; the Security Council resolutions referred to, he continued, “have clearly recognized the right of States to use force in self-defence against terrorist attacks”, and therefore surely recognize the right to use non-forcible measures to that end (A/ES-10/PV.21, p. 6).
139. Under the terms of Article 51 of the Charter of the United Nations:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

140. The Court has, however, considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation (see paragraphs 135 and 136 above). Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning

the *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, “the state of necessity is a ground recognized by customary international law” that “can only be accepted on an exceptional basis”; it “can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met” (*I.C.J. Reports 1997*, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be “the only way for the State to safeguard an essential interest against a grave and imminent peril” (Article 25 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts; [...]). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.

141. The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.
142. In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.

[...]

147. Since the Court has concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to various of Israel’s international obligations, it follows that the responsibility of that State is engaged under international law.
148. The Court will now examine the legal consequences resulting from the violations of international law by Israel by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations. The Court will begin by examining the legal consequences of those violations for Israel.
149. The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory (see paragraphs 114-137 above). Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War (see paragraph 129 above).

150. The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation [...]
151. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, in view of the Court's finding (see paragraph 143 above) that Israel's violations of its international obligations stem from the construction of the wall and from its associated régime, cessation of those violations entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with the obligations referred to in paragraph 153 below.
152. Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms: "The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47.*)
153. Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.



154. The Court will now consider the legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States.
155. The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection." (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33.) The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

[...]

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'...", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*I.C.J. Reports 1996 (I)*, p. 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.
158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention [...] provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.
159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention [...] are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.
160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction



of the wall and the associated régime, taking due account of the present Advisory Opinion.

[...]

163. For these reasons,

### THE COURT,

(1) Unanimously,

*Finds* that it has jurisdiction to give the advisory opinion requested;

(2) By fourteen votes to one

*Decides* to comply with the request for an advisory opinion

[...]

(3) *Replies* in the following manner to the question put by the General Assembly:

A. By fourteen votes to one,

The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law;

[...]

B. By fourteen votes to one,

Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;

[...]

C. By fourteen votes to one,

Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;

[...]

D. By thirteen votes to two,

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention [...] have in addition the obligation, while respecting the United Nations Charter and international

law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

[...]

- E. By fourteen votes to one,  
The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

[...]

### SEPARATE OPINION OF JUDGE KOOIJMANS

[...]

#### I. INTRODUCTORY REMARKS

1. I have voted in favour of all paragraphs of the operative part of the Advisory Opinion with one exception, viz. subparagraph (3) (D) dealing with the legal consequences for States.

I had a number of reasons for casting that negative vote which I will only briefly indicate at this stage, since I will come back to them when commenting on the various parts of the Opinion.

My motives can be summarized as follows:

[...]

And, third, I find the Court's conclusions as laid down in subparagraph (3) (D) of the *dispositif* rather weak; apart from the Court's finding that States are under an obligation "not to render aid or assistance in maintaining the situation created by [the] construction [of the wall]" (a finding I subscribe to) I find it difficult to envisage what States are expected to do or not to do in actual practice. In my opinion a judicial body's findings should have a direct bearing on the addressee's behaviour; neither the first nor the last part of operative subparagraph (3) (D) meets this requirement.

[...]

9. [...] If it is correct that the Government of Israel claims that the Fourth Geneva Convention is not applicable *de jure* in the West Bank since that territory had not previously to the 1967 war been under Jordanian sovereignty, that argument already fails since a territory, which by one of the parties to an armed conflict is claimed as its own and is under its control, is – once occupied by the other party – by definition occupied territory of a *High Contracting Party* in the sense of the Fourth Geneva Convention (emphasis added). And both Israel and Jordan were parties to the Convention.

[...]

## V. MERITS

[...]

34. *Proportionality* – The Court finds that the conditions set out in the qualifying clauses in the applicable humanitarian law and human rights conventions have not been met and that the measures taken by Israel cannot be justified by military exigencies or by requirements of national security or public order (paras. 135-137). I agree with that finding but in my opinion the construction of the wall should also have been put to the proportionality test, in particular since the concepts of military necessity and proportionality have always been intimately linked in international humanitarian law. And in my view it is of decisive importance that, even if the construction of the wall and its associated régime could be justified as measures necessary to protect the legitimate rights of Israeli citizens, these measures would not pass the proportionality test. The route chosen for the construction of the wall and the ensuing disturbing consequences for the inhabitants of the Occupied Palestinian Territory are manifestly disproportionate to interests which Israel seeks to protect, as seems to be recognized also in recent decisions of the Israeli Supreme Court.
35. *Self-defence* – Israel based the construction of the wall on its inherent right of self-defence as contained in Article 51 of the Charter. In this respect it relied on Security Council resolutions 1368 (2001) and 1373 (2001), adopted after the terrorist attacks of 11 September 2001 against targets located in the United States.

The Court starts its response to this argument by stating that Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another State (para. 139). Although this statement is undoubtedly correct, as a reply to Israel's argument it is, with all due respect, beside the point. Resolutions 1368 and 1373 recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence.

36. The argument which in my view is decisive for the dismissal of Israel's claim that it is merely exercising its right of self-defence can be found in the second part of paragraph 139. The right of self-defence as contained in the Charter is a rule of international law and thus relates to *international* phenomena. Resolutions 1368 and 1373 refer to acts of international terrorism as constituting a threat to *international* peace and security; they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the State which is also the victim of these acts. And Israel does not claim that these acts have their origin elsewhere. The Court therefore rightly concludes that the situation is different from that contemplated by resolutions 1368 and 1373 and that consequently Article 51 of the Charter cannot be invoked by Israel.

#### IV. LEGAL CONSEQUENCES

[...]

40. That reason as indicated in paragraphs 155 to 158 of the Opinion is that the obligations violated by Israel include certain obligations *erga omnes*. I must admit that I have considerable difficulty in understanding why a violation of an obligation *erga omnes* by one State should necessarily lead to an obligation for third States. The nearest I can come to such an explanation is the text of Article 41 of the International Law Commission's Articles on State Responsibility. That Article reads:

"1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40. (Article 40 deals with serious breaches of obligations arising under a peremptory norm of general international law.)

2. No State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation."

[...]

42. Paragraph 1 of Article 41 explicitly refers to a duty to co-operate. As paragraph 3 of the commentary states "What is called for in the face of serious breaches is a joint and co-ordinated effort by all States to counteract the effects of these breaches." And paragraph 2 refers to "co-operation ... in the framework of a competent international organization, in particular the United Nations". Article 41, paragraph 1, therefore does not refer to individual obligations of third States as a result of a serious breach. What is said there is encompassed in the Court's finding in operative sub-paragraph (3) (E) and not in subparagraph (3) (D).
43. Article 41, paragraph 2, however, explicitly mentions the duty not to recognize as lawful a situation created by a serious breach just as operative subparagraph (3) (D) does. In its commentary the ILC refers to unlawful situations which – virtually without exception – take the form of a legal claim, usually to territory. It gives as examples "an attempted acquisition of sovereignty over territory through denial

of the right of self-determination”, the annexation of Manchuria by Japan and of Kuwait by Iraq, South-Africa’s claim to Namibia, the Unilateral Declaration of Independence in Rhodesia and the creation of Bantustans in South Africa. In other words, all examples mentioned refer to situations arising from formal or quasi-formal promulgations intended to have an *erga omnes* effect. I have no problem with accepting a duty of non-recognition in such cases.

44. I have great difficulty, however, in understanding what the duty not to recognize an illegal fact involves. What are the individual addressees of this part of operative subparagraph (3) (D) supposed to do in order to comply with this obligation? That question is even more cogent considering that 144 States unequivocally have condemned the construction of the wall as unlawful (res. ES-10/13), whereas those States which abstained or voted against (with the exception of Israel) did not do so because they considered the construction of the wall as legal. The duty not to recognize amounts, therefore, in my view to an obligation without real substance.
45. That argument does not apply to the second obligation mentioned in Article 41, paragraph 2, namely the obligation not to render aid or assistance in maintaining the situation created by the serious breach. I therefore fully support that part of operative subparagraph (3) (D). Moreover, I would have been in favour of adding in the reasoning or even in the operative part a sentence reminding States of the importance of rendering humanitarian assistance to the victims of the construction of the wall. (The Court included a similar sentence, be it with a different scope, in its Opinion in the *Namibia* case, *I.C.J. Reports 1971*, p. 56, para. 125).
46. Finally, I have difficulty in accepting the Court’s finding that the States parties to the Fourth Geneva Convention are under an obligation to ensure compliance by Israel with humanitarian law as embodied in that Convention (para. 159, operative subparagraph (3) (D), last part).

In this respect the Court bases itself on common Article 1 of the Geneva Conventions which reads: “The High Contracting Parties undertake to respect and to *ensure respect* for the present Convention in all circumstances.” (Emphasis added.)

47. The Court does not say on what ground it concludes that this Article imposes obligations on third States not party to a conflict. The *travaux préparatoires* do not support that conclusion. According to Professor Kalshoven, who investigated thoroughly the genesis and further development of common Article 1, it was mainly intended to ensure respect of the Conventions by the population as a whole and as such was closely linked to common Article 3 dealing with internal conflicts (F. Kalshoven, “The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit” in *Yearbook of International Humanitarian Law*, Vol. 2 (1999), p. 3-61). His conclusion from the *travaux préparatoires* is:

"I have not found in the records of the Diplomatic Conference even the slightest awareness on the part of government delegates that one might ever wish to read into the phrase 'to ensure respect' any undertaking by a contracting State other than an obligation to ensure respect for the Conventions by its people 'in all circumstances'." (*Ibid.*, p. 28.)

48. Now it is true that already from an early moment the ICRC in its (non-authoritative) commentaries on the 1949 Convention has taken the position that common Article 1 contains an obligation for all States parties to ensure respect by other States parties. It is equally true that the Diplomatic Conference which adopted the 1977 Additional Protocols incorporated common Article 1 in the First Protocol. But at no moment did the Conference deal with its presumed implications for third States.
49. Hardly less helpful is the Court's reference to common Article 1 in the *Nicaragua* case. The Court, without interpreting its terms, observed that "such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression". The Court continued that "The United States [was] thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua" to act in violation of common Article 3 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Judgment*, *I.C.J. Reports 1986*, p. 114, para. 220).

But this duty of abstention is completely different from a positive duty to ensure compliance with the law.

50. Although I certainly am not in favour of a restricted interpretation of common Article 1, such as may have been envisaged in 1949, I simply do not know whether the scope given by the Court to this Article in the present Opinion is correct as a statement of positive law. Since the Court does not give any argument in its reasoning, I do not feel able to support its finding. Moreover, I fail to see what kind of positive action, resulting from this obligation, may be expected from individual States, apart from diplomatic demarches.

[...]

#### SEPARATE OPINION OF JUDGE ELARABY

[...]

### III. THE LAW OF BELLIGERENT OCCUPATION

[...]

- 3.1. [...] The Israeli occupation has lasted for almost four decades. Occupation, regardless of its duration, gives rise to a myriad of human, legal and political problems. In dealing with prolonged belligerent occupation, international law seeks to "perform a holding operation pending the termination of the conflict". No one underestimates the inherent difficulties that arise during situations

of prolonged occupation. A prolonged occupation strains and stretches the applicable rules, however, the law of belligerent occupation must be fully respected regardless of the duration of the occupation.

Professor Christopher Greenwood provided a correct legal analysis which I share. He wrote:

“Nevertheless, there is no indication that international law permits an occupying power to disregard provisions of the Regulations or the Convention merely because it has been in occupation for a long period, not least because there is no body of law which might plausibly take their place and no indication that the international community is willing to trust the occupant with *carte blanche*.”

[...]

The fact that occupation is met by armed resistance cannot be used as a pretext to disregard fundamental human rights in the occupied territory. Throughout the annals of history, occupation has always been met with armed resistance. Violence breeds violence. This vicious circle weighs heavily on every action and every reaction by the occupier and the occupied alike.

[...]

I wholeheartedly subscribe to the view [...] that the breaches by both sides of the fundamental rules of humanitarian law reside in “the illegality of the Israeli occupation regime itself”. Occupation, as an illegal and temporary situation, is at the heart of the whole problem. The only viable prescription to end the grave violations of international humanitarian law is to end occupation.

[...]

- 3.2. [...] Military necessities and military exigencies could arguably be advanced as justification for building the wall had Israel proven that it could perceive no other alternative for safeguarding its security. This, as the Court notes, Israel failed to demonstrate. A distinction must be drawn between building the wall as a security measure, as Israel contends, and accepting that the principle of military necessity could be invoked to justify the unwarranted destruction and demolition that accompanied the construction process. Military necessity, if applicable, extends to the former and not the latter. The magnitude of the damage and injury inflicted upon the civilian inhabitants in the course of building the wall and its associated régime is clearly prohibited under international humanitarian law. The destruction of homes, the demolition of the infrastructure, and the despoilment of land, orchards and olive groves that has accompanied the construction of the wall cannot be justified under any pretext whatsoever. Over 100,000 civilian non-combatants have been rendered homeless and hapless.

[...]

### SEPARATE OPINION OF JUDGE HIGGINS

[...]

14. [...] So far as the request of the Assembly envisages an opinion on humanitarian law, however, the obligations thereby imposed are (save for their own qualifying provisions) absolute. That is the bedrock of humanitarian law, and those engaged in conflict have always known that it is the price of our hopes for the future that they must, whatever the provocation, fight “with one hand behind their back” and act in accordance with international law. While that factor diminishes relevance of context so far as the obligations of humanitarian law are concerned, it remains true, nonetheless, that context is important for other aspects of international law that the Court chooses to address. Yet the formulation of the question precludes consideration of that context.

[...]

18. I regret that I do not think this has been achieved in the present Opinion. It is true that in paragraph 162 the Court recalls that “Illegal actions and unilateral decisions have been taken on all sides” and that it emphasizes that “both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law”. But in my view much, much more was required to avoid the huge imbalance that necessarily flows from being invited to look at only “part of a greater whole”, and then to take that circumstance “carefully into account”. The call upon both parties to act in accordance with international humanitarian law should have been placed within the *dispositif*. The failure to do so stands in marked contrast with the path that the Court chose to follow in operative clause F of the *dispositif* of the *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion, I.C.J. Reports 1996 (I), p. 266)*. Further, the Court should have spelled out what is required of both parties in this “greater whole”. [...]

19. I think the Court should also have taken the opportunity to say, in the clearest terms, what regrettably today apparently needs constant reaffirmation even among international lawyers, namely, that the protection of civilians remains an intransgressible obligation of humanitarian law, not only for the occupier but equally for those seeking to liberate themselves from occupation.

[...]

23. The General Assembly has in resolution ES-10/13 determined that the wall contravenes humanitarian law, without specifying which provisions and why. Palestine has informed the Court that it regards Articles 33, 53, 55 and 64 of the Fourth Geneva Convention and Article 52 of the Hague Regulations as violated. Other participants invoked Articles 23 (g), 46, 50 and 52 of the Hague Regulations, and Articles 27, 47, 50, 55, 56 and 59 of the Fourth Convention. For the Special Rapporteur, the wall constitutes a violation of Articles 23 (g) and 46 of the Hague Regulations and Articles 47, 49, 50, 53 and 55 of the Fourth Geneva Convention. It might have been expected that an advisory opinion would have contained a detailed analysis, by reference to the texts, the voluminous academic literature



and the facts at the Court's disposal, as to *which* of these propositions is correct. Such an approach would have followed the tradition of using advisory opinions as an opportunity to elaborate and develop international law.

24. It would also, as a matter of balance, have shown not only which provisions Israel has violated, but also which it has not. But the Court, once it has decided which of these provisions are in fact applicable, thereafter refers only to those which Israel has violated. Further, the structure of the Opinion, in which humanitarian law and human rights law are not dealt with separately, makes it in my view extremely difficult to see what exactly has been decided by the Court. Notwithstanding the very general language of subparagraph (3) (A) of the *dispositif*, it should not escape attention that the Court has in the event found violations only of Article 49 of the Fourth Geneva Convention (para. 120), and of Articles 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention (para. 132). I agree with these findings.
25. After its somewhat light treatment of international humanitarian law, the Court turns to human rights law. I agree with the Court's finding about the continued relevance of human rights law in the occupied territories. I also concur in the findings made at paragraph 134 as regards Article 12 of the International Covenant on Civil and Political Rights.
26. At the same time, it has to be noted that there are established treaty bodies whose function it is to examine in detail the conduct of States parties to each of the Covenants. Indeed, the Court's response as regards the International Covenant on Civil and Political Rights notes both the pertinent jurisprudence of the Human Rights Committee and also the concluding observations of the Committee on Israel's duties in the occupied territories.
27. So far as the International Covenant on Economic, Social and Cultural Rights is concerned, the situation is even stranger, given the programmatic requirements for the fulfilment of this category of rights. The Court has been able to do no more than observe, in a single phrase, that the wall and its associated régime "impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights . . ." (para. 134). For both Covenants, one may wonder about the appropriateness of asking for advisory opinions from the Court on compliance by States parties with such obligations, which are monitored, in much greater detail, by a treaty body established for that purpose. It could hardly be an answer that the General Assembly is not setting any more general precedent, because while many, many States are not in compliance with their obligations under the two Covenants, the Court is being asked to look only at the conduct of Israel in this regard.

[...]

33. I do not agree with all that the Court has to say on the question of the law of self-defence. In paragraph 139 the Court quotes Article 51 of the Charter and then continues "Article 51 of the Charter *thus* recognizes the existence of an

inherent right of self-defence in the case of armed attack by one State against another State.” There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State. That qualification is rather a result of the Court so determining in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits, Judgment, I.C.J. Reports 1986, p. 14). It there held that military action by irregulars could constitute an armed attack if these were sent by or on behalf of the State and if the activity “because of its scale and effects, would have been classified as an armed attack . . . had it been carried out by regular armed forces” (*ibid.*, p. 103, para. 195). While accepting, as I must, that this is to be regarded as a statement of the law as it now stands, I maintain all the reservations as to this proposition that I have expressed elsewhere (R. Higgins, *Problems and Process: International Law and How We Use It*, pp. 250-251).

34. I also find unpersuasive the Court’s contention that, as the uses of force emanate from occupied territory, it is not an armed attack “by one State against another”. I fail to understand the Court’s view that an occupying Power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory – a territory which it has found not to have been annexed and is certainly “other than” Israel. Further, Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable. This is formalism of an unevenhanded sort. The question is surely where responsibility lies for the sending of groups and persons who act against Israeli civilians and the cumulative severity of such action.
35. In the event, however, these reservations have not caused me to vote against subparagraph (3) (A) of the *dispositif*, for two reasons. First, I remain unconvinced that non-forcible measures (such as the building of a wall) fall within self-defence under Article 51 of the Charter as that provision is normally understood. Second, even if it were an act of self-defence, properly so called, it would need to be justified as necessary and proportionate. While the wall does seem to have resulted in a diminution of attacks on Israeli civilians, the necessity and proportionality for the particular route selected, with its attendant hardships for Palestinians uninvolved in these attacks, has not been explained.

[...]

37. I have voted in favour of subparagraph (3) (D) of the *dispositif* but, unlike the Court, I do not think that the specified consequence of the identified violations of international law have anything to do with the concept of *erga omnes* (cf. paras. 154-159 of this Opinion). The Court’s celebrated dictum in *Barcelona Traction, Light and Power Company, Limited, Second Phase*, (Judgment, I.C.J. Reports 1970, p. 32, para. 33) is frequently invoked for more than it can bear. Regrettably, this is now done also in this Opinion, at paragraph 155. That dictum was directed to a very specific issue of jurisdictional *locus standi*. As the International Law Commission has correctly put it in the Commentaries to the draft Articles on the Responsibility of States for Internationally Wrongful Acts (A/56/10 at p. 278),

there are certain rights in which, by reason of their importance “all states have a legal interest in their protection”. It has nothing to do with imposing substantive obligations on third parties to a case.

38. That an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of “*erga omnes*”. [...]
39. Finally, the invocation (para. 157) of “the *erga omnes*” nature of violations of humanitarian law seems equally irrelevant. These intransgressible principles are generally binding because they are customary international law, no more and no less. And the first Article to the Fourth Geneva Convention, under which “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances” while apparently viewed by the Court as something to do with “the *erga omnes* principle”, is simply a provision in an almost universally ratified multilateral Convention. The Final Record of the diplomatic conference of Geneva of 1949 offers no useful explanation of that provision; the commentary thereto interprets the phrase “*ensure respect*” as going beyond legislative and other action within a State’s own territory. It observes that

“in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.” (*The Geneva Conventions of 12 August 1949: Commentary, IV Geneva Convention relative to the protection of civilian persons in time of war* (Pictet ed.) p. 16.)

It will be noted that the Court has, in subparagraph (3) (D) of the *dispositif*, carefully indicated that any such action should be in conformity with the Charter and international law.

[...]

#### DECLARATION OF JUDGE BUERGENTHAL

[...]

3. It may well be, and I am prepared to assume it, that on a thorough analysis of all relevant facts, a finding could well be made that some or even all segments of the wall being constructed by Israel on the Occupied Palestinian Territory violate international law (see para. 10 below). But to reach that conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel’s legitimate right of self-defence, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which

Israel has been and continues to be subjected, cannot be justified as a matter of law. The nature of these cross-Green Line attacks and their impact on Israel and its population are never really seriously examined by the Court, and the dossier provided the Court by the United Nations on which the Court to a large extent bases its findings barely touches on that subject. I am not suggesting that such an examination would relieve Israel of the charge that the wall it is building violates international law, either in whole or in part, only that without this examination the findings made are not legally well founded. In my view, the humanitarian needs of the Palestinian people would have been better served had the Court taken these considerations into account, for that would have given the Opinion the credibility I believe it lacks.

4. This is true with regard to the Court's sweeping conclusion that the wall as a whole, to the extent that it is constructed on the Occupied Palestinian Territory, violates international humanitarian law and international human rights law. [...]
7. [...] [A]ll we have from the Court is a description of the harm the wall is causing and a discussion of various provisions of international humanitarian law and human rights instruments followed by the conclusion that this law has been violated. Lacking is an examination of the facts that might show why the alleged defences of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route. The Court says that it "is not convinced" but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.
8. It is true that some international humanitarian law provisions the Court cites admit of no exceptions based on military exigencies. Thus, Article 46 of the Hague Rules provides that private property must be respected and may not be confiscated. In the Summary of the legal position of the Government of Israel, Annex I to the report of the United Nations Secretary-General, A/ES-10/248, p. 8, the Secretary-General reports Israel's position on this subject in part as follows: "The Government of Israel argues: there is no change in ownership of the land; compensation is available for use of land, crop yield or damage to the land; residents can petition the Supreme Court to halt or alter construction and there is no change in resident status." The Court fails to address these arguments. While these Israeli submissions are not necessarily determinative of the matter, they should have been dealt with by the Court and related to Israel's further claim that the wall is a temporary structure, which the Court takes note of as an "assurance given by Israel" (para. 121).
9. Paragraph 6 of Article 49 of the Fourth Geneva Convention also does not admit for exceptions on grounds of military or security exigencies. It provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". I agree that this provision applies to the Israeli settlements in the West Bank and that their existence violates Article 49, paragraph 6. It follows that the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law. Moreover, given the demonstrable great hardship to which the affected

Palestinian population is being subjected in and around the enclaves created by those segments of the wall, I seriously doubt that the wall would here satisfy the proportionality requirement to qualify as a legitimate measure of self-defence.

[...]

## **B. HCJ, *Beit Sourik Village Council v. The Government of Israel* [et al.]**

[Source: HCJ, *Beit Sourik Village Council v. The Government of Israel* [et al.], HCJ 2056/04, 30 June 2004; available on <http://elyon1.court.gov.il/eng/home/index.html>]

[N.B.: This decision was issued on 30 June 2004, i.e. shortly before the ICJ rendered its advisory opinion. This is why the HCJ does not refer to the ICJ's decision. However, for the purposes of the case and the discussion, the authors have decided not to follow the chronological order.]

### **BEIT SOURIK VILLAGE COUNCIL**

**v.**

### **THE GOVERNMENT OF ISRAEL [ET AL.], HCJ 2056/04**

[...]

### **The Supreme Court Sitting as the High Court of Justice**

[...]

### **Judgment**

#### **President A. Barak**

The Commander of the IDF Forces in Judea and Samaria issued orders to take possession of plots of land in the area of Judea and Samaria. The purpose of the seizure was to erect a separation fence on the land. The question before us is whether the orders and the fence are legal.

#### **Background**

1. Since 1967, Israel has been holding the areas of Judea and Samaria [hereinafter – the area] in belligerent occupation. In 1993 Israel began a political process with the PLO, and signed a number of agreements transferring control over parts of the area to the Palestinian Authority. Israel and the PLO continued political negotiations in an attempt to solve the remaining problems. The negotiations, whose final stages took place at Camp David in Maryland, USA, failed in July 2000. From respondents' affidavit in answer to order nisi we learned that, a short time after the failure of the Camp David talks, the Israeli-Palestinian conflict reached new heights of violence. In September 2000, the Palestinian side began a campaign of terror against Israel and Israelis. Terror attacks take place both in the area and in Israel. They are directed against citizens and soldiers, men and women, elderly and infants, regular citizens and public figures. Terror attacks are carried out everywhere [...]. Terror organizations use gunfire attacks, suicide

attacks, mortar fire, Katyusha rocket fire, and car bombs. From September 2000 until the beginning of April 2004, more than 780 attacks were carried out within Israel. During the same period, more than 8200 attacks were carried out in the area. The armed conflict claimed (as of April 2004) the lives of 900 Israeli citizens and residents. More than 6000 were injured, some with serious wounds that have left them severely handicapped. The armed conflict has left many dead and wounded on the Palestinian side as well. Bereavement and pain wash over us.

[...]

7. The "Seamline" obstacle is composed of several components. In its center stands a "smart" fence. The purpose of the fence is to alert the forces deployed along its length of any attempt at infiltration. On the fence's external side lies an anti-vehicle obstacle, composed of a trench or another means, intended to prevent vehicles from breaking through the fence by slamming up against it. There is an additional delaying fence. Near the fence a service road is paved. On the internal side of the electronic fence, there are a number of roads: a dirt road (for the purpose of discovering the tracks of those who pass the fence), a patrol road, and a road for armored vehicles, as well as an additional fence. The average width of the obstacle, in its optimal form, is 50-70 meters. Due to constraints, a narrower obstacle, which includes only the components supporting the electronic fence, will be constructed in specific areas. In certain cases the obstacle can reach a width of 100 meters, due to topographical conditions. In the area relevant to this petition, the width of the obstacle will not exceed 35 meters, except in places where a wider obstacle is necessary for topographical reasons. In the area relevant to this petition, the fence is not being replaced by a concrete wall. Efforts are being made to minimize the width of the area of which possession will be taken *de facto*. [...] Hereinafter, we will refer to the entire obstacle on the "Seamline" as "the separation fence."

### ***The Seizure Proceedings***

8. Parts of the separation fence are being erected on land which is not privately owned. Other parts are being erected on private land. In such circumstances – and in light of the security necessities – an order of seizure is issued by the Commander of the IDF Forces in the area of Judea and Samaria (respondent 2). Pursuant to standard procedure, every land owner whose land is seized will receive compensation for the use of his land. After the order of seizure is signed, it is brought to the attention of the public, and the proper liaison body of the Palestinian Authority is contacted. An announcement is relayed to the residents, and each interested party is invited to participate in a survey of the area affected by the order of seizure, in order to present the planned location of the fence. A few days after the order is issued, a survey is taken of the area, with the participation of the landowners, in order to point out the land which is about to be seized. After the survey, a one week leave is granted to the landowners, so that they may submit an appeal to the military commander. The substance of the appeals is examined. Where it is possible, an attempt is made to reach understandings with

the landowners. If the appeal is denied, leave of one additional week is given to the landowner, so that he may petition the High Court of Justice.

### ***The Petition***

9. The petition, as originally worded, attacked the orders of seizure regarding lands in the villages of Beit Sourik, Bidu, El Kabiba, Katane, Beit A'anan, Beit Likia, Beit Ajaza and Beit Daku. [...] Petitioners are the landowners and the village councils affected by the orders of seizure. They argue that the orders of seizure are illegal. As such, they should be voided or the location of the separation fence should be changed. The injury to petitioners, they argue, is severe and unbearable. Over 42,000 dunams of their lands are affected. The obstacle itself passes over 4,850 dunams, and will separate between petitioners and more than 37,000 dunams, 26,500 of which are agricultural lands that have been cultivated for many generations. Access to these agricultural lands will become difficult and even impossible. Petitioners' ability to go from place to place will depend on a bureaucratic permit regime which is labyrinthine, complex, and burdensome. Use of local water wells will not be possible. As such, access to water for crops will be hindered. Shepherding, which depends on access to these wells, will be made difficult. Tens of thousands of olive and fruit trees will be uprooted. The fence will separate villages from tens of thousands of additional trees. The livelihood of many hundreds of Palestinian families, based on agriculture, will be critically injured. Moreover, the separation fence injures not only landowners to whom the orders of seizure apply; the lives of 35,000 village residents will be disrupted. The separation fence will harm the villages' ability to develop and expand. The access roads to the urban centers of Ramallah and Bir Naballa will be blocked off. Access to medical and other services in East Jerusalem and in other places will become impossible. Ambulances will encounter difficulty in providing emergency services to residents. Children's access to schools in the urban centers, and of students to universities, will be impaired. Petitioners argue that these injuries cannot be justified.
10. [...] First, petitioners claim that respondent lacks the authority to issue the orders of seizure. Were the route of the separation fence to pass along Israel's border, they would have no complaint. However, this is not the case. The route of the separation fence, as per the orders of seizure, passes through areas of Judea and Samaria. According to their argument, these orders alter the borders of the West Bank with no express legal authority. It is claimed that the separation fence annexes areas to Israel in violation of international law. The separation fence serves the needs of the occupying power and not the needs of the occupied area. The objective of the fence is to prevent the infiltration of terrorists into Israel; as such, the fence is not intended to serve the interests of the local population in the occupied area, or the needs of the occupying power in the occupied area. Moreover, military necessity does not require construction of the separation fence along the planned route. The security arguments guiding respondents disguise the real objective: the annexation of areas to Israel. As such, there is



no legal basis for the construction of the fence, and the orders of seizure which were intended to make it possible are illegal. Second, petitioners argue that the procedure for the determination of the route of the separation fence was illegal. [...]

11. Third, the separation fence violates many fundamental rights of the local inhabitants, illegally and without authority. Their right to property is violated by the very taking of possession of the lands and by the prevention of access to their lands. In addition, their freedom of movement is impeded. Their livelihoods are hurt and their freedom of occupation is restricted. Beyond the difficulties in working the land, the fence will make the trade of farm produce difficult. The fence detracts from the educational opportunities of village children, and throws local family and community life into disarray. Freedom of religion is violated, as access to holy places is prevented. Nature and landscape features are defaced. Petitioners argue that these violations are disproportionate and are not justified under the circumstances. The separation fence route reflects collective punishment, prohibited by international law. Thus, respondent neglects the obligation, set upon his shoulders by international law, to make normal and proper life possible for the inhabitants of Judea and Samaria. The security considerations guiding him cannot, they claim, justify such severe injury to the local inhabitants. This injury does not fulfill the requirements of proportionality. According to their argument, despite the language of the orders of seizure, it is clear that the fence is not of a temporary character, and the critical wound it inflicts upon the local population far outweighs its benefits. [...]

### ***The Normative Framework***

23. The general point of departure of all parties – which is also our point of departure – is that Israel holds the area in belligerent occupation (*occupatio bellica*). [...] In the areas relevant to this petition, military administration, headed by the military commander, continues to apply. [...] The authority of the military commander flows from the provisions of public international law regarding belligerent occupation. These rules are established principally in the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 [hereinafter – the Hague Regulations]. These regulations reflect customary international law. The military commander's authority is also anchored in IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949. [hereinafter – the Fourth Geneva Convention]. The question of the application of the Fourth Geneva Convention has come up more than once in this Court. [...] The question is not before us now, since the parties agree that the humanitarian rules of the Fourth Geneva Convention apply to the issue under review. [...]
24. Together with the provisions of international law, "the principles of the Israeli administrative law regarding the use of governing authority" apply to the military commander. [...] Indeed, "[e]very Israeli soldier carries, in his pack, the provisions of public international law regarding the laws of war and the basic provisions of Israeli administrative law." [...]



27. [...] [T]he military commander of territory held in belligerent occupation must balance between the needs of the army on one hand, and the needs of the local inhabitants on the other. In the framework of this delicate balance, there is no room for an additional system of considerations, whether they be political considerations, the annexation of territory, or the establishment of the permanent borders of the state. This Court has emphasized time and time again that the authority of the military commander is inherently temporary, as belligerent occupation is inherently temporary. Permanent arrangements are not the affair of the military commander. True, the belligerent occupation of the area has gone on for many years. This fact affects the scope of the military commander's authority. [...] The passage of time, however, cannot extend the authority of the military commander and allow him to take into account considerations beyond the proper administration of the area under belligerent occupation.

[...]

30. Petitioners, by pointing to the route of the fence, attempt to prove that the construction of the fence is not motivated by security considerations, but by political ones. They argue that if the fence was primarily motivated by security considerations, it would be constructed on the "Green Line [...]". We cannot accept this argument. The opposite is the case: it is the security perspective – and not the political one – which must examine the route on its security merits alone, without regard for the location of the Green Line. [...]
31. [...] We have no reason to assume that the objective is political rather than security-based. Indeed, petitioners did not carry the burden and did not persuade us that the considerations behind the construction of the separation fence are political rather than security-based. Similarly, petitioners did not carry their burden, and did not persuade us that the considerations of the Commander of the IDF Forces in the area, in choosing the route of the separation fence, are not military considerations, and that he has not acted to fulfill them in good faith, according to his best military understanding.
32. Petitioner[s'] second argument is that the construction of the fence in the area is based, in a large part, on the seizure of land privately owned by local inhabitants, that this seizure is illegal, and that therefore the military commander's authority has no [*sic*] to construct the obstacle. We cannot accept this argument. We found no defect in the process of issuing the orders of seizure, or in the process of granting the opportunity to appeal them. Regarding the central question raised before us, our opinion is that the military commander is authorized – by the international law applicable to an area under belligerent occupation – to take possession of land, if this is necessary for the needs of the army. See articles 23(g) and 52 of the Hague Convention; article 53 of the Fourth Geneva Convention. He must, of course, provide compensation for his use of the land. [...] Indeed, on the basis of the provisions of the Hague Convention and the Geneva Convention, this Court has recognized the legality of land and house seizure for various military needs, including the construction of military facilities [...], the paving of detour roads [...], the building of fences around outposts [...], the temporary housing of

soldiers [...], the ensuring of unimpaired traffic on the roads of the area [...], the construction of civilian administration offices [...], the seizing of buildings for the deployment of a military force [...]. Of course, regarding all these acts, the military commander must consider the needs of the local population. Assuming that this condition is met, there is no doubt that the military commander is authorized to take possession of land in areas under his control. The construction of the separation fence falls within this framework. The infringement of property rights is insufficient, in and of itself, to take away the authority to build it. It is permitted, by the international law applicable to an area under belligerent occupation, to take possession of an individual's land in order to erect the separation fence upon it, on the condition that this is necessitated by military needs. To the extent that construction of the fence is a military necessity, it is permitted, therefore, by international law. Indeed, the obstacle is intended to take the place of combat military operations, by physically blocking terrorist infiltration into Israeli population centers. The building of the obstacle, to the extent it is done out of military necessity, is within the authority of the military commander. Of course, the route of the separation fence must take the needs of the local population into account. That issue, however, concerns the route of the fence and not the authority to erect it. [...] This question is the legality of the location and route of the separation fence. [...]

### ***The Route of the Separation Fence***

33. The focus of this petition is the legality of the route chosen for construction of the separation fence. This question stands on its own, and it requires a straightforward, real answer. It is not sufficient that the fence be motivated by security considerations, as opposed to political considerations. The military commander is not at liberty to pursue, in the area held by him in belligerent occupation, every activity which is primarily motivated by security considerations. The discretion of the military commander is restricted by the normative system in which he acts, and which is the source of his authority. Indeed, the military commander is not the sovereign in the occupied territory. [...] He must act within the law which establishes his authority in a situation of belligerent occupation. What is the content of this law?
34. The law of belligerent occupation recognizes the authority of the military commander to maintain security in the area and to protect the security of his country and her citizens. However, it imposes conditions on the use of this authority. This authority must be properly balanced against the rights, needs, and interests of the local population [...]

### ***Proportionality***

36. The problem of balancing between security and liberty is not specific to the discretion of a military commander of an area under belligerent occupation. It is a general problem in the law, both domestic and international. Its solution is universal. It is found deep in the general principles of law, including

reasonableness and good faith. [...] One of those foundational principles which balance between the legitimate objective and the means of achieving it is the principle of proportionality. According to it, the liberty of the individual can be limited (in this case, the liberty of the local inhabitants under belligerent occupation), on the condition that the restriction is proportionate. This approach crosses through all branches of law. [...]

### ***The Meaning of Proportionality and its Elements***

40. According to the principle of proportionality, the decision of an administrative body is legal only if the means used to realize the governmental objective is of proper proportion. The principle of proportionality focuses, therefore, on the relationship between the objective whose achievement is being attempted, and the means used to achieve it. [...] As such, both in international law, which deals with different national systems – from both the common law family (such as Canada) and the continental family (such as Germany) – as well as in domestic Israeli law, three subtests grant specific content to the principle of proportionality. [...]
41. The first subtest is that the objective must be related to the means. The means that the administrative body uses must be constructed to achieve the precise objective which the administrative body is trying to achieve. The means used by the administrative body must rationally lead to the realization of the objective. This is the “appropriate means” or “rational means” test. According to the second subtest, the means used by the administrative body must injure the individual to the least extent possible. In the spectrum of means which can be used to achieve the objective, the least injurious means must be used. This is the “least injurious means” test. The third test requires that the damage caused to the individual by the means used by the administrative body in order to achieve its objectives must be of proper proportion to the gain brought about by that means. That is the “proportionate means” test (or proportionality “in the narrow sense.”) The test of proportionality “in the narrow sense” is commonly applied with “absolute values,” by directly comparing the advantage of the administrative act with the damage that results from it. However, it is also possible to apply the test of proportionality in the narrow sense in a “relative manner.” According to this approach, the administrative act is tested vis-à-vis an alternate act, whose benefit will be somewhat smaller than that of the former one. The original administrative act is disproportionate in the narrow sense if a certain reduction in the advantage gained by the original act – by employing alternate means, for example – ensures a substantial reduction in the injury caused by the administrative act.
42. [...] Not infrequently, there are a number of ways that the requirement of proportionality can be satisfied. In these situations a “zone of proportionality” must be recognized (similar to a “zone of reasonableness.”) Any means chosen by the administrative body that is within the zone of proportionality is proportionate. [...]
43. This principle of proportionality also applies to the exercise of authority by the military commander in an area under belligerent occupation. [...]

### ***The Proportionality of the Route of the Separation Fence***

44. The principle of proportionality applies to our examination of the legality of the separation fence. This approach is accepted by respondents. [...] The proportionality of the separation fence must be decided by the three following questions, which reflect the three subtests of proportionality. First, does the route pass the “appropriate means” test (or the “rational means” test)? The question is whether there is a rational connection between the route of the fence and the goal of the construction of the separation fence. Second, does it pass the test of the “least injurious” means? The question is whether, among the various routes which would achieve the objective of the separation fence, is the chosen one the least injurious. Third, does it pass the test of proportionality in the narrow sense? The question is whether the separation fence route, as set out by the military commander, injures the local inhabitants to the extent that there is no proper proportion between this injury and the security benefit of the fence. According to the “relative” examination of this test, the separation fence will be found disproportionate if an alternate route for the fence is suggested that has a smaller security advantage than the route chosen by respondent, but which will cause significantly less damage than that original route.

### ***The Scope of Judicial Review***

45. Before we examine the proportionality of the route of the separation fence, it is appropriate that we define the character of our examination. Our point of departure is the assumption, which petitioners did not manage to negate, that the government decision to construct the separation fence is motivated by security, and not a political, considerations. As such, we work under the assumption – which the petitioners also did not succeed in negating – that the considerations of the military commander based the route of the fence on military considerations that, to the best of his knowledge, are capable of realizing this security objective. In addition, we assume – and this issue was not even disputed in the case before us – that the military commander is of the opinion that the injury to local inhabitants is proportionate. On the basis of this factual foundation, there are two questions before us. The first question is whether the route of the separation fence, as determined by the military commander, is well-founded from a military standpoint. Is there another route for the separation fence which better achieves the security objective? This constitutes a central component of proportionality. If the chosen route is not well-founded from the military standpoint, then there is no rational connection between the objective which the fence is intended to achieve and the chosen route (the first subtest); if there is a route which better achieves the objective, we must examine whether this alternative route inflicts a lesser injury (the second subtest). The second question is whether the route of the fence is proportionate. Both these questions are important for the examination of proportionality. However, they also raise separate problems regarding the scope of judicial review. [...]

47. [...] Therefore, in our examination of the contrasting military considerations in this case, we give special weight to the fact that the commander of the area is responsible for security. Having employed this approach, we are of the opinion – the details of which we shall explain below – that petitioners have not carried their burden, and have not convinced us that we should prefer the professional expert opinion of members of the Council for Peace and Security over the security stance of the commander of the area. We are dealing with two military approaches. Each of them has military advantages and disadvantages. In this state of affairs, we must place the expert opinion of the military commander at the foundation of our decision.

### ***The Proportionality of the Route of the Separation Fence***

48. [...] The standard for this question is not the subjective standard of the military commander. The question is not whether the military commander believed, in good faith, that the injury is proportionate. The standard is objective. The question is whether, by legal standards, the route of the separation fence passes the tests of proportionality. This is a legal question, the expertise for which is held by the Court.

### ***From the General to the Specific***

49. The key question before us is [...]: is the injury caused to local inhabitants by the separation fence proportionate, or is it possible to satisfy the central security considerations while establishing a fence route whose injury to the local inhabitants is lesser and, as such, proportionate? The separation fence which is the subject of this petition is approximately forty kilometers long. Its proportionality varies according to local conditions. We shall examine its proportionality according to the various orders that were issued for the construction of different parts of the fence. We shall examine the legality of the orders along the route of the fence from west to east. This route starts east of the town of Maccabim and the Beit Sira village. It continues south to the town of Mevo Choron, and from there continues east to Jerusalem. The route of the fence continues to wind, and it divides between Israeli towns and Palestinian villages adjacent to it. It climbs Jebel Muktam in order to ensure Israeli control of it. As such, it passes the villages of Beit Likia, Beit Anan, and Chirbet Abu ALahm. After that, it advances east, separating Ma'aleh HaChamisha and Har Adar from the villages of Katane, El Kabiba, and Bidu. The fence continues and circles the village of Beit Sourik, climbing northward until it reaches route 443, which is a major traffic route connecting Jerusalem to the center of the country. In its final part, it separates the villages Bidu, Beit Ajaza, and Beit Daku from Har Shmuel, New Giv'on, and Giv'at Ze'ev.

[...]

***Order Tav/104/03; Order Tav/103/03; Order Tav/84/03 (The Western Part of the Order)***

51. These orders apply to more than ten kilometers of the fence route. This segment of the route surrounds the high mountain range of Jebel Muktam. This ridge topographically controls its immediate and general surroundings. It towers over route 443 which passes north of it, connecting Jerusalem to Modi'in. The route of the obstacle passes from southwest of the village of Beit Likia, southwest of the village of Beit Anan, and west of the village of Chirbet Abu A-Lahm. Respondent explains that the objective of this route is to keep the mountain area under Israeli control. This will ensure an advantage for the armed forces, who will topographically control the area of the fence, and it will decrease the capability of others to attack those traveling on route 443.
52. Petitioners painted a severe picture of how the fence route will damage the villages along it. [...]
53. Respondents dispute this presentation of the facts. [...]
56. From a military standpoint, there is a dispute between experts regarding the route that will realize the security objective. As we have noted, this places a heavy burden on petitioners, who ask that we prefer the opinion of the experts of the Council for Peace and Security [among them former Israeli generals] over the approach of the military commander. The petitioners have not carried this burden. We cannot – as those who are not experts in military affairs – determine whether military considerations justify laying the separation fence north of Jebel Muktam (as per the stance of the military commander) or whether there is no need for the separation fence to include it (as per the stance of petitioners' and the Council for Peace and Security). Thus, we cannot take any position regarding whether the considerations of the military commander, who wishes to hold topographically controlling hills and thus prevent "flat-trajectory" fire, are correct, militarily speaking, or not. In this state of affairs, there is no justification for our interference in the route of the separation fence from a military perspective.
57. Is the injury to the local inhabitants by the separation fence in this segment, according to the route determined by respondent, proportionate? Our answer to this question necessitates examination of the route's proportionality, using the three subtests. The first subtest examines whether there is a rational connection between the objective of the separation fence and its established route. Our answer is that such a rational connection exists. [...] By our very ruling that the route of the fence passes the test of military rationality, we have also held that it realizes the military objective of the separation fence.
58. The second subtest examines whether it is possible to attain the security objectives of the separation fence in a way that causes less injury to the local inhabitants. [...] The position of the military commander is that the route of the separation fence, as proposed by members of the Council for Peace and Security, grants less security than his proposed route. By our very determination that we shall not intervene in that position, we have also determined that there is no alternate route that fulfills, to a similar extent, the security needs while causing

lesser injury to the local inhabitants. In this state of affairs, our conclusion is that the second subtest of proportionality, regarding the issue before us, is satisfied.

59. The third subtest examines whether the injury caused to the local inhabitants by the construction of the separation fence stands in proper proportion to the security benefit from the security fence in its chosen route. This is the proportionate means test (or proportionality “in the narrow sense”). [...] According to this subtest, a decision of an administrative authority must reach a reasonable balance between communal needs and the damage done to the individual. The objective of the examination is to determine whether the severity of the damage to the individual and the reasons brought to justify it stand in proper proportion to each other. This judgment is made against the background of the general normative structure of the legal system, which recognizes human rights and the necessity of ensuring the provision of the needs and welfare of the local inhabitants, and which preserves “family honour and rights” (Regulation 46 of the Hague Regulations). All these are protected in the framework of the humanitarian provisions of the Hague Regulations and the Geneva Convention. The question before us is: does the severity of the injury to local inhabitants, by the construction of the separation fence along the route determined by the military commander, stand in reasonable (proper) proportion to the security benefit from the construction of the fence along that route?
60. Our answer is that there [*sic*] relationship between the injury to the local inhabitants and the security benefit from the construction of the separation fence along the route, as determined by the military commander, is not proportionate. The route undermines the delicate balance between the obligation of the military commander to preserve security and his obligation to provide for the needs of the local inhabitants. This approach is based on the fact that the route which the military commander established for the security fence – which separates the local inhabitants from their agricultural lands – injures the local inhabitants in a severe and acute way, while violating their rights under humanitarian international law. Here are the facts: more than 13,000 farmers (falihin) are cut off from thousands of dunams of their land and from tens of thousands of trees which are their livelihood, and which are located on the other side of the separation fence. No attempt was made to seek out and provide them with substitute land, despite our oft[en] repeated proposals on that matter. The separation is not hermetic: the military commander announced that two gates will be constructed, from each of the two villages, to its lands, with a system of licensing. This state of affairs injures the farmers severely, as access to their lands (early in the morning, in the afternoon, and in the evening), will be subject to restrictions inherent to a system of licensing. Such a system will result in long lines for the passage of the farmers themselves; it will make the passage of vehicles (which themselves require licensing and examination) difficult, and will distance the farmer from his lands (since only two daytime gates are planned for the entire length of this segment of the route). As a result, the life of the farmer will change completely in comparison to his previous life. The route of the separation fence severely violates their right of property and their freedom of movement. Their livelihood



is severely impaired. The difficult reality of life from which they have suffered (due, for example, to high unemployment in that area) will only become more severe.

61. These injuries are not proportionate. They can be substantially decreased by an alternate route, either the route presented by the experts of the Council for Peace and Security, or another route set out by the military commander. Such an alternate route exists. It is not a figment of the imagination. It was presented before us. It is based on military control of Jebel Muktam, without “pulling” the separation fence to that mountain. Indeed, one must not forget that, even after the construction of the separation fence, the military commander will continue to control the area east of it. In the opinion of the military commander – which we assume to be correct, as the basis of our review – he will provide less security in that area. However, the security advantage reaped from the route as determined by the military commander, in comparison to the proposed route, does not stand in any reasonable proportion to the injury to the local inhabitants caused by this route. Indeed, the real question in the “relative” examination of the third proportionality subtest is not the choice between constructing a separation fence which brings security but injures the local inhabitants, or not constructing a separation fence, and not injuring the local inhabitants. The real question is whether the security benefit reaped by the acceptance of the military commander’s position (that the separation fence should surround Jebel Muktam) is proportionate to the additional injury resulting from his position (with the fence separating local inhabitants from their lands). Our answer to this question is that the military commander’s choice of the route of the separation fence is disproportionate. The gap between the security provided by the military commander’s approach and the security provided by the alternate route is minute, as compared to the large difference between a fence that separates the local inhabitants from their lands, and a fence which does not separate the two (or which creates a separation which is smaller and possible to live with). Indeed, we accept that security needs are likely to necessitate an injury to the lands of the local inhabitants and to their ability to use them. International humanitarian law on one hand, however, and the basic principles of Israeli administrative law on the other, require making every possible effort to ensure that injury will be proportionate. Where construction of the separation fence demands that inhabitants be separated from their lands, access to these lands must be ensured, in order to minimize the damage to the extent possible.
62. We have reached the conclusion that the route of the separation fence, which separates the villages of Beit Likia and Beit Anan from the lands which provide the villagers with their livelihood, is not proportionate. This determination affects order Tav/103/03, which applies directly to the territory of the mountain itself, and leads to its annulment. This determination also affects order Tav/104/03 which applies to the route west of it, which turns in towards the village of Beit Likia, in order to reach the mountain. The same goes for the western part of order Tav/84/03, which descends from the mountain in a southeasterly direction. [...]



***The Eastern Tip of Order no. Tav/107/03 and Order no. Tav/108/03***

68. This order applies to the five and a half kilometer long segment of the route of the obstacle which passes west and southeast of the villages of Beit Sourik (population: 3500) and Bidu (population: 7500). A study of this part of the route, as published in the original order, reveals that the injury to these villages is great. From petitioners' data – which was not negated by respondents – it appears that 500 dunams of the lands of the village of Beit Sourik will be directly damaged by the positioning of the obstacle. 6000 additional dunams will remain beyond it (5000 dunams of which are cultivated land), including three greenhouses. Ten thousand trees will be uprooted and the inhabitants of the villages will be cut off from 25,000 thousand olive trees, 25,000 fruit trees and 5400 fig trees, as well as from many other agricultural crops. These numbers do not capture the severity of the damage. We must take into consideration the total consequences of the obstacle for the way of life in this area. The original route as determined in the order leaves the village of Beit Sourik bordered tightly by the obstacle on its west, south, and east sides. This is a veritable chokehold, which will severely stifle daily life. The fate of the village of Bidu is not much better. The obstacle surrounds the village from the east and the south, and impinges upon lands west of it. From a study of the map attached by the respondents (to their response of March 10, 2004) it appears that, on this segment of the route, one seasonal gate will be established south of the village of Beit Sourik. In addition, a checkpoint will be positioned on the road leading eastward from Bidu.
69. In addition to the parties' arguments before us, a number of residents of the town of Mevasseret Tzion, south of the village of Beit Sourik, asked to present their position. They pointed out the good neighborly relations between Israelis and Palestinians in the area and expressed concern that the route of the fence, which separates the Palestinian inhabitants from their lands, will put those relations to an end. They argue that the Palestinians' access to their lands will be subject to a series of hindrances and violations of their dignity, and that this access will even be prevented completely. On the other hand, Mr. Efraim Halevi asked to present his position, which represents the opinion of other residents of the town of Mevasseret Tzion. He argues that moving the route of the fence southward, such that it approaches Mevasseret Tzion, will endanger its residents.
70. As with the previous orders, here too we take the route of the separation fence determined by the military commander as the basis of our examination. We do so, since we grant great weight to the stance of the official who is responsible for security. The question which arises before us is: is the damage caused to the local inhabitants by this part of the separation fence route proportionate? Here too, the first two subtests of the principle of proportionality are satisfied. Our doubt relates to the satisfaction of the third subtest. On this issue, the fact is that the damage from the segment of the route before us is most severe. The military commander himself is aware of that. During the hearing of the petition, a number of changes in the route were made in order to ease the situation of the local inhabitants. He mentioned that these changes provide an inferior

solution to security problems, but will allow the injury to the local inhabitants to be reduced, and will allow a reasonable level of security. However, even after these changes, the injury is still very severe. The rights of the local inhabitants are violated. Their way of life is completely undermined. The obligations of the military commander, pursuant to the humanitarian law enshrined in the Hague Regulations and the Fourth Geneva Convention, are not being satisfied.

71. The Council for Peace and Security proposed an alternate route, whose injury to the agricultural lands is much smaller. It is proposed that the separation fence be distanced both from the east of the village of Beit Sourik and from its west. Thus, the damage to the agricultural lands will be substantially reduced. We are convinced that the security advantage achieved by the route, as determined by the military commander, in comparison with the alternate route, is in no way proportionate to the additional injury to the lives of the local inhabitants caused by this order. There is no escaping the conclusion that, for reasons of proportionality, this order before us must be annulled. The military commander must consider the issue again. [...] This is the military commander's affair, subject to the condition that the location of the route free the village of Beit Sourik (and to a lesser extent, the village of Bidu) from the current chokehold and allow the inhabitants of the villages access to the majority of their agricultural lands.

[...]

### ***Overview of the Proportionality of the Injury Caused by the Orders***

82. Having completed the examination of the proportionality of each order separately, it is appropriate that we lift our gaze and look out over the proportionality of the entire route of the part of the separation fence which is the subject of this petition. The length of the part of the separation fence to which these orders apply is approximately forty kilometers. It causes injury to the lives of 35,000 local inhabitants. 4000 dunams of their lands are taken up by the route of the fence itself, and thousands of olive trees growing along the route itself are uprooted. The fence separates the eight villages in which the local inhabitants live from more than 30,000 dunams of their lands. The great majority of these lands are cultivated, and they include tens of thousands of olive trees, fruit trees and other agricultural crops. The licensing regime which the military commander wishes to establish cannot prevent or substantially decrease the extent of the severe injury to the local farmers. Access to the lands depends upon the possibility of crossing the gates, which are very distant from each other and not always open. Security checks, which are likely to prevent the passage of vehicles and which will naturally cause long lines and many hours of waiting, will be performed at the gates. These do not go hand in hand with the farmer's ability to work his land. There will inevitably be areas where the security fence will have to separate the local inhabitants from their lands. In these areas, the commander should allow passage which will reduce, to the extent possible, the injury to the farmers.

83. During the hearings, we asked respondent whether it would be possible to compensate petitioners by offering them other lands in exchange for the lands that were taken to build the fence and the lands that they will be separated from. We did not receive a satisfactory answer. This petition concerns farmers that make their living from the land. Taking petitioners' lands obligates the respondent, under the circumstances, to attempt to find other lands in exchange for the lands taken from the petitioners. Monetary compensation may only be offered if there are no substitute lands.
84. The injury caused by the separation fence is not restricted to the lands of the inhabitants and to their access to these lands. The injury is of far wider a scope. It strikes across the fabric of life of the entire population. In many locations, the separation fence passes right by their homes. In certain places (like Beit Sourik), the separation fence surrounds the village from the west, the south and the east. The fence directly affects the links between the local inhabitants and the urban centers (Bir Nabballa and Ramallah). This link is difficult even without the separation fence. This difficulty is multiplied sevenfold by the construction of the fence.
85. The task of the military commander is not easy. He must delicately balance between security needs and the needs of the local inhabitants. We were impressed by the sincere desire of the military commander to find this balance, and his willingness to change the original plan in order to reach a more proportionate solution. We found no stubbornness on his part. Despite all this, we are of the opinion that the balance determined by the military commander is not proportionate. There is no escaping, therefore, a renewed examination of the route of the fence, according to the standards of proportionality that we have set out.

### ***Epilogue***

86. Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security. [...] Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for. The result is that we reject the petition against order no. Tav/105/03. We accept the petition against orders Tav/104/03, Tav/103/03,

Tav/84/03 (western part), Tav/107/03, Tav/108/03, Tav/109/03, and Tav/110/03 (to the extent that it applies to the lands of Beit Daku), meaning that these orders are nullified, since their injury to the local inhabitants is disproportionate.

Respondents will pay 20,000 NIS in petitioners' costs.

**Vice President E. Mazza**

I concur.

**Justice M. Cheshin**

I concur.

Held, as stated in the opinion of President A. Barak.

June 30, 2004

### **C. HCJ, *Mara'abe [et al.] v. The Prime Minister of Israel [et al.]***

[Source: HCJ, *Zaharan Yunis Muhammad Mara'abe [et al.] v. The Prime Minister of Israel [et al.]*, HCJ 7957/04; available at <http://elyon1.court.gov.il/eng/home/index.html>]

**HCJ 7957/04**

**Petitioners: 1. Zaharan Yunis Muhammad Mara'abe**

[...]

**v.**

**Respondents: 1. The Prime Minister of Israel**

[...]

**The Supreme Court Sitting as the High Court of Justice**

[September 12 2004; March 31 2005; June 21 2005]

[...]

**JUDGMENT**

**President A. Barak:**

Alfei Menashe is an Israeli town in the Samaria *area*. It was established approximately four kilometers beyond the Green Line. Pursuant the military commander's orders, a separation fence was built, surrounding the town from all sides, and leaving a passage containing a road connecting the town to Israel. A number of Palestinian villages are included within the fence's perimeter. The separation fence cuts them off from the remaining parts of the Judea and Samaria *area*. An enclave of Palestinian villages on the "Israeli" side of the fence has been created. Petitioners are residents of the villages. They contend that the separation fence is not legal. This contention of theirs is based upon the judgment in *The Beit Sourik Case* [...] [See **Part B** of this case]. The petition also relies upon the Advisory Opinion of the International Court of Justice at the Hague [...] [See **Part A** of this case]. Is the separation fence legal? That is the question before us.

**A. The Background and the Petition**

[...]

The separation fence discussed in the petition before us is part of phase A of fence construction. The separation fence discussed in The Beit Sourik Case is part of phase C of fence construction. [...] [See **Part A** of this case, paras 80-81]

**2. The Alfei Menashe Enclave**

The Alfei Menashe enclave – the topic of the petition before us – is part of phase A of the fence. The decision regarding it was reached on June 23 2002. The construction of the fence was finished in August 2003. The fence circumscribes Alfei Menashe (population approximately 5650) and five Palestinian villages (population approximately 1200) [...].

**3. The Petition**

[...]

11. Petitioners contend that the separation fence is not legal, and should be dismantled. They argue that the military commander is not authorized to give orders to construct the separation fence. That claim is based on the Advisory Opinion of the International Court of Justice at the Hague (hereinafter also "ICJ"). Petitioners also contend that the separation fence does not satisfy the standards determined in The *Beit Sourik Case*. On this issue, petitioners argue that the fence is disproportionate and discriminatory. [...] On the merits, respondents argue that the military commander is authorized to erect a separation fence, as ruled in The *Beit Sourik Case*. The Advisory Opinion of the International Court of Justice at the Hague makes no difference in this regard, since it was based upon a factual basis different from that established in The *Beit Sourik Case*. Respondents also contend that the injury to the Palestinian residents satisfies the standards determined in The *Beit Sourik Case*.

[...]

**B. The Normative Outline in the Supreme Court's Caselaw**

[...]

**2. The Military Commander's Authority to Erect a Security Fence**

15. Is the military commander authorized, according to the law of belligerent occupation, to order the construction of a separation fence in the Judea and Samaria *area*? In The *Beit Sourik Case* our answer was that the military commander is not authorized to order the construction of a separation fence, if the reason behind the fence is a political goal of "annexing" territories of the *area* to the State of Israel and to determine Israel's political border. The military commander is authorized to order the construction of the separation fence if the reason behind its construction is a security and military one. [...]

[...]

18. The rationale behind the military commander's authority to construct a separation fence for security and military reasons includes, first and foremost, the need to protect the army in the territory under belligerent occupation. It also includes defense of the State of Israel itself [...]. Does the military commander's authority to construct a separation fence also include his authority to construct a fence in order to protect the lives and safety of Israelis living in Israeli communities in the Judea and Samaria *area*? This question arises in light of the fact that Israelis living in the *area* are not "protected persons," as per the meaning of that term in §4 of *The Fourth Geneva Convention* [...]. Is the military commander authorized to protect the lives and defend the safety of people who are not "protected" under *The Fourth Geneva Convention*? In our opinion, the answer is positive. The reason for this is twofold: first, the military commander's general authority is set out in regulation 43 of *The Hague Regulations*, which determines:

"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

The authority of the military commander is, therefore, "to ensure . . . public order and safety". This authority is not restricted only to situations of actual combat. It applies as long as the belligerent occupation continues [...]. This authority is not restricted only to the persons protected under international humanitarian law. It is a general authority, covering any person present in the territory held under belligerent occupation. [...]

In another case I [stated]:

"The Israeli settlement in the Gaza Strip is controlled by the law of belligerent occupation. Israeli law does not apply in this area . . . the lives of the settlers are arranged, mainly, by the security legislation of the military commander. The military commander's authority 'to ensure public order and safety' is directed towards every person present in the area under belligerent occupation. It is not restricted to 'protected persons' only . . . this authority of his covers all Israelis present in the area" [...].

Indeed, the military commander must ensure security. He must preserve the safety of every person present in the *area* of belligerent occupation, even if that person does not fall into the category of 'protected persons' [...].

19. Our conclusion is, therefore, that the military commander is authorized to construct a separation fence in the *area* for the purpose of defending the lives and safety of the Israeli settlers in the *area*. It is not relevant whatsoever to this conclusion to examine whether this settlement activity conforms to international law or defies it, as determined in the Advisory Opinion of the International Court of Justice at the Hague. For this reason, we shall express no position regarding that question. The authority to construct a security fence for the purpose of defending

the lives and safety of Israeli settlers is derived from the need to preserve “public order and safety” (regulation 43 of *The Hague Regulations*). It is called for, in light of the human dignity of every human individual. It is intended to preserve the life of every person created in God’s image. The life of a person who is in the *area* illegally is not up for the taking. Even if a person is located in the *area* illegally, he is not outlawed. This Court took this approach in a number of judgments. [...]

In a similar vein wrote my colleague, Justice A. Procaccia:

“Alongside the area commander’s responsibility for safeguarding the safety of the military force under his command, he must ensure the well being, safety and welfare of the residents of the area. This duty of his applies to all residents, without distinction by identity – Jew, Arab, or foreigner. The question of the legality of various populations’ settlement activity in the area is not the issue put forth for our decision in this case. From the very fact that they have settled in the area is derived the area commander’s duty to preserve their lives and their human rights. This sits well with the humanitarian aspect of the military force’s responsibility in belligerent occupation” [...].

20. Indeed, the legality of the Israeli settlement activity in the *area* does not affect the military commander’s duty – as the long arm of the State of Israel – to ensure the life, dignity and honor, and liberty of every person present in the *area* under belligerent occupation [...]. Even if the military commander acted in a manner that conflicted the law of belligerent occupation at the time he agreed to the establishment of this or that settlement – and that issue is not before us, and we shall express no opinion on it – that does not release him from his duty according to the law of belligerent occupation itself, to preserve the lives, safety, and dignity of every one of the Israeli settlers. The ensuring of the safety of Israelis present in the *area* is cast upon the shoulders of the military commander [...].
21. The second reason which justifies our conclusion that the military commander is authorized to order the construction of a separation fence intended to protect the lives and ensure the security of the Israeli settlers in the *area* is this: the Israelis living in the *area* are Israeli citizens. The State of Israel has a duty to defend their lives, safety, and well being. Indeed, the constitutional rights which our Basic Laws and our common law grant to every person in Israel are also granted to Israelis who are located in territory under belligerent occupation which is under Israeli control. [...]

In sum, Israelis present in the *area* have the rights to life, dignity and honor, property, privacy, and the rest of the rights which anyone present in Israel enjoys [...]. Converse to this right of theirs stands the state’s duty to refrain from impinging upon these rights, and to protect them. In one case, an Israeli wished to enter the *area*. The military commander refused the request, reasoning his refusal by the danger to the Israeli from being present in the place he wished to enter. The Israeli responded that he will “take the risk” upon himself. We rejected this approach, stating:

"Israel has the duty to protect her citizens. She does not satisfy her duty merely since citizens are willing to 'take the risk upon themselves'. This 'taking of risk' does not add or detract from the issue, as the state remains obligated to the well being of its citizens, and must do everything possible to return them safely to the country" [...].

Thus it is, generally speaking. Thus it certainly is, when many of the Israelis living in the *area* do so with the encouragement and blessing of the government of Israel.

22. Of course, the scope of the human right of the Israeli living in the *area*, and the level of protection of the right, are different from the scope of the human right of an Israeli living in Israel and the level of protection of that right. At the foundation of this differentiation lies the fact that the *area* is not part of the State of Israel. Israeli law does not apply in the *area*. He who lives in the *area* lives under the regime of belligerent occupation. Such a regime is inherently temporary [...]. The rights granted to Israelis living in the *area* came to them from the military commander. They have no more than what he has – *Nemo dat quod non habet*. Therefore, in determining the substance of the rights of Israelis living in the *area*, one must take the character of the area and the powers of the military commander into account. [...]

## DISCUSSION

### I. Applicable law

1.
  - a. Are the Hague Regulations and GC IV applicable to the Palestinian territories? According to the International Court of Justice (ICJ)? According to the Israeli High Court of Justice (HCJ)?
  - b. Which para. of GC IV, Art. 2 (para. 1 or para. 2) is decisive for the ICJ's conclusion as to the applicability of GC IV?
  - c. (*ICJ, para. 1*) How can the General Assembly resolution reaffirm the applicability of Protocol I while Israel is not a party to that treaty? Does the ICJ apply Protocol I? If it had done so, would its conclusions have been different?
  - d. (*ICJ, para. 91*) In which sense is the unilateral undertaking given by the declaration of 7 June 1982 to respect GC IV valid? Does it make Palestine a State party to GC IV? Has this undertaking any impact on the outcome of the case before the HCJ?
2. Are all provisions of GC IV still applicable in the Palestinian territories, or only those referred to in Art. 6(3)? Have all military operations in the territories ceased?

### II. Legality of the construction of the wall/fence

3.
  - a. Does the construction of the wall/fence amount to an annexation? According to the ICJ? According to the HCJ? Would such an annexation be contrary to IHL? What does the ICJ say about this?
  - b. Would the HCJ have found the wall/fence illegal if its route had been influenced by anything other than security considerations? May an occupying power take into account the security of its own population on its national territory? That of inhabitants of settlements? On what basis



does the HCJ come to the conclusion that no political or Zionist considerations influenced the route of the wall? Does the fact that it does not follow the “Green Line” argue in favour of the opposite conclusion?

4. a. (*ICJ, Separate Opinion of Judge Higgins, paras 23 and 24*) Does the ICJ explain why the wall/fence violates Arts 47, 49, 52, 53 and 59 of GC IV? Can you explain this for each of these provisions? Do you agree with Judge Higgins’ criticism?
- b. Explain why the destruction and requisition of private property contravene the requirements of Arts 46 and 52 of the Hague Regulations and of Art. 53 of GC IV. Is this conclusion correct even if the facts are those described by the HCJ (*HCJ, Beit Sourik, para. 8*)? Do you agree with Judge Buergenthal’s criticism (*ICJ, Declaration of Judge Buergenthal*)?
- c. (*ICJ, paras 135-137*) Which of the provisions mentioned by the ICJ are subject to derogations if military exigencies so require? Are military exigencies and military operations equivalent? Why is the destruction of private property necessary to build the wall not permitted under Art. 53 of GC IV?
- d. May an occupying power seize land for the needs of its army? For security reasons?

### III. Protection of Israeli settlers

(*HCJ, Mara’abe, paras 15-22*)

5. Why does the HCJ say that the Israelis living in Palestinian territories are not “protected persons” according to GC IV? What is their status? Are they protected by IHL at all?
6. a. Do you agree with the HCJ that Art. 43 of the Hague Regulations applies to the Israeli settlers living in Palestinian territories? What does the duty to “restore, and ensure, as far as possible, public order and safety” entail? Does it include the protection of the settlers, who arrived after the occupation began?
- b. Do you think that protecting Israeli settlements in Palestinian territories will contribute to restoring or ensuring public order and safety in the West Bank?
7. (*ICJ, para. 120*) Why are Israeli settlements in the Palestinian territories prohibited? Does every establishment of an Israeli citizen in the Palestinian territories violate IHL? Is the fact that Israeli settlements are included within the wall decisive for the conclusion that it contravenes IHL? For the ICJ? For Judge Buergenthal? In your opinion? Does the HCJ deal with the prohibition of settlements? Why not? Isn’t it a humanitarian rule of GC IV?
8. a. May Israel protect the lives of settlers in the occupied territories? Does it even have a duty under IHL to protect its citizens living in Palestinian territories? Even if those citizens were transferred unlawfully into the occupied territory? May it only protect their lives, or also their continued presence in the occupied territories? Wouldn’t it be contradictory for IHL to protect settlements that it prohibits?
- b. Is the HCJ saying that GC IV applies to the Palestinian territories? Why does it refer to GC IV, whereas Israel has always denied its *de jure* application?
- c. (*ICJ, Declaration of Judge Buergenthal, para. 9*) Do you agree with Judge Buergenthal that, as the settlements are illegal under international law, any measure to protect them, including the construction of the wall/fence, is necessarily illegal?
9. Does Israeli law apply in the occupied territories? What does the Court say in this regard (*HCJ, Mara’abe, para. 22*)? May the protection of Israeli citizens in the occupied territories be based on Israel’s Basic Laws and its common law?

#### IV. Proportionality

(HCJ, *Beit Sourik*, paras 36-85)

10. a. Do you agree with the HCJ's definition of proportionality? With the application of that definition to the facts?
- b. Does the HCJ consider that a route for the wall/fence less injurious for Palestinians exists? Does it therefore consider that the present route is disproportionate? Would the HCJ consider the route disproportionate if the security interests and the injury to Palestinians were the same, but no alternative route existed?
- c. Does the HCJ consider that if a measure violating IHL is proportionate, it is admissible?
- d. Does the ICJ refer at all to the question of proportionality? In the context of IHL or of international human rights law?

#### V. Human rights law and self-defence

(ICJ, paras 102-113 and 127-137)

11. a. Is international human rights law applicable in armed conflicts? If yes, how do you determine whether that law or IHL prevails if they are contradictory?
- b. Does international human rights law apply in an occupied territory? Are the reasons the same for the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child? According to the ICJ? In your opinion?
- c. Are all provisions of human rights treaties fully applicable during an armed conflict? Are derogations due to the exigencies of the situation only admissible so long as they are officially declared?
- d. Are the human rights mentioned by the ICJ also protected by IHL in occupied territories? Which are not protected by the latter? Are there any contradictions between those human rights and IHL?
- e. Does IHL provide for freedom of movement in an occupied territory? Is such freedom compatible with IHL?
- f. Does international human rights law lead the ICJ to any conclusion in this case which it would not have reached under IHL?
- g. Does the HCJ apply international human rights law?
12. Can the right to self-defence or a state of necessity justify violations of IHL? Of international human rights law? According to the ICJ? The HCJ? In your opinion?

#### VI. Consequences

(ICJ, paras 147-160; HCJ, *Beit Sourik*, para. 86)

13. What are the legal consequences of the illegality of the wall/fence for Israel? According to the ICJ? According to the HCJ?
14. a. What are the legal consequences of the illegality of the wall/fence for third States?
- b. Do all rules of IHL have an *erga omnes* character? What is the impact of such an *erga omnes* character?
- c. Does common Art. 1 mean that third States must ensure respect for IHL by Israel? Does it simply confirm the *erga omnes* character of IHL rules, or does it also have an additional meaning? Do

- you agree with the criticism by Judge Koojijmans and Professor Kalshoven of this interpretation of common Art. 1?
- d. In practice, what is meant by the obligation for third States not to recognize the illegal situation resulting from the construction of the wall/fence? What about their obligation not to render aid or assistance in maintaining the situation created by such a construction? What are the reasons for such obligations?
  - e. What measures must third States take to ensure that the wall/fence is not built? Are there any limitations to those measures?
  - f. Do you agree with Judge Koojijmans' criticism of operative subpara. (3)(D) of the ICJ decision?
15. Does Judge Buergenthal consider that the construction of the wall/fence does not violate IHL?
16. Is Judge Higgins right that the ICJ should also have dealt with the broader context, i.e. the suicide attacks by Palestinians on Israeli civilians? Do those attacks violate IHL? Could such violations have led to different conclusions by the ICJ? If the ICJ had attributed those attacks to the Palestinian Authority?
17. (*HCJ, Beit Sourik, para. 86*) Do you agree with the HCJ that there is no security without law and that satisfying the provisions of the law is an aspect of national security? If yes, explain why.

**Case No. 124, Israel/Gaza, Operation Cast Lead****I. The Report of the Israeli Ministry of Foreign Affairs**

[Source: "The Operation in Gaza, Factual and Legal Aspects," Report, Israeli Ministry of Foreign Affairs, July 2009, available at <http://www.mfa.gov.il> (footnotes omitted)]

**THE OPERATION IN GAZA****27 DECEMBER 2008 – 18 JANUARY 2009****Factual and Legal Aspects**

[...]

**III. THE APPLICABLE LEGAL FRAMEWORK**

[...]

28. First, the applicable legal framework for assessing the recent operations in Gaza is the "Law of Armed Conflict," also known as "International Humanitarian Law." According to the decision of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in the *Tadić* case, "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State." The conflict between Israel and Hamas in Gaza meets this definition. Hamas is a highly organised and well-armed group that uses armed force against Israel, and, indeed, considers such armed struggle to be its primary mission. By any measure, the conflict between Israel and Hamas has been protracted, spanning many years and intensifying in recent years as Hamas tightened its unlawful grip on Gaza.
29. Generally, international law recognises two kinds of armed conflicts: "international armed conflict" and "non-international armed conflict." Each has its own rules, although many of the basic provisions are common to both. It is not yet settled which regime applies to cross-border military confrontations between a sovereign State and a non-State terrorist armed group operating from a separate territory.
30. In this case, the Gaza Strip is neither a State nor a territory occupied or controlled by Israel. In these *sui generis* circumstances, Israel as a matter of policy applies to its military operations in Gaza the rules of armed conflict governing both international and non-international armed conflicts. At the end of the day, classification of the armed conflict between Hamas and Israel as international or non-international in the current context is largely of theoretical concern, as many similar norms and principles govern both types of conflicts.

31. Some of the rules governing the use of force in armed conflicts are set forth in treaties, such as the Geneva Conventions of 1949 and the Regulations annexed to the Fourth Hague Convention of 1907. Others have gained acceptance by the practice of the international community and become part of customary international law. The Israeli High Court has ruled that these customary international law rules bind Israel under both international law and Israeli law. In particular, Israel's High Court of Justice has confirmed that in the ongoing armed conflict with Palestinian terrorist organisations, including Hamas, Israel must adhere to the rules and principles in (a) the Fourth Geneva Convention, (b) the Regulations annexed to the Fourth Hague Convention (which reflect customary international law), and (c) the customary international law principles reflected in certain provisions of Additional Protocol I to the Geneva Conventions on 1949. Israel is not a party to the Additional Protocol I, but accepts that some of its provisions accurately reflect customary international law.

[...]

#### IV. THE CONTEXT OF THE OPERATION

##### A. The Ongoing Armed Conflict with Hamas

36. Israel has been engaged in an ongoing armed conflict with Hamas and other Palestinian terrorist organisations since the massive outbreak of armed terrorist violence and hostilities in October 2000, what the Palestinians have termed the *Al Aqsa Intifadah*. [...]
38. Hamas has chosen, in particular, to launch extensive and almost incessant rocket and mortar attacks against civilian communities in Southern Israel. For the eight years preceding the Gaza Operation at issue in this Paper, Hamas and other terrorist organisations (such as "Palestinian Islamic Jihad" and the "Popular Resistance Committees") launched more than 12,000 rockets and mortar rounds from the Gaza Strip at the towns in Southern Israel. The daily attacks began in 2000 and have continued since that time with only brief respites in the violence.
39. In August 2005 Israel withdrew from the Gaza Strip, terminating its civilian and military presence there. Hamas exploited this disengagement to promote its terrorist agenda and publicly endorsed terrorism as the preferred tool for achieving its political goals. For instance, on 30 March 2007 Hamas spokesman Ismail Radwan issued a call to "liberate Palestine" by attacking and killing Jews rather than by engaging in diplomatic efforts.
40. In June 2007 Hamas executed a violent and bloody *coup d'état* in the Gaza Strip, [...] neutralising the Palestinian Authority's military and political power and setting up a radical Muslim entity in its place. [...]

##### B. Hamas' Increasing Attacks on Israel During 2008

41. Following Hamas' violent takeover of the Gaza Strip, the frequency and intensity of rocket and mortar attacks on Israel increased dramatically. In 2008 alone, nearly

3,000 rockets and mortars were fired, despite the six relatively calm months of the lull ("*Tahadiya*") [...].

60. On Friday, 19 December 2008, Hamas unilaterally announced the end of the *Tahadiya*, launching dozens of Qassam and longer-range Grad rockets against Israeli population centres. [...] On [...] 24 December 2008, thirty more rockets were launched into Israel. [...]
67. In these circumstances, there is no question that Israel was legally justified in resorting to the use of force against Hamas. As explained above, this resort to force occurred in the context of an ongoing armed conflict between a highly organised, well-armed, and determined group of terrorists and the State of Israel. The Gaza Operation was simply the latest in a series of armed confrontations precipitated by the attacks perpetrated without distinction against all Israeli citizens by Hamas and its terrorist allies. In fact, over the course of this conflict, Israel conducted a number of military operations in the West Bank and the Gaza Strip, to halt terrorist attacks.

[...]

## **E. Stages of the Operation**

83. On 27 December 2008, after exhausting other alternatives and after issuing warnings that Israel would attack if the rocket and mortar assault from Gaza did not stop, the IDF launched a military operation against Hamas and other terrorist organisations in the Gaza Strip. The Operation was limited to what the IDF believed necessary to accomplish its objectives: to stop the bombardment of Israeli civilians by destroying and damaging the mortar and rocket launching apparatus and its supporting infrastructure, and to improve the safety and security of Southern Israel and its residents by reducing the ability of Hamas and other terrorist organisations in Gaza to carry out future attacks. The Gaza Operation did not aim to re-establish an Israeli presence in the Gaza Strip.
84. The Gaza Operation commenced with aerial operations on 27 December 2008. These focused on Hamas terrorist infrastructure, as well as rocket and mortar launching units. The Israel Air Force ("IAF") targeted military objectives, including the headquarters from which Hamas planned and initiated operations against Israel, command posts, training camps and weapons stores used in the planning, preparation, guidance and execution of terrorist attacks. [...]
85. On 3 January 2009, one week into the Gaza Operation and facing the continued rocket and mortar attacks on Israeli civilians, the IDF commenced a ground manoeuvre. Despite initial reluctance, a ground manoeuvre was necessary because, despite the Israeli aerial attacks, Hamas refused to stop firing on Israeli localities. [...] Ground forces entered the Gaza Strip with naval and air support. The objectives of this manoeuvre included undermining Hamas' terrorist infrastructure, taking control of rocket and mortar launching sites and reducing the number of attacks on Israeli territory. The IDF expanded the ground

manoeuvre on 10 January 2009, entering deeper into the Gaza Strip, with the objective of dismantling terrorist infrastructure and taking control of rocket launching sites in the heart of the urban areas.

86. The Gaza Operation ended on 17 January 2009 (after 22 days in all) with Israel's implementation of a unilateral ceasefire. Subsequently, IDF troops began their withdrawal from the Gaza Strip, which they completed on 21 January 2009 in accordance with Security Council Resolution 1860. [...]

## V. THE USE OF FORCE

### A. The Legal Framework

89. Even where resort to force is justified, [...] customary law limits the manner in which a State can exercise force (*jus in bello*). The two critical aspects of this limitation – the principle of distinction and the principle of proportionality – are both designed to protect civilians not taking direct part in the hostilities and civilian objects, while taking into account the military necessities and the exigencies of the situation.
90. The fact of civilian casualties in an armed conflict, even in significant numbers, does not in and of itself establish any violation of international law. In fact, the doctrine of “proportionality operates in scenarios in which incidental injury and collateral damage are the foreseeable, albeit undesired, result of attack on a legitimate target.” [...]
92. [...] [O]ne cannot jump from the unfortunate occurrence of civilian harm to the unfounded conclusion that the attacks were illegal. The critical but often omitted link in determining the legality of an attack – even an attack that results in death or injury to civilians – is whether the attacking forces sought to observe the rules of the Law of Armed Conflict, and in particular the principles of distinction and proportionality. This analysis depends on the particular facts of each incident. When individual attacks are legitimate, “the mere cumulation” of such instances, all of which are deemed to have been lawful, “cannot *ipso facto* be said to amount to a crime.”

[...]

### (1) The Principle of Distinction

94. The first core principle of the Law of Armed Conflict, as reflected both in treaty law and in customary international law, is that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” The principle imposes obligations on both parties to an armed conflict.

**(a) *The Obligation Not to Target the Adversary's Civilians***

95. It is unlawful to deliberately make civilians the object of attack. As the customary international law principle is reflected in Additional Protocol I, "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary *purpose* of which is to spread terror among the civilian population are prohibited." Rather, "[a]ttacks shall be limited strictly to military objectives."
96. It is important to make clear what this principle does *not* require. First, by definition, the principle of distinction does not forbid the targeting of combatants, nor the targeting of civilians who take a direct part in the hostilities.
97. Second, this principle addresses only deliberate targeting of civilians, not incidental harm to civilians in the course of striking at legitimate military objectives. This understanding of customary international law was made explicit by numerous States in their ratifications of Additional Protocol I, and many other States have officially adopted this interpretation.
98. Direct participation in hostilities has been interpreted by Israel's High Court of Justice as involving all persons that perform the function of combatants, including "a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it," as well as "a person who collected intelligence on the army, whether on issues regarding the hostilities . . . or beyond those issues . . . ; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may." [See *Case No. 136*, Israel, *The Targeted Killings Case*, paras 34-35]
99. Fourth, more broadly, the presence of *civilians at a site* (whether voluntarily or involuntarily) does not by itself forbid an attack on an otherwise legitimate military target. [...]
101. The determination of what is a lawful "military objective" turns on an assessment of "military advantage." Additional Protocol I reflects customary international law in defining "military objectives" as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage." The tactics and strategy of the opposing force can transform sites that may once have been purely civilian into legitimate military objectives. [...]
105. The military manuals of many States also confirm that the relevant "military advantage" defining a "military objective" relates to "the military campaign or operation of which the attack is a part considered *as a whole* and not only from isolated or particular parts of that campaign or operation." Further, the "security of the attacking forces" is a proper consideration in assessing military advantage.



106. The manuals recognise as well that objects “normally dedicated to civilian purposes, but which are being used for military purposes” (such as houses, schools or churches) lose their protection under the applicable law, and may properly become lawful “military objectives.” [...]
107. The loss of absolute protection for a civilian site when it is misused by the adversary as a locus for military operations is broadly recognised in the Law of Armed Conflict. Thus, for instance, the hidden placement of a significant military asset within a civilian building or even the presence of enemy combatants can make the otherwise civilian site amenable to attack. This is a harsh reality of urban warfare.

[...]

110. [...] [A] commander’s *intent* is critical in reviewing the principle of distinction during armed conflict. Where it is believed in good faith, on the basis of the best available intelligence, that a civilian building has been misused as a sanctuary for military fighters, military intelligence, or the storage and manufacture of military assets, the commander has a legitimate basis for using force against the site. This is so even where judgment is based on limited information in a fluid battlefield situation.
111. The definition of military targets thus could include terrorists who move rapidly throughout a neighbourhood, even where they shelter themselves in civilian dwellings. It does not relieve the commander of the obligation to judge the proportionality of his action. But it makes clear that a civilian site can be converted to a legitimate target by the conduct of the opposing force in using such places for military purposes, including the escape of armed combatants.

[...]

## **(2) The Principle of Proportionality**

### **(a) The Obligation to Weigh Military Objectives Against Civilian Harm**

120. In addition to the principle of distinction, customary international law bars military attacks that are anticipated to harm civilians excessively in relation to the expected military advantage. [...]
121. The very notion of not inflicting “excessive” harm recognises that some civilian casualties may be unavoidable when pursuing legitimate military objectives. [...]
122. By definition, then, evaluation of proportionality (or excessive harm to civilians compared to military advantage) requires balancing two very different sets of values and objectives, in a framework in which all choices will affect human life. States have duties to protect the lives of their civilians and soldiers by pursuing proper military objectives, but they must balance this against their duty to minimise incidental loss of civilian lives and civilian property during military operations. That balancing is inherently difficult, and raises significant moral and ethical issues. [...]

125. Thus, the core question, in assessing a commander's decision to attack, will be (a) whether he or she made the determination on the basis of the best information available, given the circumstances, and (b) whether a reasonable commander could have reached a similar conclusion. [...]
126. The same criteria for assessing "military advantage" apply in the proportionality context, namely that the "military advantage anticipated" from a particular targeting decision must be considered from the standpoint of the overall objective of the mission. In addition, it may legitimately include not only the need to neutralise the adversary's weapons and ammunition and dismantle military or terrorist infrastructure, but also – as a relevant but not overriding consideration – protecting the security of the commander's own forces.

[...]

**(b) *The Obligation of Attacking Forces to Take Feasible Precautions to Minimise Incidental Civilian Harm***

132. In addition to the obligation to refrain from acts that would harm civilians disproportionately in relation to anticipated military advantage, Additional Protocol I requires both parties to a conflict to take "feasible" precautions to minimise incidental loss of civilian life. [...]
133. In assessing the adequacy of precautions, under the provisions of Additional Protocol I, the measure is one of "feasibility," not perfection. [...]

**B. Hamas' Breaches of the Law of Armed Conflict and War Crimes**

[...]

**(2) Abuse of Civilian Sites as Cover for Military Operations**

151. The Law of Armed Conflict not only prohibits targeting an enemy's civilians; it also requires parties to an armed conflict to distinguish their combatant forces from their own civilians, and not to base operations in or near civilian structures, especially protected sites such as schools, medical facilities and places of worship. As the customary law principle is reflected in Article 51(7) of Additional Protocol I,

"The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular attempts to shield military objectives from attacks or shield, favour or impede military operations."

[...]

153. The reason for these rules is clear. When a party to an armed conflict uses civilian and protected spaces for military purposes, those spaces become legitimate targets for the opposing side, thereby placing civilian lives and infrastructure in grave danger.

154. [...] Hamas' strategy was two-fold: (1) to take advantage of the sensitivity of the IDF to civilian casualties on the Palestinian side, in an attempt to deter the IDF from attacking legitimate military targets; and (2) where the IDF did attack, to wield an excellent propaganda weapon against Israel, featuring civilian casualties as well as damage to homes and public institutions. In other words, Hamas chose to base its operations in civilian areas not in spite of, but because of, the likelihood of substantial harm to civilians. The tactic did succeed in causing IDF to forego attacks on legitimate military objectives in order to protect the lives of innocent Palestinians and to preserve intact important public facilities. But in many cases, the IDF could not forego a legitimate military objective without undermining its mission and jeopardising both its soldiers and Israeli civilians. In those circumstances, the result of Hamas' approach was to make it difficult, and sometimes impossible, for IDF forces to avoid harm to civilians and civilian structures.

**(a) *Staging of Attacks From Residential Areas and Protected Sites***

[...]

159. During the Gaza Operation, Hamas continued to launch attacks from densely populated areas and protected sites. In fact, as IDF forces advanced into Gaza, Hamas began relying even more heavily than before on rocket and mortar launches from the midst of urban centres. [...]
162. In conducting rocket attacks from within civilian sites, Hamas committed grave breaches of the principle of distinction, as well as the obligation not to put its own civilians at risk.

**(b) *Use of Civilian Homes and Public Institutions as Bases of Operation***

163. In addition to staging rocket attacks from civilian areas, Hamas conducted much of its fighting during the Gaza Operation from bases within private residences and public facilities, which Hamas assumed the IDF would be reluctant to attack. [...]
169. During the Gaza Operation, Hamas frequently commandeered the homes of civilians as temporary bases to attack Israeli forces.
- [...]

**C. *IDF's Conduct of the Operation and Procedures to Ensure Compliance with International Law***

[...]

**(3) *IDF Pursuit of Legitimate Military Targets During the Gaza Conflict***

230. Consistent with its rules of engagement, IDF Forces sought to maintain an equilibrium between two competing considerations: military necessity and humanitarian considerations. In the course of the Gaza Operation, IDF's military necessities included first and foremost the prevention of rocket and mortar fire

against Israel and Israelis, as well as the dismantling of terrorist infrastructure, but also the protection of IDF forces operating in the Gaza Strip.

231. [...] IDF troops were exposed to considerable risk by the death traps Hamas had laid for them in urban areas [...]. These took the form of booby-trapped and mined neighbourhoods, buildings, roads and tunnels, as well as anti-tank rockets, automatic weapons, and sniper fire from concealed positions in civilian buildings and suicide bombers dressed as civilians. In such circumstances, the risk for the safety and security of IDF troops was extremely high, and was properly taken into account.
232. However, like all other considerations of military necessity, the protection of IDF troops did not override all other factors. In accordance with the IDF's operational plans and rules of engagement, military necessity was balanced against the fundamental obligations of the Law of Armed Conflict, through the principles of distinction, proportionality, and the obligation to take appropriate precautions to minimise civilian harm.

**(a) Targeting of Hamas Terrorist Infrastructure**

233. Consistent with the principle of distinction, IDF forces attacked military targets directly connected to Hamas and other terrorist organisations' military activities against Israel. For instance, IDF forces targeted Hamas rocket launchers, weapons stockpiles, command and control facilities, weapons factories, explosives laboratories, training facilities and communications infrastructure. That these objects were often concealed or embedded in civilian facilities such as residential buildings, schools, or mosques did not render them immune from attack. In accordance with the Law of Armed Conflict, civilian facilities that served military purposes did not enjoy protection from attack. Thus, a residential building that doubled as an ammunition depot or military headquarters was a legitimate military target for attack.

[...]

235. It should be noted that Israeli forces have come under criticism from various international organisations for attacking a number of Hamas targets, such as various "ministries" operated by Hamas, which were alleged to be civilian in nature. While Hamas operates ministries and is in charge of a variety of administrative and traditionally governmental functions in the Gaza Strip, it still remains a terrorist organisation. Many of the ostensibly civilian elements of its regime are in reality active components of its terrorist and military efforts. Indeed, Hamas does not separate its civilian and military activities in the manner in which a legitimate government might. Instead, Hamas uses apparatuses under its control, including quasi-governmental institutions, to promote its terrorist activity.
236. IDF took account of these realities in carrying out attacks against a number of Hamas ministries during the Gaza Operation. With respect to each particular target, IDF made the determination that the attacks were lawful under international law. [...]

**(b) Targeting of Terrorist Operatives**

237. In addition to Hamas terrorist infrastructure, the military operatives of Hamas and other terrorist organisations were also legitimate targets for attack by the IDF. Hamas' military forces in Gaza were comprised mainly of the Izz al-Din al-Qassam Brigades, but also of other forces making up the so-called "internal security" apparatus, which perform significant military functions during intense fighting with Israel. Due to their military functions, these internal security forces were not accorded the immunity from attack generally granted to civilians.
238. Whereas members of a civilian police force that is solely a civilian police force, who have no combat function are not considered combatants under the Law of Armed Conflict, international law recognises that this principle does not apply where police are part of the armed forces of a party. In those circumstances, they may constitute a legitimate military target. In other words, the status of the Palestinian "police" under the Law of Armed Conflict depends on whether they fulfilled combat functions in the course of the armed conflict. The evidence thus far is compelling that they are.
239. Hamas formed the Executive Force in May 2006 as a militia force loyal to Hamas and opposed to the security apparatus of the Fatah-led Palestinian Authority. Hamas drew this paramilitary force largely from its military wing, the Izz al-Din al-Qassam Brigades, and armed the members with anti-tank missiles, mortars, machine guns and grenades. The newly recruited commanders and subordinates were not obliged to give up their military wing affiliation, and continued to operate simultaneously in both functions.
- [...]
241. [...] Hamas restructured the Executive Force and subdivided it into several units, including the "police." The newly established police force thereafter assumed many traditional law enforcement functions, to the extent enforcing the unlawful rule of a terrorist organisation over a population could be termed "law enforcement." As the leader of the Executive Force emphasised in an August 2007 interview, however, the force's members were also "resistance fighters," a common term for Hamas' military wing. Their weaponry continued to include machine guns and anti-tank weapons – not the tools of a regular civilian police force.
242. After its transformation, the former Executive Force continued to be closely integrated with – although not formally part of – the al-Qassam Brigades. [...] As documented by the Intelligence and Terrorism Information Center [...], many members of the internal security services also served directly in the al-Qassam Brigades.
243. Even more crucially, as noted in an April 2008 Report by the Intelligence and Terrorism Information Center, the operational military plan for hostilities with Israel was that:

“The operatives of the internal security system and of the other Palestinian terrorist organizations would integrate into the Izzedine al-Qassam Brigades, program for defence should the IDF enter the Gaza Strip.”

244. Indeed, several days before the ground phase of the Gaza Operation began, Hamas police spokesman Islam Shahwan said that the Hamas leadership had instructed police to fight against IDF forces. He added that senior police officers had drawn up action plans and that the police and the security forces were on high alert for a ground assault. He further noted that “the police forces had received ... instructions from the leadership to fight the enemy in [the event of] an invasion” into the Gaza Strip.
245. It appears that the police in fact followed these instructions. In an interview about the functioning of the police during the Gaza Operation, Hamas police chief Jamal Jarah said that “[t]he police was able to defend the resistance home front by tracking down agents and arresting them” and that “the police took part [in the fighting] alongside the resistance and helped it defend the soil of Gaza.” Other leaders of Hamas’ internal security forces made similar statements. [...] All of these statements confirm the reality that Hamas intended to, and did, in fact, employ its internal security forces for military activities during the Gaza Operation. Under the Law of Armed Conflict, those security forces therefore are regarded for the purposes of the conduct of hostilities as combatants, and as combatants, they are legitimate military targets.
246. This collective role of the Gaza “police” as an integral part of Hamas armed forces is further evidenced by the fact that many Gaza “policemen” were also members of the al-Qassam Brigades. [...]
247. In fact, there is evidence that an overwhelming majority of the police forces were also members of the Hamas military wing or activists of Hamas or other terrorist organisations. A recent study has reviewed a list of all the internal security services members that Hamas reported killed during the Gaza Operation – consisting of 245 names in total. It found that 75.2 percent were Hamas activists (mostly members of the al-Qassam Brigades), and the total number of terrorist activists and fighters (including members of other terrorist groups operating in Gaza) from among the number of fatal casualties of the Palestinian security forces was 311, or 90.7 percent. In other words, more than nine out of every ten alleged “civilian police” were found to be armed terrorist activists and combatants directly engaged in hostilities against Israel.
248. This evidence demonstrates that considering Hamas “police” casualties as civilians is inappropriate. The reality is that the internal security services have been and continue to be a cadre of terrorist operatives armed with a variety of heavy weapons including anti-tank missile launchers, with standing orders to fight Israeli forces. Under the Law of Armed Conflict, Israel is permitted to target such forces and their bases of operation.

**(4) IDF Precautions During the Gaza Conflict**

[...]

**(b) Advance Notice to Civilians**

262. The IDF [...] made special efforts to notify civilians of impending IDF operations and to instruct them how to avoid harm. The early warnings system was comprised of several layers that were complementary to each other.
263. First, general warnings were used, calling on civilians to stay away from sites where Hamas was conducting combat activities. In addition, regional warnings were distributed in certain areas, calling on civilians to leave those areas before IDF forces operated in them. Efforts were made to include in these warnings sufficient information to the residents, including a timeframe for the evacuation and designated specific routes for this purpose leading to safe areas. Far from having no place to flee, residents could – and the vast majority did – move to safe locations. Finally, specific warnings were issued to residents of particular buildings before attack.
264. Throughout the Gaza Operation, the IDF employed a variety of methods to communicate warnings effectively. The warning techniques included:
- *Radio Broadcasts and Phone Calls:* The IDF conveyed instructions and advance warnings to residents by local radio broadcasts with IDF announcements and by about 165,000 phone calls. This involved specific notices as well as a daily news broadcast (the latter from 31 December onwards).
  - *Dropping of Leaflets:* During the Gaza Operation, the IDF dropped a total of some 2,500,000 leaflets of various kinds in the Gaza Strip. Some of the leaflets warned civilians to distance themselves from military targets, including buildings containing weapons, ammunitions or tunnels, or areas where terrorist activity was being conducted. Other leaflets directed residents to leave a particular location and move to a safe zone by a certain route and within a defined period of time. Such leaflets were distributed, for instance, in the northern Gaza neighbourhood of Sajaiya. While warnings were a significant tool to reduce the likelihood of civilian casualties, IDF forces did not consider the distribution of leaflets alone as sufficient to presume the absence of civilians at the relevant locations.
  - *Specific Warnings Before Attacks:* In addition to the above, the IDF made specific telephone calls just before an attack was about to take place, informing residents at risk about the upcoming strike and urging them to leave the place. In certain instances, although such warnings were made, the civilians chose to stay. In such cases, the IDF made even greater efforts to avoid civilian casualties and minimise collateral damage *by firing warning shots from light weapons that hit the roofs* of the designated targets, before proceeding with the strike. These warnings were accompanied by real-time surveillance in order to assess the presence of civilians in the designated

military target, despite the advance warnings. Accordingly, the commander in charge assessed whether the collateral damage anticipated, including to those who chose to stay at the premises, was not excessive in relation to the military advantage anticipated. The specific warnings were generally effective. [...]

265. While the warning systems implemented by the IDF did not provide a 100 percent guarantee against civilian casualties, they were, in fact, highly effective. Aerial video surveillance by IDF forces confirmed the departure of civilians from targeted areas prior to the attack as a direct result of the warnings.

[...]

## II. The Report of the United Nations Fact-Finding Mission

[Source: "Report of the United Nations Fact-Finding Mission on the Gaza Conflict," Human Rights Council, Doc. A/HRC/12/48, 25 September 2009, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>, footnotes omitted]

### HUMAN RIGHTS IN PALESTINE AND OTHER OCCUPIED ARAB TERRITORIES

#### Report of the United Nations Fact-Finding Mission on the Gaza Conflict

[...]

#### EXECUTIVE SUMMARY

##### A. Introduction

1. On 3 April 2009, the President of the Human Rights Council established the United Nations Fact Finding Mission on the Gaza Conflict with the mandate "to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after."

[...]

#### PART ONE: METHODOLOGY, CONTEXT AND APPLICABLE LAW

[...]

#### IV. APPLICABLE LAW

268. The Mission's mandate covers all violations of international human rights law (IHRL) and international humanitarian law (IHL) that might have been committed at any time, whether before, during or after, in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 to 18 January 2009. The Mission has therefore carried out its task within the framework of general international law, in particular IHRL and IHL.

[...]



**B. International humanitarian law**

[...]

273. The legal framework applicable to situations of occupation includes provisions contained in the Hague Regulations (especially articles 42-56), the Fourth Geneva Convention (especially articles 47-78) and Additional Protocol I, and customary international law. [...]
274. Article 42 of the Hague Regulations, regarded as customary international law, prescribes that “territory is considered occupied when it is actually placed under the authority of the hostile army”. The occupying authority so established shall take all measures in its power “to restore, and ensure, as far as possible, public order and safety” in the occupied area (art. 43). These provisions call for an examination of whether there was exercise of authority by Israel in the Gaza Strip during the period under investigation.
275. While the drafters of the Hague Regulations were as much concerned with protecting the rights of the State whose territory is occupied as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians (“protected persons”) in times of war regardless of the status of the occupied territories. That the Fourth Geneva Convention contains requirements in many respects more flexible than the Hague Regulations and thus offering greater protections was recognized by the International Criminal Tribunal for the former Yugoslavia in the *Naletelic* case, where the Trial Chamber applied the test contained in article 6 of the Fourth Geneva Convention: the protections provided for in the Fourth Geneva Convention become operative as soon as the protected persons fall “in the hands” of a hostile army or an occupying Power, this being understood not in its physical sense but in the broader sense of being “in the power” of a hostile army. The Trial Chamber concluded that: “the application of the law of occupation as it affects ‘individuals’ as civilians protected under Geneva Convention IV does not require that the occupying Power have actual authority”.
276. Israel has without doubt at all times relevant to the mandate of the Mission exercised effective control over the Gaza Strip. The Mission is of the view that the circumstances of this control establish that the Gaza Strip remains occupied by Israel. The provisions of the Fourth Geneva Convention therefore apply at all relevant times with regard to the obligations of Israel towards the population of the Gaza Strip.
277. Despite Israel’s declared intention to relinquish its position as an occupying Power by evacuating troops and settlers from the Gaza Strip during its 2005 “disengagement”, the international community continues to regard it as the occupying Power.
278. Given the specific geopolitical configuration of the Gaza Strip, the powers that Israel exercises from the borders enable it to determine the conditions of life within the Gaza Strip. Israel controls the border crossings (including to a significant degree

the Rafah crossing to Egypt, under the terms of the Agreement on Movement and Access) and decides what and who gets in or out of the Gaza Strip. It also controls the territorial sea adjacent to the Gaza Strip and has declared a virtual blockade and limits to the fishing zone, thereby regulating economic activity in that zone. It also keeps complete control of the airspace of the Gaza Strip, *inter alia*, through continuous surveillance by aircraft and unmanned aviation vehicles (UAVs) or drones. It makes military incursions and from time to time hit targets within the Gaza Strip. No-go areas are declared within the Gaza Strip near the border where Israeli settlements used to be and enforced by the Israeli armed forces. Furthermore, Israel regulates the local monetary market based on the Israeli currency (the new sheqel) and controls taxes and custom duties.

279. The ultimate authority over the Occupied Palestinian Territory still lies with Israel. Under the law and practice of occupation, the establishment by the occupying Power of a temporary administration over an occupied territory is not an essential requirement for occupation, although it could be one element among others that indicates the existence of such occupation. [...] Although Israel has transferred to the Palestinian Authority a series of functions within designated zones, it has done so by agreement, through the Oslo Accords and related understandings, keeping for itself “powers and responsibilities not so transferred”. When Israel unilaterally evacuated troops and settlements from the Gaza Strip, it left in place a Palestinian local administration. There is no local governing body to which full authority has been transferred. In this regard, the Mission recalls that the International Court of Justice, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, regards the transfer of powers and responsibilities by Israel under various agreements with the Palestine Liberation Organization (PLO) as having “done nothing” to alter the character of Israel as an occupying Power.

[...]

281. The developments that have taken place in the past two decades, in particular through the jurisprudence of international tribunals, have led to the conclusion that the substantive rules applicable to either international or non-international armed conflicts are converging. The Mission nonetheless recognizes that certain differences exist in relation to the regime of enforcement established by treaty law, in particular the regime of “grave breaches” contained in the Geneva Conventions.
282. Military hostilities took place between the Israeli armed forces and the military wing of Hamas (al-Qassam Brigades) and of other Palestinian factions, including the al-Aqsa Martyrs’ Brigades, loosely affiliated with the Fatah movement in control of the Palestine Authority. The Israeli Supreme Court has seen the confrontation between Israeli armed forces and what it calls “terrorist organizations” active in the Occupied Palestinian Territory as an international armed conflict on two grounds: the existing context of the occupation and the cross-border nature of the confrontation. Nonetheless, as the Government of Israel suggests, the classification of the armed conflict in question as international

or non-international, may not be too important as “many similar norms and principles govern both types of conflicts”.

283. It is common for armed conflicts to present elements of an international as well as of a non-international character. The rules contained in article 3 common to the four Geneva Conventions, regarded as customary international law, are the baseline rules applicable to all conflicts. The concern for the protection of civilians and those *hors de combat* in all kinds of conflicts has led to an increasing convergence in the principles and rules applicable to international and non-international armed conflicts, as was authoritatively held by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case. [...]

## **PART TWO: OCCUPIED PALESTINIAN TERRITORY**

### **THE GAZA STRIP**

#### **Section A: Military operations**

#### **V. THE BLOCKADE: INTRODUCTION AND OVERVIEW**

311. The military operations of 28 December to 19 January 2009 and their impact cannot be fully evaluated without taking account of the context and the prevailing living conditions at the time they began. In material respects, the military hostilities were a culmination of the long process of economic and political isolation imposed on the Gaza Strip by Israel, which is generally described as a blockade. [...]
313. The blockade comprises measures such as the closure of border crossings, sometimes completely for a number of days, for people, goods and services, and for the provision of fuel and electricity. The closure has had severe effects on trade and general business activity, agriculture and industry in the Gaza Strip. Electricity and fuel that are provided from Israel are essential for a broad range of activities from business to education, health services, industry and agriculture. Further limits to the fishing area in the sea adjacent to the Gaza Strip were fixed and enforced by Israel, negatively impacting on fishing activities and the livelihood of the fishing community. Israel also established a buffer zone of variable and uncertain width along the border, together with a sizeable no-go area in the northern part of the Gaza Strip where some Israeli settlements used to be situated. This no-go area is in practice an enlarged buffer zone in the northern part of the Gaza Strip where people cannot go. The creation of the buffer zone has forced the relocation of a number of factories from this area closer to Gaza City, causing serious environmental concerns and potential health hazards for the population. People's movements have also been drastically restricted, with only a few businesspeople allowed to cross on a very irregular and unpredictable basis.
314. Because of the occupation, which created so many ties of dependence, and for other geographic, political and historical reasons, the availability of goods and services as well as the carrying-on of daily life in the Gaza Strip are highly dependent

on Israel and its policies regarding the area. Food and other consumable items as well as fuel, electricity, construction materials and other items are traded from or through Israel. Israel also serves as the communication channel for the population of Gaza with the rest of the Occupied Palestinian Territory and the world, including for purposes of education and exchange programmes. [...]

319. In effect, economic activity in the Gaza Strip was severely affected because of the blockade. Since the military operation, the economy has almost come to a standstill. The private sector, particularly the manufacturing industry, has suffered irreparable damage.

[...]

326. The Mission holds the view that Israel continues to be duty-bound under the Fourth Geneva Convention and to the full extent of the means available to it to ensure the supply of foodstuff, medical and hospital items and others to meet the humanitarian needs of the population of the Gaza Strip without qualification. Furthermore, the Mission notes the information it received regarding the lack of compliance by the Government of Israel even with the minimum levels set by the Israeli Court, and in this regard observes that the Government retains wide discretion about the timing and manner of delivering fuel and electricity supplies to the Gaza Strip, and that this discretion appears to have been exercised capriciously and arbitrarily. [See Case No. 137, Israel, Power Cuts in Gaza]

[...]

## VII. ATTACKS ON GOVERNMENT BUILDINGS AND POLICE

### A. Deliberate attacks on Gaza government infrastructure

#### 1. Overview of damage to Gaza government buildings

365. In its early recovery and reconstruction plan for Gaza, the Palestinian Authority states that “seven government institutions were either completely or partially levelled (including the Government Palace, the Archives building, the General Personnel Council, and the Presidential Compound), and the Ministries of Interior, Justice and Culture were either partially or entirely destroyed, along with their associated compounds. In addition, 19 municipal facilities were damaged and 11 were totally destroyed, including commercial centres such as markets, slaughterhouses and stores.”

#### 2. The Israeli air strikes on the Gaza main prison and on the Palestinian Legislative Council building

366. The Mission visited two locations where government buildings were destroyed by Israeli air strikes: the Palestinian Legislative Council building and the main prison in the al-Saraya complex in Gaza City. [...]
368. The main prison was located in a densely built-up area of Gaza City in the al-Saraya complex of buildings occupied by government departments, including the Ministries of Education, Transport and the Interior. The prison itself was

an old building, several stories high, reportedly used as a prison by successive authorities in charge of Gaza during the previous and present centuries. It held both common offenders and political detainees.

369. While there were some discrepancies in the different accounts of this incident, the Mission was able to ascertain that the complex was attacked at 11 a.m. on 28 December 2008, on the second day of the air strikes by Israel. At the time of the attack between 200 and 300 prisoners were held in the facility, most of the almost 700 prisoners having been released in the days before the strike. [...] The guards had opened the prison doors immediately after the first strike. Others reported that "some prisoners were killed in the bombing, while others escaped the destroyed building." [...]
370. Despite the limited number of casualties that may have occurred, the high probability of more serious loss of life and of injuries in an attack on a populated prison facility could not have been discounted by the Israeli forces. The Mission has taken note of the assessment of the Israeli air force that 99 per cent of the strikes it carried out were accurate. In the light of this claim and in the absence of explanations to the contrary from the Israeli Government, it can only be concluded that the prison was the intended target of the strike. There is no indication from the information gathered on the incident and an inspection of the site that there was any cause for considering the prison building a "military objective".
371. The Palestinian Legislative Council building in central Gaza City was, according to information provided by the Israeli armed forces on their official web site, attacked on 31 December 2008. Mr. Ahmad Bahr, then Acting Speaker of the Palestinian Legislative Council in Gaza, stated to the Mission that it was hit by three missiles launched from fighter planes. The Mission [...] saw the rubble of the severely damaged three-storey building of the Parliament, which had been completed two years before. It was explained to the Mission that the new building contained a videoconferencing room which allowed the Gazan parliamentarians to hold joint sessions with the members of Parliament based in Ramallah. No casualties as a result of the strike on the Legislative Council building were reported to the Mission.

[...]

### **3. The position of the Government of Israel**

374. The Mission observes that the Government of Israel is not alleging that any Hamas military activity, such as launching of rockets, storage of weapons or planning of operations, was carried out in the Legislative Council building, the Ministry of Justice or the main prison. The justification of the Government of Israel for the strike on the Palestinian Legislative Council is that it is a "Hamas Government site", and that such sites "serve as a critical component of the terrorist groups' infrastructure in Gaza" and "constitute part of Hamas's mechanism of control".

[...]

#### 4. Factual findings

[...]

381. The factual question of whether these two institutions and their buildings served a military purpose must be considered with regard to the legal definition of military objectives. [...]

#### 5. Legal analysis

382. In assessing the Israeli strikes against the Legislative Council building and the main prison, the Mission first of all notes that Hamas is an organization with distinct political, military and social welfare components.
383. Since July 2007 Hamas has been the *de facto* government authority in Gaza. As recognized by the Israeli Government, the Hamas-led authorities in Gaza have been responsible for the civilian administration of Gaza. For instance, they employ civil servants and workers, run schools, hospitals, traffic police and the administration of justice. The fact that these institutions and the buildings housing them have been administered by authorities led by Hamas since July 2007, and no longer by a government composed of both Hamas and Fatah members has, in the view of the Mission, no bearing on the continued civilian character of these institutions. [...]
384. [...] While Hamas constitutes the *de facto* authority in Gaza, the buildings attacked and destroyed served a public purpose that cannot be regarded as “promoting Hamas terrorist activity”.
385. The fundamental rule of international humanitarian law applicable to attacks against buildings and infrastructure is enshrined in article 52 of Additional Protocol I [...]. This provision is generally recognized as codifying customary law applicable to both international and non-international armed conflicts [...].
386. The statement by the Israeli Government concerning the attack on the Legislative Council building and the Ministry of Justice does not suggest any “effective contribution to military action” that the buildings might have been making. No reference is made to any “definite military advantage” that their destruction would offer. Instead, the explanation is that government buildings constitute “part of Hamas’s mechanism of control”, that they “serve as a critical component of the terrorist groups’ infrastructure in Gaza” and that “ostensibly civilian elements of [the Hamas] regime are in reality active components of its terrorist and military efforts.”
387. The Mission observes that there is nothing unique in the fact that in Gaza ministries and prisons are part of the government’s “mechanism of control” and that the legislature’s assembly hall and administrative buildings are a critical component of the government infrastructure. That is not, however, the test applied by international humanitarian law and accepted State practice to distinguish between civilian and military objects. [...]

388. The Mission further notes that international humanitarian law also recognizes a category of civilian objects which may nonetheless be targeted in the course of armed conflict to the extent that they have a “dual use”. Examples often made for such dual-use objects, which serve both civilian and military purposes, are civilian infrastructures such as telecommunications, power-generating stations or bridges, *in so far as they are used by the military in addition to their civilian use*. There is no indication, nor any allegation of any such dual use of the Legislative Council building or of the Gaza main prison.
389. There is an absence of evidence or, indeed, any allegation from the Israeli Government and armed forces that the Legislative Council building, the Ministry of Justice or the Gaza main prison “made an effective contribution to military action.” On the information available to it, the Mission finds that the attacks on these buildings constituted deliberate attacks on civilian objects in violation of the rule of customary international humanitarian law whereby attacks must be strictly limited to military objectives.
390. In the Mission’s view these facts further indicate the commission of the grave breach of extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly, as defined in article 147 of the Fourth Geneva Convention.
391. The Mission rejects the analysis of present and former senior Israeli officials that, because of the alleged nature of the Hamas government in Gaza, the distinction between civilian and military parts of the government infrastructure is no longer relevant in relation to Israel’s conflict with Hamas. [...]
392. The Mission is of the view that this is a dangerous argument that should be vigorously rejected as incompatible with the cardinal principle of distinction. International humanitarian law prohibits attacks against targets that do not make an effective contribution to military action. Attacks that are not directed against military (or dual use) objectives are violations of the laws of war, no matter how promising the attacker considers them from a strategic or political point of view. [...]

## **B. Deliberate attacks on the Gaza police**

393. Information received by the Mission indicates that 248 members of the Gaza police were killed in the course of Israel’s military operations. In other words, more than one out of every six casualties was a member of the Gaza police.
- [...]
395. The attacks investigated by the Mission were all directed against facilities used by the police force called *shurta* (police) in official documents of the Gaza authorities and referred to as “civil police” in many English reports.
- [...]

## 2. Conflicting characterizations of the Gaza security forces

### (a) *The approach of the Government of Israel*

408. The position of the Government of Israel is that “due to their military functions, these internal security forces were not accorded the immunity from attack generally granted to civilians.” [...] [See *supra* Part I, “The View of the Israeli Ministry of Foreign Affairs,” paras 237-248]

### (b) *The approach of the Gaza authorities*

409. The characterization of the Gaza internal security forces by the Government of Israel differs sharply from the tasks of the police as they are described on the official website of the Gaza Ministry of Interior, in orders to the police issued by the Minister of Interior which the Mission has reviewed, and in the interviews with the Director of Police and the police spokesman conducted by the Mission.

[...]

411. According to the police spokesperson, during the military operations the mandate of the police was firstly to “protect the internal front”, i.e. ensure that the relationship between the civilian population and the authorities stayed “intact”. Secondly, the police were to monitor the distribution of humanitarian goods to the civilian population. Thirdly, they were to continue regular law-enforcement duties, with a particular focus on combating looting and speculation on prices.

## 3. The Mission’s assessment of the role and composition of the police

412. In order to shed some light on where the truth might lie between these two conflicting descriptions of the police, the Mission finds it necessary to examine the development of the security forces linked to Hamas after its election victory in January 2006. When Mr. Said Seyam, a senior Hamas representative, took office as the Palestinian Authority’s Minister of Interior in April 2006, he found that he had little or no control over the Palestinian Authority’s security forces, which were put under the control of the President of the Palestinian Authority and of officials loyal to him. On 20 April 2006, he announced the formation of a new security force reporting directly to him. This was the Security Forces Support Unit, also known as the Executive Force (*al-Quwwa al-Tanfiziyya*). The new security force appears to have had a double function as both a law-enforcement agency and, at least potentially, a military force. It was officially charged with enforcing public security and protecting property. At the same time, he appointed Mr. Jamal Abu Samhadana, commander of the Popular Resistance Committees, as the head of the Executive Force and announced that it would be composed of 3,000 new recruits from various Palestinian armed groups, including al-Qassam Brigades. The newly appointed commander reportedly declared: “[The Executive Force] will be the nucleus of the future Palestinian army. The resistance must continue. We have only one enemy. ... I will continue to carry the rifle and pull the trigger whenever required to defend my people. We are also a force against corruption. We are against thieves, corrupt officials and law breakers.”



413. In August 2007, following the June 2007 Hamas seizure of full control over Gaza, the current Director of the Gaza authorities' civil police, then head of the Executive Force, Gen. Abu Obeidah, described the planned reorganization of the security services in Gaza. Executive Force members were to be integrated into the civil police. He reportedly stated that Hamas was "working hard to retrain Executive Force members to perform police duties" and that the "Force will be in charge of chasing drug dealers and lawless residents". At the same time, he stated that "members of the Force are religious, and are resistance fighters."
414. In October 2007, the security services operating in Gaza were reorganized. The previous Palestinian Authority's police agencies in Gaza were merged with the Executive Force. The security forces under the control of the Ministry of Interior emerging from this reorganization comprise the Civil Police, the Civil Defence, the Internal Security (an intelligence agency) and the National Security. Their mandates, according to the Gaza authorities' Ministry of Interior's website, are differentiated.
415. The National Security force is given specific military tasks, such as "the protection of the State from any foreign aggression" and "responsibility for the defence of the Palestinian homeland in the face of external and internal threats". It is thus plainly a military force whose members are, under international humanitarian law, combatants. [...]
416. On 1 January 2009, during the Israeli military operations in Gaza, the police spokesperson, Mr. Islam Shahwan, informed the media that the police commanders had managed to hold three meetings at secret locations since the beginning of the armed operations. He added that "an action plan has been put forward, and we have conducted an assessment of the situation and a general alert has been declared by the police and among the security forces in case of any emergency or a ground invasion. Police officers received clear orders from the leadership to face [...] the enemy, if the Gaza Strip were to be invaded." Confirming to the Mission that he had been correctly quoted, Mr. Shahwan stated that the instructions given at that meeting were to the effect that in the event of a ground invasion, and particularly if the Israeli armed forces were to enter urban settlements in Gaza, the police was to continue its work of ensuring that basic food stuffs reached the population, of directing the population to safe places, and of upholding public order in the face of the invasion. Mr. Shahwan further stated that not a single policeman had been killed in combat during the armed operations, proving that the instructions had been strictly obeyed by the policemen.
417. The Mission notes that there are no allegations that the police as an organized force took part in combat during the armed operations. On the basis of the information provided by the Gaza authorities [...], it would appear that 75 per cent of its members killed in the course of the military operations died as a result of the air strikes carried out during the first minutes of the Israeli attack. These men had not engaged in combat with the Israeli armed forces.

[...]

419. Except for the statements of the police spokesperson, the Israel Government has presented no other basis on which a presumption can be made against the overall civilian nature of the police in Gaza. It is true that the police and the security forces created by Hamas in Gaza may have their origins in the Executive Force. However, while the Mission would not rule out the possibility that there might be individuals in the police force who retain their links to the armed groups, it believes that the assertion on the part of the Government of Israel that “an overwhelming majority of the police forces were also members of the Hamas military wing or activists of Hamas or other terrorist organizations”, appears to be an overstatement that has led to prejudicial presumptions against the nature of the police force that may not be justified.

[...]

## 5. Legal analysis

### (a) *The applicable rules of international humanitarian law*

430. The general rule of international humanitarian law is that members of law-enforcement agencies are considered part of the civilian population, unless they have been incorporated into the armed forces of a party to the conflict. This principle is accepted by the Israeli Government. The obligation to distinguish at all times between the civilian population and combatants and to direct attacks only against military objectives (the principle of distinction) therefore generally prohibits attacks against members of the law-enforcement agencies. In its Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice recognized the principle of distinction as an “intransgressible” principle of customary international law. [See Case No. 62, ICJ, Nuclear Weapons Advisory Opinion, para. 79]
431. There are three situations in which direct attacks against members of police forces would not constitute a violation of the principle of distinction. First, if the law-enforcement agency or the unit to which the policeman belongs has been “incorporated” into the armed forces, thus conferring combatant status upon its members. Second, if individual members of the law enforcement agency are at the same time members of an armed group, they would be combatants. Thirdly, individual members of the law-enforcement agency, like any civilians, may not be targeted “unless and for such time as they take a direct part in hostilities.” Finally, as with civilians generally, policemen might be indirectly injured or killed in an attack which is directed at a military objective, as long as the attack complies with the principle of proportionality.

### (b) *Conclusion*

432. The Mission will now draw conclusions with regard to each of these grounds potentially justifying the attacks against the police.

433. First, as already noted above, the Mission finds that there is insufficient information to conclude that the Gaza police as a whole had been “incorporated” into the armed forces of the Gaza authorities. Accordingly, the policemen killed cannot be considered to have been combatants by virtue of their membership in the police.
434. Second, the Mission finds that the policemen killed on 27 December 2008 cannot be said to have been taking a direct part in hostilities. Thus, they did not lose their civilian immunity from direct attack as civilians on this ground.
435. Third, the Mission examined whether the attacks on the police stations could be justified on the basis that there were, allegedly, members of Palestinian armed groups among the policemen. The question would thus be one of proportionality. The principle of proportionality is reflected in Additional Protocol I, which prohibits launching attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”
436. The Mission has earlier accepted that there may be individual members of the Gaza police that were at the same time members of al-Qassam Brigades or other Palestinian armed groups and thus combatants. Even if the Israeli armed forces had reliable information that some individual members of the police were also members of armed groups, this did not deprive the whole police force of its status as a civilian law-enforcement agency.
437. From the facts available to it, the Mission finds that the deliberate killing of 99 members of the police at the police headquarters and three police stations during the first minutes of the military operations, while they were engaged in civilian tasks inside civilian police facilities, constitutes an attack which failed to strike an acceptable balance between the direct military advantage anticipated (i.e. the killing of those policemen who may have been members of Palestinian armed groups) and the loss of civilian life (i.e. the other policemen killed and members of the public who would inevitably have been present or in the vicinity). The attacks on the Arafat City police headquarters and the Abbas Street police station, al-Tuffah police station and the Deir al-Balah investigative police station constituted disproportionate attacks in violation of customary international humanitarian law.

[...]

#### **VIII. OBLIGATION ON PALESTINIAN ARMED GROUPS IN GAZA TO TAKE FEASIBLE PRECAUTIONS TO PROTECT THE CIVILIAN POPULATION**

439. An assessment of the events occurring during the military operations in Gaza in December 2008 – January 2009 requires an investigation of the tactics used both by the Israeli armed forces and by the Palestinian armed groups in the context of their obligations under international humanitarian law to take constant care to minimize the risk of harm to the civilian population and to civilian objects. [...] In this chapter, the Mission examines allegations that the conduct of the Palestinian armed groups placed the civilian population of Gaza and civilian objects at risk of attack.

[...]

### G. Factual findings

482. On the basis of the information it gathered, the Mission finds that there are indications that Palestinian armed groups launched rockets from urban areas. The Mission has not been able to obtain any direct evidence that this was done with the specific intent of shielding the rocket launchers from counterstrikes by the Israeli armed forces. The Mission also notes, however, that Palestinian armed groups do not appear to have given Gaza residents sufficient warning of their intention to launch rockets from their neighbourhoods to allow them to leave and protect themselves against Israeli strikes at the rocket launching sites. The Mission notes that, in any event, given the densely populated character of the northern half of the Gaza Strip, once Israeli forces gained control of the more open or outlying areas during the first days of the ground invasion, most – if not all – locations still accessible to Palestinian armed groups were in urban areas.
483. The Mission finds that the presence of Palestinian armed fighters in urban residential areas during the military operations is established. [...] While reports reviewed by the Mission credibly indicate that members of Palestinian armed groups were not always dressed in a way that distinguished them from civilians, the Mission found no evidence that Palestinian combatants mingled with the civilian population with the intention of shielding themselves from attack.

[...]

### H. Legal findings

489. Customary international humanitarian law establishes that all “parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.” [See Case No. 43, ICRC, Customary International Humanitarian Law, Rule 22]
490. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas. Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives.
491. These rules of customary international law are reflected in article 57 (1) of Additional Protocol I: “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” The following paragraphs of article 57 set forth the specific precautions to be taken by a party launching an attack.
492. In addition to the general duty to take constant care to spare the civilian population in the conduct of military operations, international humanitarian law establishes a specific prohibition against the use of civilians as human shields. Article 28 of the Fourth Geneva Convention specifically addresses this issue: “The presence of a protected person may not be used to render certain points or areas

immune from military operations". This is reinforced by article 51 (7) of Additional Protocol I:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

These provisions reflect rules of customary law.

493. The Mission finds it useful to clarify what is meant, from a legal perspective, by using civilians or a civilian population as a human shield. Parties to a conflict are not permitted to use a civilian population or individual civilians in order to render certain points or areas immune from military operations. It is not in dispute that both Palestinian armed groups and Israeli forces were fighting within an area populated by civilians. Fighting within civilian areas is not, by itself, sufficient for a finding that a party is using the civilian population living in the area of the fighting as a human shield. As the words of article 57 (1) show ("shall not be used to render", "in order to attempt to shield"), an intention to use the civilian population in order to shield an area from military attack is required.
494. From the information available to it, the Mission found no evidence to suggest that Palestinian armed groups either directed civilians to areas where attacks were being launched or forced civilians to remain within the vicinity of the attacks.
495. The reports received by the Mission suggest that it is likely that the Palestinian armed groups did not at all times adequately distinguish themselves from the civilian population among whom the hostilities were being conducted. Their failure to distinguish themselves from the civilian population by distinctive signs is not a violation of international law in itself, but would have denied them some of the legal privileges afforded to combatants. What international law demands, however, is that those engaged in combat take all feasible precautions to protect civilians in the conduct of their hostilities. The Mission found no evidence that members of Palestinian armed groups engaged in combat in civilian dress. It can, therefore, not find a violation of the obligation not to endanger the civilian population in this respect.
496. The conduct of hostilities in built-up areas does not, of itself, constitute a violation of international law. However, launching attacks – whether of rockets and mortars at the population of southern Israel or at the Israeli armed forces inside Gaza – close to civilian or protected buildings constitutes a failure to take all feasible precautions. In cases where this occurred, the Palestinian armed groups would have unnecessarily exposed the civilian population of Gaza to the inherent dangers of the military operations taking place around them. This would

have constituted a violation of the customary rules of international humanitarian law referred to above. [...]

#### **IX. OBLIGATION ON ISRAEL TO TAKE FEASIBLE PRECAUTIONS TO PROTECT CIVILIAN POPULATION AND CIVILIAN OBJECTS IN GAZA**

499. This chapter focuses on incidents where the Mission considered compliance by Israel with its obligations under the Fourth Geneva Convention and customary rules of international law in relation to taking feasible precautions. [...]

##### **A. Warnings**

500. The Israeli Government has stated that it took the following steps to warn the civilian population of Gaza [...]. [See *supra* Part I, “The View of the Israeli Ministry of Foreign Affairs,” paras 264]

[...]

##### **1. Telephone calls**

503. The Mission received first-hand information about some of these methods in its interviews with witnesses in Gaza. In the report on the attack at al-Fakhura Street junction [...], the Mission notes the credible account of Mr. Abu Askar of the telephone warning he received as a result of which he was able to evacuate up to 40 people from his and other houses. He received that call at around 1.45 a.m. and Israeli forces destroyed his house with a missile strike seven minutes later.

504. The Mission is also aware of circumstances in which telephone warnings may have caused fear and confusion. Al-Bader Flour Mills Co. [...] received two recorded messages indicating the mill was to be destroyed, but neither of these was acted upon. Five days later the mill was struck in the early hours of the morning with no warning whatsoever. The owners of the business and their staff suffered anxiety by having to evacuate the premises on two occasions as a result of receiving such messages when no strikes took place.

[...]

##### **2. Roof-knocking**

506. The Israeli Government describes that in certain circumstances its armed forces fired “warning shots from light weapons that hit the roofs of the designated targets” – a practice referred to as roof-knocking. The Israeli Government indicates that this practice was used when it appeared that people had remained in their houses despite being given some previous warning. It is not clear whether this was the only circumstance in which this method was employed. [...] The Mission [...] saw in the Sawafeary house [...] that a missile had penetrated the rear of the house on the wall near the ceiling, gone through an internal wall and exited through the wall at the front of the house near the windows. At the time (around 10 p.m. on 3 January 2009) there were several family members in the house, who

happened to be lying down. The Mission cannot say what size of weapon was used on this occasion, although it was sufficiently powerful to penetrate three walls, or whether it was intended as a warning.

### **3. Radio broadcasts and leaflet dropping**

507. The radio broadcasts that the Mission listened to appeared to be generic. For example, on 3 January 2009 a radio broadcast made the following points:

- Gaza residents are welcome to receive food and medical supplies, delivered via the Rafah, Karni and Kerem Shalom passages, at the UNRWA [United Nations Relief and Works Agency] centres throughout the Gaza Strip;
- Israel calls on the population to move to city centres for its own safety.

This warning preceded the ground phase of the military operations. Its language clearly indicates that UNRWA centres should be regarded as places of safety and civilians may collect food from them.

508. Leaflets dropped appear to fall into a number of categories. One leaflet did not deal with attacks on a particular place but on the storage of weapons and ammunition:

To the residents of the Gaza Strip;

The IDF will act against any movements and elements conducting terrorist activities against the residents of the State of Israel;

The IDF will hit and destroy any building or site containing ammunition and weapons;

As of the publication of this announcement, anyone having ammunition and/or weapons in his home is risking his life and must leave the place for the safety of his own life and that of his family;

You have been warned.

509. In some areas specific warnings were sometimes given. One example of a sufficiently specific warning is that issued to the residents of Rafah:

Because your houses are used by Hamas for military equipment smuggling and storing, the Israeli Defense Forces (IDF) will attack the areas between Sea Street and till the Egyptian border...

All the Residents of the following neighbourhoods: Block O – al-Barazil neighbourhood – al-Shu'ara' – Keshta – al-Salam neighbourhood should evacuate their houses till beyond Sea Street. The evacuation enters into force from now till tomorrow at 8 a.m.

For your safety and for the safety of your children, apply this notice.

**4. Factual findings**

510. Whether a warning is deemed to be effective is a complex matter depending on the facts and circumstances prevailing at the time, the availability of the means for providing the warning and the evaluation of the costs to the purported military advantage.
511. Israel was in a strong position to prepare and issue effective warnings. The preparations for its military operations were “extensive and thorough.” Israel had intimate knowledge and sophisticated up-to-date intelligence in its planning. It had the means to use the landlines and mobile telephone networks. It had complete domination of Gaza’s airspace. In terms of the practical capabilities of issuing warnings, it is perhaps difficult to imagine more propitious circumstances.
512. The Mission accepts that the element of surprise that was sought in the initial strikes might well have provided a degree of justification for not giving any advance notice of the time the strikes would take place or the buildings that would be struck.

**(a) *The question of whether civilians could be expected to respond to the warnings to leave their homes***

513. The Mission recognizes that leaflets dropped from the air can have some direct benefit in assisting the civilian population to get out of harm’s way. The effectiveness will depend on three considerations: the clarity of the message, the credibility of the threat and the possibility of those receiving the warning taking action to escape the threat.
514. [...] At the beginning of the land-air phase of the operations, the Israeli armed forces [...] dropped leaflets and made broadcasts advising people to move towards city centres.
515. There had been an intense aerial campaign from 27 December 2008 until 3 January 2009 that had seen hundreds of buildings destroyed in built-up areas of city centres. Civilians not living in city centres were being asked to leave their homes to go to places that as far as they could reasonably assess were already in much more danger than they were in their own homes. In order for the warning to be effective there had to be an objective basis to believe that they would be safer elsewhere. The Mission does not consider that such an objective evaluation could reasonably have been made by civilians in the Gaza Strip.

[...]

**(c) *The inference that those who did not go to the city centres must be combatants***

522. The warning to go to city centres came at the start of the ground invasion. In the Mission’s view it was unreasonable to assume, in the circumstances, that civilians would indeed leave their homes. As a consequence, the conclusion that allegedly formed part of the logic of soldiers on the ground that those who had stayed had to be combatants was wholly unwarranted. There are many



reasons why people may not have responded. In several cases the Mission heard from witnesses about people who were physically disabled, too frail or deaf so that it was difficult or impossible to respond to the warning. In other cases, as outlined above, civilians who could have responded may have had legitimate reasons not to do so. The issuance of warning is one measure that should be taken wherever possible. The fact that a warning was issued does not, however, relieve a commander or his subordinates from taking all other feasible measures to distinguish between civilians and combatants.

523. Israeli armed forces had created the circumstances in which civilians could not reasonably believe the city centres were safe. An effective warning had to make clear why, even in those circumstances, it was better for civilians to leave than to stay in their homes.

[...]

## **6. Legal findings**

526. Chapter IV of Additional Protocol I to the Geneva Conventions addresses the issue of precautionary measures that must be taken. Article 57 (1) states that “in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”
527. Article 57 (2) (c) requires that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”
528. The Mission regards both these provisions to be norms of customary international law. In addition, Israel appears to consider itself bound by the obligation to provide effective warnings under customary law.
529. The determination of whether the circumstances permit a warning must be made in the context of a good-faith attempt to adhere to the underlying duty to minimize death and injury to civilians or damage to civilian objects. The key limitation on the application of the rule is if the military advantage of surprise would be undermined by giving a warning. The same calculation of proportionality has to be made here as in other circumstances. The question is whether the injury or damage done to civilians or civilian objects by not giving a warning is excessive in relation to the advantage to be gained by the element of surprise for the particular operation. There may be other circumstances when a warning is simply not possible.
530. Article 57 (2) (c) requires the warning to be effective. The Mission understands by this that it must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible warning

means that civilians should be in no doubt that it is intended to be acted upon, as a false alarm or hoax may undermine future warnings, putting civilians at risk.

**(a) *Pre-recorded generic telephone calls***

531. As regards the generic nature of some pre-recorded phone messages, the Mission finds that these lacked credibility and clarity, and generated fear and uncertainty. In substance, there is little difference between telephone messages and leaflets that are not specific. The Mission takes the view that pre-recorded messages with generic information may not be considered generally effective.

**(b) *Warning shots delivered to roofs***

532. The Mission is doubtful whether roof-knocking should be understood as a warning as such. In the context of a large-scale military operation including aerial attacks, civilians cannot be expected to know whether a small explosion is a warning of an impending attack or part of an actual attack. In relation to the incident at the Sawafeary house recounted above, the Mission cannot say for certain if this missile was meant to warn or to kill. It notes that, if this was meant as a warning shot, it has to be deemed reckless in the extreme.
533. The legal requirement is for an effective warning to be given. This means that it should not require civilians to guess the meaning of the warning. The technique of using small explosives to frighten civilians into evacuation, even if the intent is to warn, may cause terror and confuse the affected civilians.
534. The Mission does not have sufficient information to assess the accuracy of the Israeli Government's claim that the warning shot method was used only when previous warnings (leaflets, broadcasts or telephone calls) had not been acted upon. However, in many circumstances it is not clear why another call could not be made if it had already been possible to call the inhabitants of a house. The Mission notes that these warnings all took place in situations where the view appears to have been reached that those in the house are civilians or predominantly civilians. If the choice is between making another call or firing a light missile that carries with it a significant risk of killing those civilians, the Mission is not convinced that it would not have been feasible to make another call to confirm that a strike was about to be made.
535. Finally, apart from the issue of fear and ambiguity, there is the question of danger. The idea that an attack, however limited in itself, can be understood as an effective warning in the meaning of article 57 (2) (c) is rejected by the Mission.

**(c) *Leaflets***

536. The leaflets and radio broadcasts that told people to leave their homes and head towards city centres were in most cases lacking in specificity and clarity: people could not be certain that the warnings were directed at them in particular, since they were being issued as far as they could tell to almost everyone, and they

could not tell when they should leave since there was rarely an indication of when attacks would take place. Furthermore, in the circumstances created by the Israeli armed forces, people could not reasonably be expected to flee to what appeared to be even less safe places on the basis of such non-specific warnings. Therefore, the Mission does not consider such warnings to have been the most effective possible in the circumstances and, indeed, doubts that many were effective at all.

[...]

### **XIII. ATTACKS ON THE FOUNDATIONS OF CIVILIAN LIFE IN GAZA: DESTRUCTION OF INDUSTRIAL INFRASTRUCTURE, FOOD PRODUCTION, WATER INSTALLATIONS, SEWAGE TREATMENT PLANTS AND HOUSING**

#### **A. The destruction of el-Bader flour mill**

913. The Mission visited the site of the air strikes and surveyed the surrounding area in Sudaniyah, west of Jabaliyah. It met and interviewed the Hamada brothers, joint owners of the el-Bader flour mill, on four occasions. [...]
914. The Hamada brothers are well-established businessmen and hold Businessman Cards, issued by the Israeli authorities to facilitate business travel to and from Israel. [...]

[...]

919. On 9 January, at around 3 or 4 a.m., the flour mill was hit by an air strike, possibly by an F-16. The missile struck the floor that housed one of the machines indispensable to the mill's functioning, completely destroying it. The guard who was on duty at the time called Mr. Hamada to inform him that the building had been hit and was on fire. He was unhurt. In the next 60 to 90 minutes the mill was hit several times by missiles fired from an Apache helicopter. These missiles hit the upper floors of the factory, destroying key machinery. Adjoining buildings, including the grain store, were not hit. The strikes entirely disabled the factory and it has not been back in operation since. A large amount of grain remains at the site but cannot be processed.
920. The Israeli armed forces occupied the disabled building until around 13 January. Hundreds of shells were found on its roof after the soldiers left. They appeared to be 40-mm grenade machine-gun spent cartridges.
921. The Hamada brothers rejected any suggestion that the building was at any time used for any purpose by Palestinian armed groups. They pointed out that all of the buildings and factories were surrounded by a high wall and manned by at least one guard at night. In addition, the Israeli authorities knew them as businessmen and they would not have been given Businessman Cards had there been any reason for the Israeli Government to suspect that they were involved with or supported armed groups. They were both adamant that their interest was and always had been industrial and commercial, and that the last thing they were prepared to do was put their business at risk.

[...]

## 2. Legal findings

926. In considering the degree to which there may have been violations of international humanitarian law, the Mission refers to article 52 of Additional Protocol I [...]. The Mission also considers the following provisions to be relevant to its deliberations: Article 54 (1) and (2) of Additional Protocol I [...], Article 147 of the Fourth Geneva Convention [...].

927. No other buildings in the industrial compound belonging to the Hamadas were damaged at the time of the strikes. It appears that the strikes on the flour mill were intentional and precise.

[...]

930. The nature of the strikes on the mill and in particular the precise targeting of crucial machinery on one of the mid-level floors suggests that the intention was to disable its productive capacity. There appears to be no plausible justification for the extensive damage to the flour mill if the sole objective was to take control of the building. It thus appears that the only purpose was to put an end to the production of flour in the Gaza Strip.

931. From the facts it ascertained, the Mission finds that there has been a violation of the grave breaches provisions of the Fourth Geneva Convention. Unlawful and wanton destruction which is not justified by military necessity would amount to a war crime.

932. Having concluded that the strikes were without any military justification, and therefore wanton and unlawful, the Mission finds it useful to consider if there was any non-military purpose to the strikes.

933. The aim of the strike, if not military, could only have been to destroy the local capacity to produce flour. The question is whether such deliberate destruction of the sole remaining flour-producing capacity in the Gaza Strip can be described as having been done for the purpose of denying sustenance to the civilian population.

934. Article 54 (1) and (2) of Additional Protocol I reflect customary international law. Article 54 (2) prohibits acts whose specific purpose is the denial of sustenance for whatever reason, including starvation, forced displacement or anything else. In short, the motive for denying sustenance need not be to starve the civilian population. Indeed, the motive is irrelevant.

[...]

937. From the facts ascertained by it, the Mission finds that the destruction of the mill was carried out for the purpose of denying sustenance to the civilian population, which is a violation of customary international law as reflected in article 54 (2) of Additional Protocol I and may constitute a war crime.

[...]

**B. The destruction of the Sawafeary chicken farms**

[...]

943. Sameh Sawafeary is a chicken farmer. His family has been in the egg production business for many years. He indicated that he, his brothers and his children owned 11 chicken farms in Zeytoun as of December 2008. The farms housed more than 100,000 chickens.

[...]

948. For the purposes of this section the Mission refers to the information it received about the systematic destruction that occurred for several days and which the witnesses were able to see during the time they were forced by the circumstances to remain in the [nearby] house of Mr. Mughrabi.
949. Mr. Sawafeary and Mr. Mughrabi informed the Mission that they had watched Israeli armoured bulldozers systematically destroy land, crops, chickens and farm infrastructure. Mr. Mughrabi stated that he watched the bulldozers plough through fields with crops and trees, destroying everything in their path. [...]
950. [...] [W]hen [M. Mughrabi] was able to return to his home after the Israeli withdrawal all 31,000 of his chickens had been killed and the coops systematically flattened.
951. [...] He pointed out that, in addition to the loss of livestock, the farm had been completely automated with significant investment in machinery, all of which had been destroyed, as had the plant for packaging the eggs. [...]
954. Mr. Sawafeary told the Mission that he and his family together supplied approximately 35 per cent of the egg market in Gaza. His own farms supplied over 10 per cent. He noted that it was not only his farms that had been destroyed but also most of his family's farms had been destroyed in the same way as his. He estimated that close to 100,000 chickens were killed in the process.

[...]

**1. Factual findings**

[...]

960. From the facts ascertained by it, the Mission finds that the Sawafeary chicken farms, the 31,000 chickens and the plant and material necessary for the business were systematically and deliberately destroyed, and that this constituted a deliberate act of wanton destruction not justified by any military necessity.

**2. Legal findings**

961. The Mission makes the same findings regarding article 147 of the Fourth Geneva Convention and article 54 (2) of Additional Protocol I [...] as it made above in relation to the el-Bader flour mill.

### **C. The destruction of water and sewage installation**

#### **1. The Gaza wastewater treatment plant, Road No. 10, al-Sheikh Ejlin, Gaza City**

[...]

963. The Gaza wastewater treatment plant is located in the coastal area south-west of Gaza City in the al-Sheikh Ejlin neighbourhood. It was built in 1977 and expanded with support from development cooperation. It consists of a number of installations, including offices, tanks and lagoons to store raw sewage.

964. At some point between 3 and 10 January, a large missile hit the northernmost wall of lagoon No. 3, causing a massive outflow of raw sewage, which travelled a distance of 1.2 kilometres and damaged 5.5 hectares of land, including agricultural land [...].

[...]

#### **Factual findings**

[...]

974. Notwithstanding the possible military advantage offered to the Israeli armed forces by the plant's location, the Mission cannot find any justification for striking the lagoon with what must have been a very powerful missile, sufficient to cause a breach 5 metres deep and 22 metres wide. It is highly unlikely that Palestinian armed groups could have taken up positions in or around the lagoon after the initial occupation of the area by Israeli armed forces: any such groups would have been exposed in the open area. The fact that the lagoon wall was struck precisely there where it would cause outflow of the raw sewage suggests that the strike was deliberate and premeditated.

#### **2. Namar wells group, Salah ad-Din Street, Jabaliyah refugee camp**

[...]

976. The wells group stood approximately 50 metres from the Jabaliyah refugee camp's administration building, which was also destroyed. A crater (approximately five metres wide) was still visible in the grounds belonging to the civil administration, with at its bottom the case of a rocket.

977. This was a complex of two water well pumps, one in operation and another next to it as standby. [...] [The] water well [...] produced more than 200 cubic metres per hour of the best-quality water in the area. The well supplied water to some 25,000 people in eastern and central Jabaliyah. The standby well pump was capable of pumping some 100 cubic metres of water. Both were completely destroyed on 27 December by an airstrike.

978. In the Namar water wells complex there were not only pumping machines but also a 180 kg generator, a fuel store, a reservoir chlorination unit, buildings and related equipment. These were also destroyed.

979. The operator, Mr. Abdullah Ismail al-Zein, was killed in the air strike while he was working at the station. [...]
980. The strike also blew up the pipes connecting the wells to other water wells; incoming water spilled into the area for some 10 days before the pipes could be shut off.
- [...]

### **Factual findings**

- [...]
985. The question remains as to whether the Israeli air strikes on the Namar wells group were deliberate or made in error. The Mission notes that the deployment systems and aircraft used in the strikes of 27 December (principally F-16 fighter jets and UAVs) are capable of a high degree of precision. It notes also that, by all accounts, a great deal of preparation had been put into determining and designating the targets of air strikes. The Mission considers it unlikely that a target the size of the Namar wells could have been hit by multiple strikes in error, given the nature of the deployment systems and the distance between the wells and any neighbouring buildings. The facts thus indicate that the strikes on the Namar wells group were intentional.
986. The Mission found no grounds to suggest that there was any military advantage to be gained from hitting the wells. There was no suggestion that Palestinian armed groups had used the wells for any purpose.

### **3. Legal findings**

987. From the facts ascertained by it, the Mission makes similar findings to those set out regarding the violation of article 147 of the Fourth Geneva Conventions and article 54 (2) of Additional Protocol I in relation to the destruction of the el-Bader flour mill.
988. The right to food clearly includes the right to have adequate access to water. The Mission finds that this was denied to the people served by the Namar wells. It took some 75 days to repair them.
989. The Mission also finds that the killing of Mr. Abdullah Ismail al-Zein was unlawful [...]. Since targeting the wells constituted an act of wanton destruction, the incidental loss of life cannot be justified with regard to any military advantage.
- [...]

## **XVII. THE IMPACT OF THE BLOCKADE AND OF THE MILITARY OPERATIONS ON THE PEOPLE OF GAZA AND THEIR HUMAN RIGHTS**

[...]

### **K. Legal analysis**

- 1300.[...] The protections owed under international humanitarian law to the civilian population of the Gaza Strip by all parties to the conflict include the duty to allow the free passage of humanitarian medical supplies, as well as consignments of essential foodstuffs and clothing for children, pregnant women and mothers at the earliest opportunity (article 23 of the Fourth Geneva Convention). Article 70 of Additional Protocol I provides that parties to a conflict are obliged to allow the passage of articles that are essential for the civilian population, at the earliest opportunity and without delay.
1301. The relevant provisions of the Fourth Geneva Convention relating to the duties of an occupying Power should also be taken into consideration, in particular the obligations contained in articles 50 (duty to facilitate the working of care and education institutions), 55 (duty to ensure food and medical supplies to the population), 56 (duty to ensure and maintain medical and hospital establishments and services), 59 (duty to agree on relief schemes if the occupied territory is not well supplied) and 60 (duty to continue performing obligations even if third parties provide relief consignments). [...]
1305. The Mission considers that the closure of or the restrictions imposed on border crossings by Israel in the immediate period before the military operations subjected the local population to extreme hardship and deprivations that are inconsistent with their protected status. The restrictions on the entry of foodstuffs, medical supplies, agricultural and industrial input, including industrial fuel, together with the restrictions on the use of land near the border and on fishing in the sea have resulted in widespread poverty, increased dependence on food and other assistance, increased unemployment and economic paralysis. The Mission can conclude only that Israel has and continues to violate its obligations as an occupying Power under the Fourth Geneva Convention.
1306. The Mission has given consideration to the argument put forward by the Israeli Government that the above policies and restrictions are being imposed as a form of sanction. However, such blanket sanctions are not permitted under international law. [...]
1308. The Mission also notes that reprisals and collective penalties are prohibited under international humanitarian law.
1309. The Mission has considered the question of military security. As serious as the situation that arises when rockets and mortars are fired on or near border crossings may be, the Mission considers that it does not justify a policy of collective punishment of the civilian population of the Gaza Strip. The Mission is aware of the Government of Israel's declaration of the Gaza Strip as a "hostile



territory". Again, for the Mission, such a declaration does not relieve Israel of its obligations towards the civilian population of the Gaza Strip under international humanitarian law.

1310. Moreover, the Mission takes note that following the decision of the Supreme Court of Israel in what is known as the Fuel and electricity case, Israel reconsidered its obligations relating to the amounts and types of humanitarian supplies that it allowed into the Gaza Strip to meet "vital humanitarian needs". Whatever that somewhat vague standard may be, the Mission stresses that Israel is bound to ensure supplies to meet the humanitarian needs of the population, to the fullest extent possible. [See Case No. 137, Israel, Power Cuts in Gaza]

1311. In sum, the Mission restates its view that Israel has not fulfilled its duties as an occupying Power in relation to the Gaza Strip.

[...]

1313. The Mission has also given consideration to the extent and type of military operations conducted by Israel in the Gaza Strip between 27 December 2008 and 18 January 2009. As mentioned earlier, provisions of the Fourth Geneva Convention and of Additional Protocol I that reflect international customary law apply to those operations. Their obligations include that under the Fourth Geneva Convention [...] to allow the free passage of all consignments of medical and hospital objects, food and clothing subject to certain conditions (art. 23). [...]

1314. The Government of Israel has provided information about the actions it took to ensure the supply of humanitarian assistance to the Gaza Strip and to ensure that medical relief and rescue as well as essential facilities would function during the hostilities. These actions allegedly comprised: the continuous supply of humanitarian aid through the crossings; coordination of evacuation within the Gaza Strip and outside; a unilateral suspension of military operations each day to enable the resupply of assistance for the population and actions to ensure the functioning of essential infrastructure in the Gaza Strip. To this end, the Government of Israel reported that it established a number of coordinating and liaison bodies with Palestinian authorities and organizations, the United Nations agencies on the ground and humanitarian agencies, such as ICRC. The Government also reported that a number of trucks carrying humanitarian goods from Israel and from other countries, including from international organizations, were given passage.

1315. In response, the Mission draws attention to the fact that no consideration was given to the situation that prevailed in the Gaza Strip before the military operations. In particular, the Mission notes that the amounts and types of food, medical and hospital items and clothing were wholly insufficient to meet the humanitarian needs of the population. Given that since the end of the operations the number of truckloads allowed through the crossings has again fallen, the humanitarian supplies are even less sufficient.

[...]

1318. From the facts it ascertained and the foregoing analysis, the Mission finds that Israel has violated its obligation to allow the free passage of all consignments of medical and hospital stores and objects, food and clothing (article 23 of the Fourth Geneva Convention).

[...]

1328. The Mission also considered whether the Gaza population was subject to collective punishment or penalty. According to article 33 of the Fourth Geneva Convention, “collective penalties and likewise all measures of intimidation or of terrorism are prohibited”. Article 75 (2) (d) of Additional Protocol I includes collective punishment as an act that is “prohibited at any time and in any place whatsoever”. Reprisals against protected persons are also prohibited under article 33. These prohibitions are part of customary international law.

1329. [...] The cumulative effect of the blockade policies, with the consequent hardship and deprivation among the whole population, and of the military operations coupled with statements by Israel made to the effect that the whole of the Gaza Strip was a “hostile territory” strongly suggest that there was an intent to subject the Gaza population to conditions such that they would be induced into withdrawing their support from Hamas. [...]

1331. The facts ascertained by the Mission, the conditions resulting from the deliberate actions of the Israeli armed forces and the declared policies of the Israeli Government – as they were presented by its authorized representatives – with regard to the Gaza Strip before, during and after the military operation, cumulatively indicate the intention to inflict collective punishment on the people of the Gaza Strip. The Mission, therefore, finds a violation of the provisions of article 33 of the Fourth Geneva Convention.

[...]

#### **XVIII. THE CONTINUING DETENTION OF ISRAELI SOLDIER GILAD SHALIT**

1336. The Mission notes the continued detention of Gilad Shalit, a member of the Israeli armed forces, captured in 2006 by Palestinian armed groups during a cross-border operation. [...]

1337. Israeli Government officials have repeatedly stated that the easing of the blockade on the Gaza Strip [...] is linked to the release of Gilad Shalit. In February 2009, it appeared that the Israeli Government had dropped its demand for Palestinian militants to release Gilad Shalit before it would end the blockade.

[...]

#### **Legal findings and conclusions**

1343. The Mission is of the opinion that, as a soldier who belongs to the Israeli armed forces and who was captured during an enemy incursion into Israel, Gilad Shalit

meets the requirements for prisoner-of-war status under the Third Geneva Convention. As such, he should be protected, treated humanely and be allowed external communication as appropriate according to that Convention. ICRC should be allowed to visit him without delay. Information about his condition should also be provided promptly to his family.

1344. The Mission is concerned by the declarations referred to above, made by various Israeli officials, who have indicated the intention of maintaining the blockade of the Gaza Strip until the release of Gilad Shalit. The Mission is of the opinion that this would constitute collective punishment of the civilian population of the Gaza Strip.

## DISCUSSION

### I. Qualification of the conflict and applicable law

(*Israeli report, paras 28-67; UN Mission, paras 273-283*)

1. How does the Israeli report qualify the operation in Gaza in the winter of 2008-2009? How does the UN Mission qualify it? According to each of the two reports, which law is applicable?
2. (*Israeli report, paras 36 and 67*) Do you agree with the Israeli report that there has been a single armed conflict between Israel and the Palestinian armed groups since 2000? May Operation Cast Lead be considered part of a continuing armed conflict despite the *Tahadiya*? Is it preferable to apply the laws on the conduct of hostilities to every clash between the Israeli armed forces and the Palestinian armed groups, rather than law enforcement rules? Which regime would be more protective?
3. a. (*Israeli report, paras 29-30*) Do you agree that “[i]t is not yet settled which regime applies to cross-border military confrontations between a sovereign State and a non-State terrorist armed group operating from a separate territory”? Do you agree that the qualification of the conflict between Israel and the Palestinian armed groups is merely of “theoretical concern”? As IHL stands today, does it make a difference whether the law of international armed conflict or the law of non-international armed conflict applies? Do you agree that similar rules apply to both types of conflict? Even concerning the obligations of Israel as an occupying power (of the Gaza Strip as a whole or of places reoccupied during the operation)? Even concerning the status and treatment of Gilad Shalit? May we conclude that, because the same customary norms may apply in both types of conflict, there are no longer any differences between the two regimes?
- b. (*UN Mission, paras 273-283*) Do you agree with the Mission that there still is a situation of occupation in Gaza? Can it be a situation of occupation when the occupying forces are no longer present in the occupied territory and are involved in full-scale combat operations against organized armed groups from that occupied territory? Is the classification by the ICJ of the territory on which Israel built the Wall/Security Fence (*UN Mission, para. 279*) conclusive for the classification of the Gaza Strip? If the Gaza Strip is no longer considered an occupied territory, does GC IV nevertheless apply to some aspects of the operation? (HR, Art. 42; GC I-IV, common Art. 2)

## II. Conduct of hostilities – military objectives

4. a. (*Israeli report, paras 101-105*) How does the report define a military objective? Does the determination of what a military objective is depend solely on an assessment of military advantage? What other elements are included in the definition of a military objective? Does the report take them into account? (P I, Art. 52(2); CIHL, Rule 8)
- b. (*Israeli report, para. 105*) May the notion of military advantage be understood, for the purposes of Art. 52(2) of P I, as encompassing the results of a military campaign as a whole? Is this in accordance with the terms of P I, Art. 52(2)? What are the dangers of such an approach? (P I, Arts 51(5)(a) and 52; CIHL, Rules 8 and 13)
5. (*Israeli report, para. 105*) Do you agree that the security of the attacking forces “is a proper consideration in assessing military advantage”? What are the dangers of relying extensively on this consideration?
6. a. (*Israeli report, paras 106-111, 233*) When may a civilian object be a direct target for attack? Is it sufficient that the civilian object is being used for military purposes? Does a civilian object lose “absolute protection” when it is used for military purposes? (P I, Art. 52; CIHL, Rules 7-10)
- b. (*Israeli report, para. 110*) Is it sufficient that a civilian object is believed to be used for military purposes for it to be lawfully targeted? Is there a presumption of civilian character for objects “normally dedicated to civilian purposes? (P I, Art. 52(3))
7. a. (*Israeli report, paras 153-154*) Does a civilian area automatically become a military objective because the enemy is launching attacks from it? May the entire area be considered a military objective? Is the fact that the area is used by the enemy to launch attacks sufficient to allow the other party to launch a counter-attack directly targeting that area? (P I, Arts 52 and 57; CIHL, Rules 7-10,15)
- b. (*Israeli report, paras 159-169*) Does the launching of attacks from civilian-populated areas, or from within private residences, amount to a violation of the principle of distinction? Is it a grave breach? (P I, Arts 48, 52 and 85; CIHL, Rule 1)
8. (*UN Mission, para. 495*) Is there an obligation under IHL for combatants and fighters to distinguish themselves from the civilian population? Do you agree with the Mission’s report that the failure to do so does not amount to a violation of IHL? When are combatants and fighters required to distinguish themselves? Is the denial of combatant privileges the only consequence for a combatant who does not do so? (P I, Arts 44(3) and 48; CIHL, Rule 1)
9. (*Israeli report, para. 235; UN Mission, paras 365-392*) Do you agree that the ministries operated by Hamas may be considered as legitimate targets for attack? Does the question of who owns or administers a building have any bearing on its possible qualification as a military objective? May all objects somehow related to, owned by, or associated with the enemy party be collectively considered as military objectives? Would this approach be in accordance with the principle of distinction? Similarly, may all civil servants and employees of official buildings of the enemy be considered as part of the enemy’s force and thus be lawfully targeted? (P I, Arts 50-52; CIHL, Rules 1-10)
10. (*UN Mission, paras 365-392*)
  - a. Was the Gaza prison a military objective? May the targeting of a prison be justified under IHL? Do you agree with the Mission that the attack on the prison may amount to a grave breach of GC IV? Was the prison property protected by GC IV? (GC IV, Art. 147; P I, Art. 52; CIHL, Rules 7-10)
  - b. Was the Palestinian Legislative Council building a military objective? May legislative buildings in general be considered military objectives? Did the Palestinian Legislative Council building

become a military objective merely because of the presence of a “video-conferencing room which enabled the Gazan parliamentarians to hold joint sessions with the members of Parliament based in Ramallah”? Could this be considered as making an effective contribution to Hamas’ military activity? (P I, Art. 52; CIHL, Rules 7-10)

11. (*Israeli report, para. 237-248; UN Mission, paras 393-437*)
  - a. What is the Israeli report’s conclusion with regard to the status of the Palestinian police? What is the UN Mission’s conclusion in that regard? On which elements does the Israeli report base its conclusion that the police were a legitimate target? According to the UN Mission’s description of the police duties during Operation Cast Lead, would you say that the police took on a military function? (*UN Mission, paras 412-419*)
  - b. Do you agree that the Palestinian police as a whole should be regarded as “combatants” and therefore as legitimate targets? Assuming that some of the policemen were also members of Hamas’ military wing, would this mean that they may be directly targeted? May they be targeted because they may potentially engage in combat operations against the IDF? May they be targeted on that basis even when not yet engaged in such operations?
  - c. Assuming that some of the policemen were also members of Hamas’ military wing, would this mean that the police group they belonged to became a legitimate target? May the entire group of policemen lose their protection if it were established that some members were actually taking direct part in hostilities with the al-Qassam brigades against the IDF?
12. (*UN Mission, paras 913-989*) May the flour mill be considered as a military objective? May the chicken farms be considered as such? May the water and sewage installations be considered as such? In which circumstances may these objects and buildings become military objectives? May they be considered as objects indispensable to the survival of the civilian population? Do you agree with the Mission that the destruction of these objects and buildings amounted to grave breaches of GC IV? Was the destruction of any of these objects and buildings extensive enough to amount to a grave breach? When the chicken farm was destroyed, could it be considered as property protected by GC IV? Even if the Gaza Strip as a whole was not considered as an occupied territory? (GC IV, Art. 147; P I, Arts 52 and 54; CIHL, Rules 8, 53 and 54)

### III. Conduct of hostilities – principle of proportionality

(*Israeli report, paras 120-126, 230-232*)

13. How does the Israeli report assess proportionality? Which are the two elements to be balanced? How does the report define the “military advantage anticipated”? For the purposes of IHL, does the notion include the protection of a party’s own forces? (P I, Art. 51(5)(b); CIHL, Rule 14)
14. Do you agree that the notion of “military advantage anticipated” must be considered “from the standpoint of the overall objective of the mission” rather than from the standpoint of every single attack? Would this approach be in accordance with the literal meaning of P I, Art. 51(5)(b)?

### IV. Conduct of hostilities – precautionary measures

15. (*Israeli report, paras 132-133*) Do you agree with the Israeli report that the obligation to take precautionary measures is a question of “feasibility” and not one of perfection? Considering the paragraphs on Israel’s conduct of operations (*paras 230-265*), and more specifically the issuance of warnings, do you think that Israel always took all feasible precautions before launching attacks? Should it be considered that when a precautionary measure has proved inefficient, no other precautions need be taken? (P I, Art. 57; CIHL, Rules 15-21)

16. (*UN Mission, para. 529*) Do you agree that the phrase “unless circumstances do not permit” in P I, Art. 57(2)(c), encompasses the military advantage of surprise? Do you agree that the principle of proportionality should be applied here to balance the potential injury to civilians or damage to civilian objects against the anticipated advantage to be gained by the element of surprise? (P I, Art. 57(2)(c); CIHL, Rule 20)
17. (*Israeli report, paras 151-169; UN Mission, paras 439-498*)
  - a. Does IHL explicitly prohibit the launching of attacks from within civilian-populated areas? Are such attacks prohibited only when their purpose is to prevent counter-attacks or shield fighters or military objectives? When do civilians living in an area from which an attack is launched become human shields? (P I, Arts 51(7), 57(1) and 58; CIHL, Rules 22-24)
  - b. May a party launch attacks from within a civilian-populated area if it has given sufficient advance warning to local residents? If it removes the civilian population from the area beforehand? (P I, Arts 57(2)(c) and 58(a); CIHL, Rules 20, 23-24)
  - c. (*UN Mission, para. 492*) Is Hamas bound by Art. 28 of GC IV in respect of Palestinian civilians? Is it bound at least if the Gaza Strip is considered to be an occupied territory?
18. (*Israeli report, paras 262-265; UN Mission, paras 499-536*)
  - a. (*UN Mission, paras 530-536*) How do you assess the effectiveness of a warning (*para. 503*)? What can you say about the effectiveness of a warning when the attack occurs only seven minutes later (*para. 515*)? What can you say about a warning advising civilians to reach places that they know have been subject to attacks? Do you agree with the Mission that most of Israel’s warnings cannot be regarded as effective? What could Israeli forces have done to make them effective? (P I, Art. 57(2)(c); CIHL, Rule 20)
  - b. (*UN Mission, para. 522*) Does the issuance of warnings relieve a party from taking other precautionary measures before launching an attack? Could it be argued that the persons who stayed after a warning has been issued must be combatants or directly participating in hostilities and may therefore be directly targeted? Which other precautionary measures, if any, should be taken? (P I, Art. 57; CIHL, Rules 15-21)
  - c. (*UN Mission, paras 532-535*) Can the firing of shots be considered a warning? Can this method be used when there has been no response to preliminary warnings? What are the dangers of using warning methods that can be equated with attacks?

## V. Blockade

19. Is a blockade a lawful method of warfare? Does IHL regulate blockades? (GC IV, Art. 23; P I, Art. 70)
20. (*UN Mission, paras 311-326, 1305-1331*)
  - a. What is the UN mission’s conclusion about the consequences of the blockade? What were Israel’s obligations, if any, regarding the provision of foodstuffs, medical items, and agricultural and industrial supplies? Did the establishment of the blockade violate these obligations? (GC IV, Arts 23 and 59; P I, Arts 54(1), 69 and 70; CIHL, Rules 54 and 55)
  - b. Assuming that Israel had some obligations towards the Gazan population regarding humanitarian assistance before the beginning of Operation Cast Lead, did these obligations still apply once the hostilities had started? What were Israel’s obligations towards the Gazan population during military operations? (GC IV, Arts 23 and 59; P I, Arts 54(1), 69 and 70; CIHL, Rules 53 and 55)
21. (*UN Mission, paras 311-326, 1305-1331*)

- a. Is it realistic to assume that Israel was the occupying power in Gaza? Do you agree with the Commission that Israel was bound by GC IV and the provisions on humanitarian assistance? Before Operation Cast Lead? During Operation Cast Lead?
  - b. Assuming that Israel was no longer the occupying power, can it be argued that some of the obligations assigned to occupying powers still applied because of the level of control exercised by Israel over Gaza? If yes, which obligations were still binding for Israel? Did the blockade violate them?
  - c. If none of the obligations incumbent on occupying powers applied, did some rules of IHL nevertheless oblige Israel to let humanitarian assistance through to Gaza (GC IV, Arts 23 and 59; P I, Art. 70; CIHL, Rules 53 and 55)
22. (*UN Mission, paras 1306, 1328-1331*) May Israel impose restrictions on humanitarian supplies as a sanction against the attacks launched by Palestinian armed groups? Do you agree with the UN Mission that this may amount to reprisals or collective punishments? Are reprisals always prohibited by IHL? Are collective punishments always prohibited by IHL? Are they prohibited only when they concern humanitarian supplies? (GC IV, Art. 33; P I, Arts 20, 51(6), 52(1), 54(4), 75; CIHL, Rule 103)

## VI. Detention of Gilad Shalit

23. (*UN Mission, paras 1336-1344*)
- a. Is Gilad Shalit a prisoner of war? Is he in the power of the enemy in an international armed conflict? If he is not a prisoner of war, is he necessarily a hostage? (GC III, Arts 2, 3 and 4; P II, Art. 5)
  - b. Until when may he be detained? Has the ICRC a right to visit him? Must information about his condition be given to his family? (GC III, Arts 3, 118, 122, 123 and 126; CIHL, Rules 99, 124, 125 and 128)
  - c. May Israel maintain a blockade of the Gaza Strip? At least until Gilad Shalit is released? (GC IV, Arts 23, 33, 55-59; CIHL, Rules 53, 55 and 103)

**Case No. 125, Israel, Applicability of  
the Fourth Convention to Occupied Territories**

[Source: Shamgar, M. [At that time Attorney General (Israel), later member and President of the Israeli Supreme Court.], "The Observance of International Law in the Administered Territories," in *Israeli Yearbook on Human Rights*, vol. 1, 1971, pp. 262-77; footnotes omitted.]

**I. APPLICATION OF CONVENTIONS**

There is certainly a wide awareness of the great difficulty in approaching problems connected with the actual implementation of the rules of warfare without influence by innate prejudices or a deep-seated subjective outlook. The difficulty is actually twofold: the lack of that unanimity and clarity which is a comparatively frequent characteristic of municipal law, and, over and above that, the difficulty posed by political predilection. [...]

Before turning to the question of the observance of rules of international law, due consideration should be given to the difference between the questions connected with the observance of these rules and the prior question of the applicability of a certain set of rules to given circumstances. In other words, *de facto* observance of rules does not necessarily mean their applicability by force of law. [...]

Humanitarian law concerns itself essentially with human beings in distress and victims of war, not States or their special interests. As Max Huber said: "The fate of human beings is independent of the legal character which belligerents wish to give to their struggle." It is, therefore, always important to seek ways and means by which humanitarian relief can be extended to victims of war without waiting for the international law to develop further and without subjecting the fate of the civilians to the political and legal reality. While political rights and the legal interpretation of a given set of factual circumstances are of far-reaching consequence for the fate of nations, and cannot be excluded from consideration, any possible separation between the decision on political issues and the pragmatic application of humanitarian rules should be considered positively. It must be borne in mind that this was also underlying idea of Article 3, common to all four Geneva Conventions.

In my opinion there is no existing rule of international law according to which the Fourth Convention applies in each and every armed conflict whatever the status of the parties. Territory conquered does not always become occupied territory to which the rules of the Fourth Convention apply. It is apparently not so, for example, in cases of cessation of hostilities that lead to termination of war, nor is it so in cases of subjugation, although this question arose only before 1949.

The whole idea of the restriction of military government powers is based on the assumption that there had been a sovereign who was ousted and that he had been a legitimate sovereign. Any other conception would lead to the conclusion that France, for example, should have acted in Alsace-Lorraine according to rules 42-56 of the Hague Rules of 1907, until the signing of a peace treaty.



As I mentioned before, I am aware of the theory of subjugation, which has been applied since World War II; if the Fourth Convention applies to every conflict, how do we adapt this theory to the Fourth Convention? In my view, *de lege lata*, the automatic applicability of the Fourth Convention to the territories administered by Israel is at least extremely doubtful, to use an understatement, and automatic application would raise complicated juridical and political problems. I shall mention some of them.

Israel never recognized the rights of Egypt and Jordan territories occupied by them till 1967. Judea and Samaria and the Gaza Strip were part of the territory of the British Mandate of Palestine which ended on May 14, 1948. The war which started on that date never led to recognized boundaries. On the contrary, the Armistice agreements of 1948 explicitly stated that the Armistice demarcation line is not to be construed in any sense as a political or territorial boundary and is delineated without prejudice to the rights, claims or position of either party.

From 1948 till 1956 and again from 1956 till 1967 the Gaza Strip was, according to express U.A.R. statements, under Egyptian military occupation, ruled by a U.A.R. Military Governor. The inhabitants of the Gaza Strip were not nationals of the Occupying Power. They even needed a special permit to enter the U.A.R. Military courts were set up, curfew was declared, and administrative detention was carried out according to the orders of the Military Governor. It is worth noting that notwithstanding these facts, the question of the application of the Fourth Convention to this territory was never brought up or considered before 1967.

The history of the legal status of Judea and Samaria is also relevant. On May 13, 1948, a law was enacted in Transjordan according to which the provisions of the Transjordan Defense law apply to any country or place in which Jordan is responsible for the preservation of security and order. On May 18, 1948, General Ibrahim Pecha Hashem was appointed by King Abdullah as Military Governor of all territories which were held by the Transjordan Army. According to Proclamation No. 2 published by General Hashem:

All the laws and regulations which were in force in Palestine at the end of the Mandate on 15.5.48 shall remain in force in all areas in which the Arab Jordan Army stays or in which it is responsible for the preservation of security and order, except the laws and regulations which are contrary to the Defense Law of Transjordan of 1935 or the Regulations and Orders published under this law.

On September 16, 1950, the Law Regarding Laws and Regulations in Force in the Two Banks of the Hashemite Jordan Kingdom was published and entered into force. This law provided that the laws and regulations in each of the two banks should remain in force until unified laws for the two banks were promulgated with the consent of the national council and with the ratification of the King. The unification of the laws of the East and West banks went on from 1950 to 1967, although by June 5, 1967, some laws still remained different. The annexation by Jordan of the West Bank on April 24, 1950, was recognized only by two countries: Great Britain and Pakistan. [...]

There is no need to fully appraise the relative value and merit of the rights of the parties in this context. It should, however, be mentioned that in the interpretation most favorable to the Kingdom of Jordan her legal standing in the West Bank was at most that

of a belligerent occupant following an unlawful invasion. In other words, following an armed invasion in violation of international law, the military forces of Jordan remained stationed in the West Bank and the Kingdom of Jordan then annexed the West Bank, after having agreed in the Armistice Agreement of 1949 that it had no intention of prejudicing the rights, claims, and positions of the parties to the Agreement. It is therefore not surprising to find the following conclusion as to the relative rights in the West Bank in Blum's article "Reflections on the Status of Judea and Samaria":

[...] [T]he traditional rules of international law governing belligerent occupation are based on a twofold assumption, namely, (a) that it was the legitimate sovereign which was ousted from the territory under occupation; and (b) that the ousting side qualifies as a belligerent occupant with respect to the territory. According to Glahn, "(b)elligerent occupation... as regulated by customary and conventional international law, presupposes a state of affairs in which the sovereign, the legitimate government of the occupied territory of both an ousted legitimate sovereign and a belligerent occupant lies at the root of all those rules of international law, which, while recognizing and sanctioning the occupant's rights to administer the occupied territory, aim at the same time to safeguard the reversionary rights of the ousted sovereign. It would seem to follow that, in a case like the present where the ousted State never was the legitimate sovereign, those rules of belligerent occupation directed to safeguarding that sovereign's reversionary rights have no application." [*Israeli Law Review*, 1968, pp. 279]

The same conclusion would apply to the Gaza Strip which was regarded even by the U.A.R. government as territory under military occupation, and that Government never even raised the claim that it had any legal rights to the territory.

The territorial position is thus *sui generis*, and the Israeli Government tried therefore to distinguish between theoretical juridical and political problems on the one hand, and the observance of the humanitarian provisions of the Fourth Geneva Convention on the other hand. Accordingly, the Government of Israel distinguished between the legal problem of the applicability of the Fourth Convention to the territories under consideration which, as stated, does not in my opinion apply to these territories, and decided to act *de facto* in accordance with the humanitarian provisions of the Convention. [...]

## V. CONCLUSION

[...] The significant achievements of the existing system, in my opinion, are the following: (a) the existence, since the first day of Military Government, of a military legal system based on the rule of law, a system in which even hostile critics abroad have detected no real flaws; (b) the speedy restoration of the normal functioning of the local courts, which exercise their powers without interference; (c) the fact that the right of defense is ensured in both military and civil trials; (d) the avenue for criticism of the army authorities which has been voluntarily provided for by recourse to the High Court of Justice, in contrast to what has been customary in all other countries during military rule in occupied territory; (e) the existence of Appeals Committees on compensation for damage and on decisions of the Custodian, presided over by

lawyers; (f) the fact that the rights of the population are ensured by a long series of legislative acts relating to protection of property, safeguarding of rights to property, social benefit rights, and freedom of worship. [...]

## DISCUSSION

1. a. Was there an international armed conflict between Israel, Jordan and Egypt in 1967? Is Convention IV applicable to the conflict? When does its application cease? (GC IV, Arts 2 and 6)
- b. Are Convention IV's provisions on occupied territories only applicable to occupation of a territory of a "High Contracting Party" (GC I-IV, Art. 2(2))? Or to all territory that comes under the control of a party to an international armed conflict? (GC I-IV, Art. 2(1)) According to Shamgar's interpretation, are the provisions on "aliens on the territory of a party to the conflict" applicable to the West Bank and Gaza? Or according to that interpretation, are neither these provisions nor those on occupied territories applicable? (GC IV, Arts 2, 35-46 and 47-78)
- c. When is a territory considered occupied according to IHL? (HR, Art. 42) Is it a question of fact, or of the legal status of the territory, or both, whether a territory is occupied? Is the concept of "occupied territory" the same under Convention IV and under the Hague Regulations?
- d. Why does Shamgar claim that neither the West Bank nor Gaza is occupied territory as defined by IHL, and that therefore Convention IV is not applicable? Does IHL consider the status of the territory before occupation? According to IHL, can a territory only be occupied if it was previously under the control of a legitimate sovereign government, as claimed by Shamgar? Is the application of IHL conditional on recognition of the sovereignty of the previous government? What would the practical consequences for the applicability of Convention IV be if it depended on whether the previous control of a conquered territory was legitimate or not? During a conflict, who could answer this question? What are the odds of the belligerents agreeing on this and therefore on the applicability of Convention IV?
- e. Does Convention IV address questions such as "who started the war?" "Who is fighting a just cause?" or "Who exercises legitimate control?" Isn't it a confusion between *jus ad bellum* and *jus in bello*?
- f. Is it the aim of IHL to protect sovereign rights, as seems to be suggested by the quotation from Blum's article? Or is its main aim to protect individuals? Who or what is protected by Convention IV? (GC IV, Art. 4)
2. Is Shamgar's interpretation of what constitutes an occupied territory in accordance with the "ordinary meaning to be given to the terms of the treaty"? (Vienna Convention on the Law of Treaties, Art. 31(1); available at <http://untreaty.un.org>)
3. Although Israel consented to "act *de facto* in accordance with the humanitarian provisions of the Convention", did it say which provisions? Which are the "humanitarian provisions"? Can Convention IV be divided into humanitarian provisions and non-humanitarian provisions? Doesn't IHL by definition consist entirely of humanitarian provisions? Are the provisions invoked against Israel in **Case No. 127**, Israel, Ayub v. Minister of Defence; **Case No. 128**, Israel, House Demolitions in the Occupied Palestinian Territory; and **Case No. 132**, Israel, Cases Concerning Deportation Orders, accordingly non-humanitarian provisions? For example, are the prohibitions of torture and of deportations non-humanitarian?

**Case No. 126, Israel, Military Prosecutor v. Kassem and Others**

[Source: Lauterpacht, E. (ed.), *International Law Reports*, Cambridge, Grotius Publications Limited, vol. 42, 1971, pp. 470-483]

**MILITARY PROSECUTOR v. OMAR MAHMUD KASSEM AND OTHERS**

**Israel, Military Court sitting in Ramallah**

**April 13, 1969**

The following is the judgement of the Court:

[...] [T]he first of the accused pleaded that he was a prisoner of war, and similar pleas were made by the remaining defendants.

[...] [T]he defendants were asked by the Court whether they were prepared to testify so that it could be ascertained whether the conditions entitled them to be regarded as prisoners of war were fulfilled [...].

The second defendant [...] was prepared to testify on oath. [...] [H]e claimed that he belonged to the 'Organization of the Popular Front for the Liberation of Palestine' and when captured was wearing military dress and had in his possession a military pass issued to him on behalf of the Popular Front, bearing "the letters J.T.F. [Popular Front for the Liberation of Palestine], my name and my serial number." [...]

[...]

[W]e hold that we are competent to examine and consider whether the defendants are entitled to prisoner-of-war status, and if we so decide, we shall then cease to deal with the charge. [...]

[W]e shall now inquire into the kinds of combatants to whom the status of prisoners of war is accorded upon capture by enemy forces. [...]

[...]

The principles of the subject were finally formulated in the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949. Whether we regard this Convention as an agreement between the Contracting Parties or whether we regard it as expressive of the position under customary International Law relating to the treatment of prisoners of war, we proceed on the assumption that it applies to the State of Israel and its armed forces; Israel in fact acceded to the Convention on 6 July 1951, Jordan did so on 29 May 1951.

Article 4A of this Convention defines all those categories of persons who, having fallen into enemy hands, are regarded as prisoners of war within the meaning of the Convention. For the purpose of deciding the status of the defendants before us, we shall consider paragraphs (1), (2), (3) and (6) of Article 4A.

Without a shadow of doubt, the defendants are not, in the words of paragraph (1), 'Members of the armed forces of a Party to the conflict' or 'members of militias or volunteer corps forming part of such armed forces'.

Article 2, which prescribes the scope of its application, states that it applies to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'.

To comprehend the true intent of the Convention, let us quote Leland Harrison, representative of the U.S.A:

'The Convention would, therefore, be applicable to all cases of declared or undeclared war between States to the Convention, and to certain armed conflicts within the territory of a State party to the Convention' (Final Report, IIB, p. 12).

This makes it clear that the Convention applies to relations between States and not between a State and bodies which are not States and do not represent States. It is therefore the Kingdom of Jordan that is a party to the armed conflict that exists between us and not the Organization that calls itself the Front for the Liberation of Palestine, which is neither a State nor a Government and does not bear allegiance to the regime which existed in the West Bank before the occupation and which exists now within the borders of the Kingdom of Jordan. In so saying, we have in fact excluded the said Organization from the application of the provisions of paragraph (3) of Article 4. [...]

Paragraph (6) of Article 4 is also not pertinent, since the defendants are not inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units.

We can be brief. The Organization to which the defendants belong does not answer even the most elementary criteria of a *levée en masse*. We have not to do with the population of an area which an enemy is approaching or invading. In October 1969 we were not approaching an area whose population was not yet under our effective control and we were certainly not invading new areas, and there cannot be the least doubt that, in the period from 5 June 1967 to October 1968, that 'population' had time to 'form itself' into regular armed units.

Another category of persons mentioned in the Convention are irregular forces, i.e., militia and volunteer forces not forming part of the regular national army, but set up for the duration of the war or only for a particular assignment and including resistance movements belonging to a party to the armed conflict, which operate within or outside their own country, even if it is occupied. To be recognized as lawful combatants, such irregulars must, however, fulfil the following four conditions: (a) they must be under the command of a person responsible for his subordinates; (b) they must wear a fixed distinctive badge recognizable at a distance, (c) they must carry arms openly; (d) they must conduct their operations in accordance with the laws and customs of war.

Let us now examine whether these provisions of Article 4A, paragraph (2), are applicable to the defendants and their Organization.

First, it must be said that, to be entitled to treatment as a prisoner of war, a member of an underground organization on capture by enemy forces must clearly fulfil all the four above-mentioned conditions and that the absence of any of them is sufficient to attach to him the character of a combatant not entitled to be regarded as a prisoner of war. [...]

For some reason, however, the literature on the subject overlooks the most basic condition of the right of combatants to be considered upon capture as prisoners of war, namely, the condition that the irregular forces must belong to a belligerent party. If they do not belong to the Government or State for which they fight, then it seems to us that, from the outset, under current International Law they do not possess the right to enjoy the status of prisoners of war upon capture.

It is natural that, in international armed conflicts, the Government which previously possessed an occupied area should encourage and take under its wing the irregular forces which continue fighting within the borders of the country, give them protection and material assistance, and that therefore a 'command relationship' should exist between such Government and the fighting forces, with the result that a continuing responsibility exists of the Government and the commanders of its army for those who fight in its name and on its behalf.

[...] If International Law indeed renders the conduct of war subject to binding rules, then infringements of these rules are offences, the most serious of which are war crimes. It is the implementation of the rules of war that confers both rights and duties, and consequently an opposite party must exist to bear responsibility for the acts of its forces, regular and irregular. We agree that the Convention applies to military forces (in the wide sense of the term) which, as regards responsibility under International Law, belong to a State engaged in armed conflict with another State, but it excludes those forces – even regular armed units – which do not yield to the authority of the State and its organs of government. The Convention does not apply to these at all. They are to be regarded as combatants not protected by the International Law dealing with prisoners of war, and the occupying Power may consider them as criminals for all purposes.

The importance of the allegiance of irregular troops to a central Government made it necessary during the Second World War for States and Governments-in-exile to issue declarations as to the relationship between them and popular resistance forces (see, e.g., the Dutch Royal Emergency Decree of September 1944). In fact, the matter of the allegiance of irregular combatants first arose in connection with the Geneva Convention. The Hague Convention of 18 October 1907 did not mention such allegiance, perhaps because of the unimportance of the matter, little use being made of combat units known as irregular forces, guerrillas, etc., at the beginning of the century. In view, however, of the experience of two World Wars, the nations of the world found it necessary to add the fundamental requirement of the total responsibility of Governments for the operations of irregular corps and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war.

In the present case, the picture is otherwise. No governments with which we are in a state of war accepts responsibility for the acts of the Popular Front for the Liberation of Palestine. The organization itself, so far as we know, is not prepared to take orders from the Jordan Government, witness the fact that it is illegal in Jordan and has been repeatedly harassed by the Jordan authorities. The measures that Jordan has adopted against it have included the use of arms. This type of underground activity is unknown in the international community, and for this reason, as has been pointed out, we have found no direct reference in the relevant available literature to irregular forces being treated as illegal by the authorities to whom by the nature of things they should be subject. If these authorities look upon a body such as the Popular Front for the Liberation of Palestine as an illegal organization, why must we have to regard it as a body to which international rules relating to lawful bodies are applicable?

Despite all, let us nevertheless be extremely liberal and endeavour to proceed on the assumption that each member, even of such an illegal body, is entitled upon capture to be treated as a prisoner of war, if that body fulfils the four basic conditions mentioned in the first article of the rules concerning the laws and customs of war on land, which form an annex to the Hague Convention of 18 October 1907. [...]

Not every combatant is entitled to the treatment which, by a succession of increasingly humane conventions, have ameliorated the position of wounded members of armed forces. Civilians who do not comply with the rules governing "*levée en masse*" and have taken an active part in fighting are in the same position as spies. Similarly, combatants who are members of the armed forces, but do not comply with the minimum qualifications of belligerents or are proved to have broken other rules of warfare, are war criminals and as such are liable to any treatment and punishment that is compatible with the claim of a captor State to be civilized.

By the introduction of additional distinctions between lawful and unlawful combatants, and combined application of the test of combatant and non-combatant character and of civilian and military status, it becomes possible to give far-reaching protection to the overwhelming majority of the civilian population of occupied territories and captured members of the armed forces.

Within narrower limits even those categories of prisoners who are excluded from such privileged treatment enjoy the benefits of the standard of civilization. At least they are entitled to have the decisive facts relating to their character as non-privileged prisoners established in... judicial proceedings. Moreover, any punishment inflicted on them must keep within the bounds of the standard of civilization.

From all the foregoing, it is not difficult to answer the submission of counsel for the defence that a handful of persons operating alone and themselves fulfilling the conditions of Article 4A (2) of the Convention may also be accorded the status of prisoners of war. Our answer does not follow the line of reasoning of learned counsel.

[...] [I]t may be said that a person or body of persons not fulfilling the conditions of Article 4 A(2) of the Convention can never be regarded as lawful combatants even if they proclaim their readiness to fight in accordance with its terms. He who adorns himself with peacock's feathers does not thereby become a peacock.



What is the legal status of these unlawful combatants under international law? The reply may be found in von Glahn, [*The Occupation of Enemy Territories*, p. 52].

If an armed band operates against the forces of an occupant in disregard of the accepted laws of war ... then common sense and logic should counsel the retention of its illegal status. If an armed band operates in search of loot rather than on behalf of the legitimate sovereign of the occupied territory, then no combatant or prisoner-of-war rights can be or should be claimed by its members. [...]

If we now consider the facts we have found on the evidence of the witness for the prosecution, Moshe, as above, we see that the body which calls itself the Popular Front for the Liberation of Palestine acts in complete disregard of customary International Law accepted by civilized nations.

The attack upon civilian objectives and the murder of civilians in Mahne Yehuda Market, Jerusalem, the Night of the Grenades in Jerusalem, the placing of grenades and destructive charges in Tel Aviv Central Bus Station, etc., were all wanton acts of terrorism aimed at men, women and children who were certainly no lawful military objectives. [...] Immunity of non-combatants from direct attack is one of the basic rules of the international law of war.

The presence of civilian clothes among the effects of the defendants is, in the absence of any reasonable explanation, indicative of their intent to switch from the role of unprotected combatants to that of common criminals. Acts involving the murder of innocent people, such as the attack on the aircraft at Athens and Zurich airports, are abundant testimony of this.

International Law is not designed to protect and grant rights to saboteurs and criminals. The defendants have no right except to stand trial in court and to be tried in accordance with the law and with the facts established by the evidence, in proceedings consonant with the requirements of ethics and International Law.

We therefore reject the plea of the defendants as to their right to be treated as prisoners of war and hold that we are competent to hear the case in accordance with the charge-sheet. [...]

[Report: *Law and Courts in the Israel held Areas* (Jerusalem, 1970), p. 17.]

## DISCUSSION

1. a. Was there an international armed conflict that made IHL applicable? If so, between which States? When does Convention III apply? Who is a belligerent party? Does the Court contend that Convention III does not apply in this case? For which reasons? (GC I-IV, common Art. 2)
- b. Is the Court's decision based on the same arguments used to establish the inapplicability of Convention IV to the West Bank and Gaza Strip? [See **Case No. 125**, Israel, Applicability of the Fourth Convention to Occupied Territories] Is Convention III applicable before Israeli courts, but not Convention IV? When the Court states in its judgment that the Popular Front for the Liberation of Palestine (PFLP) "operates in search of loot rather than on behalf of the legitimate sovereign of the occupied territory" does it consider, contrary to **Case No. 125**, Israel,



Applicability of the Fourth Convention to Occupied Territories, that Jordan is the legitimate sovereign, or would it deny prisoner-of-war (POW) status to Jordanian soldiers?

- c. According to the Court's reasoning, does Convention III protect Palestinians residing in the occupied territory who rise up against occupation? Would it have applied to Palestinians fighting in that same territory prior to occupation? What would your answer, according to IHL, be to those questions?
  - d. Is an individual who fights for a State not recognized by the Detaining Power entitled to POW status under Convention III? What if it is simply the government that is not recognized by the Detaining Power? Has the State or the government to recognize that the individual is fighting for them or is it sufficient that the individual, in fact, fights for them? Are your answers different under Protocol I? Or is it sufficient to belong to a party to the conflict? Was the defendant not fighting for a Palestinian State? Does the PFLP represent that State? (GC III, Arts 2 and 4; P I, Arts 1 and 43)
  - e. Does such an interpretation of Art. 2 of Convention III explain why Protocol I includes Art. 1(4)? Could this Court's judgement have been rendered if Protocol I had applied? Would the result have been different? Which part of the Court's reasoning would have been different? Which additional factors would the Court have had to consider? Would the Conventions have been automatically inapplicable because the PFLP was not a State Party? (P I, Arts 1(4) and 96(3))
2. According to IHL, who is considered a combatant? Of what relevance is that determination to this case? In addition to Art. 4(A) of Convention III, does not Art. 1 of the Hague Regulations provide a definition?
  3.
    - a. Is the Court right in stating that to benefit from POW status, a person has to belong to a party to the conflict? Or is it sufficient to comply with the requirements listed under Art. 4(A)(2)(a)-(d)? Would the answer be different if Protocol I had been applicable?
    - b. Are the requirements listed under Art. 4(A)(2)(a)-(d) cumulative? Do they have to be fulfilled by the whole group or only by the member claiming POW status? Is it sufficient if the group only aims at fulfilling the requirements?
  4. If the accused had been granted POW status, would the Court have had to cease dealing with charges of "murder of civilians, [...] placing of grenades in Tel Aviv Central Bus Station, [...] wanton acts of terrorism"? If Protocol I had applied, would the accused have been immune from prosecution for such acts? Or would IHL on the contrary have prescribed such prosecution? (GC III, Arts 4 and 85; P I, Arts 43, 44, 51 and 85(3)(a))

**Case No. 127, Israel, Ayub v. Minister of Defence**

[Source: reproduced as summarized and partly translated by Domb, F. in *Israel Yearbook on Human Rights*, 1979, pp. 337-342; footnotes omitted.]

**H.C. 606/78,  
AYUB, ET AL. v. MINISTER OF DEFENCE, ET AL.  
(THE BETH EL CASE);  
H.C. 610/78,  
MATAWA, ET AL. v. MINISTER OF DEFENCE, ET AL.  
(THE BEKAOT CASE)  
33(2) Piskei Din 113.**

In this case, the Supreme Court of Israel, sitting as the High Court of Justice, was asked to rule on the legality of establishing Jewish civilian settlements on private Arab lands previously requisitioned by the Israeli Military Government for military and security needs. Both Arab petitioners are the owners of lands in Al-Bireh and Tubas respectively, which are in Judea and Samaria, in the West Bank Region (that has been under Israeli Military Administration since the Six Day War of 1967). The lands had been requisitioned in 1970 and 1975 pursuant to Orders issued by the Military Commander of the Region. The Orders stated that the Military Commander of the Region deemed the requisition to be necessary for military and security purposes. At the initiative of the Israeli civilian Government, and not the Military Commander, Jewish settlements were established on the requisitioned lands in 1978, whereupon the Arab land-owners petitioned the High Court of Justice for an injunction against the Requisition Orders and for the return of their lands. Two grounds were cited:

- (a) the requisition was not necessary for genuine military or security purpose and does not, in fact, serve any such purpose;
- (b) alternatively, even if justified for military needs, the requisition of the lands still constitutes a violation of rules of international law which the petitioners are entitled to rely upon in this Court.

With regard to the connection between these two grounds the Court at the outset proceeded to stress that

these are two separate grounds which must not be confused. An act of a military government in an occupied territory might be justified from a military, security viewpoint and yet it would not be impossible for it to be defective from the point of view of international law. Not everything that furthers security needs is permissible under international law.

The High Court bench [...] analysed both grounds separately and, finally, unanimously rejected the petition. The leading judgment was delivered by Witkon J. [...].

At the commencement, Witkon J. adds a preliminary remark clarifying [that] the Court's [...] decision will be based solely on the

rights of the parties before us, according to the current situation prevailing between Israel and the Arab States. This is a situation of belligerency and the status of the respondents with respect to the occupied territory is that of an Occupying Power.

The first argument raised by the petitioners – whereby the requisitioning was not justified by genuine military or security needs – was rejected by Witkon J. for the following reasons:

1. No distinction can be drawn, as suggested by the petitioners, between strict military needs justifying Requisition Orders and general security needs, which are allegedly beyond the scope of requisition powers. In the Court's opinion, "the military aspect and the security aspect are one and the same" because

the prevailing situation is one of belligerency, and the responsibility for maintaining order and security in the occupied territory is imposed upon the Occupying Power. It also must forestall the dangers arising out of such territory to the occupied territory itself and to the Occupying Power. These days warfare takes the form of acts of sabotage, and even those who regard such acts (which injure innocent citizens) as a form of a guerrilla war, will admit that the Occupying Power is authorized and even obliged to take all steps necessary for their prevention.

Therefore, the acts of the Military Commander are justified as serving either strict military needs or needs of general security or, obviously, both of them.

2. The Occupying State may take preventive measures against terrorist activities and acts of sabotage even in areas where they do not actually occur.

This is in line with the Court's opinion in the *Hilu* Case to which Witkon J. refers. In that case, land owned by Bedouin tribes in the Rafiah Salient (in Northern Sinai) was requisitioned and Jewish settlements were established upon it. The Bedouin's application for an injunction against the Requisition Orders was dismissed by the Court. The arguments of the respondent that the steps taken were necessary due to the terrorist activities and acts of sabotage which in fact took place in the area were unanimously upheld by the Court. Although in the present case no terrorist activity has actually taken place in the area in question, Witkon J. refused to differentiate between the two cases maintaining that prevention was the best cure for any ailment, it being preferable to detect and thwart terrorist activity prior to its perpetration. Since one of the affidavits submitted by the respondents unequivocally indicates that the requisitioned lands are situated in sensitive strategic areas "it is difficult to expect that an Occupying Power would leave the control of such areas to elements which are likely to be hostile."

3. As long as a state of belligerency exists, Jewish settlements in occupied territories serve actual and real security needs. Witkon J. sustains the opinion he expressed in the *Hilu* Case that the fact that requisitioned lands are intended for Jewish settlements does not deprive such requisitioning of its security character. In his view

it is indisputable that in occupied areas the existence of settlements – albeit “civilian” – of citizens of the Occupying Power contributes greatly to the security in that area and assists the army in fulfilling its task. One need not be a military and defence expert to understand that terrorist elements operate with greater ease in an area solely inhabited by a population that is indifferent or sympathizes with the enemy, than in an area in which one also finds people likely to observe the latter and report any suspicious movement to the authorities. Terrorists will not be granted a hideout, assistance or supplies by such people.

Since the affidavits of the respondent confirm that the Jewish settlers are subject to the control of the army and remain there only with the permission and the authority of the army, Witkon J. still adheres to his view expressed in the *Hilu* Case that “as long as a state of belligerency exists, Jewish settlement in occupied territories serves genuine security needs.”

Consequently, the Court held that the requisitions in question and the establishment of civilian settlements thereon actually serve military and security needs and are therefore in accord with Israeli internal-municipal law.

In support of their alternative argument – challenging the legality of the requisitions from the standpoint of international law – the petitioners relied on provisions of both the 1907 Hague Convention (No. IV) respecting the Laws and Customs of War on Land and the 1949 (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War. Turning to this argument, Witkon J. first considers and rules on the preliminary question as to whether the petitioners, as protected persons, may themselves claim their rights under these Conventions in a municipal (internal) court of the Occupying State or, whether, only the contracting States to those Conventions are entitled to claim the rights of the protected persons and that, of course, only on the international level.

In the words of the Court, the answer to this question depends on whether the invoked provisions of international law have become part of the internal-municipal law of the State whose court is asked to enforce it. A provision of an international Convention is part of the internal law – and, hence, enforceable in internal courts – if it forms part of customary international law, as distinct from conventional international law which binds only the contracting States *inter se*.

With regard to provisions of the 1907 Hague Convention and the 1949 Fourth Geneva Convention, Witkon J. refers to three judgments of the Supreme Court in which both these Conventions were held to be part of conventional international law on which individuals may not rely in an Israeli internal court. However, following these judgments, Professor Yoram Dinstein published an article stressing that a difference does exist between the two Conventions and that while the 1949 Fourth Geneva Convention has remained part of conventional international law, the 1907 Hague Regulations, which in any case only express the law as it had been accepted by all enlightened States, are considered as customary international law.

In light of this article, and after considering the views of Schwarzenberger and von Glahn, Witkon J. became convinced that the 1907 Hague Convention is generally

regarded as customary international law, whereas provisions of the 1949 Fourth Geneva Convention remain conventional in their nature. Consequently the petitioners may rely in this Court on the 1907 Hague Convention – which thus forms part of Israeli internal law – but not on provisions of the 1949 Fourth Geneva Convention. Since their contention as to the illegality of the settlements was totally based on Article 49 of the 1949 Fourth Geneva Convention, the Court lacks the competence to deal with it.

It therefore remained for the Court to decide only whether the requisition of the petitioners' lands violates, *inter alia*, Articles 23 and 46 of the Hague Regulations prohibiting confiscation of private property. It was proven to the Court that the lands in question were seized only to be used and that rental was offered to the petitioners, who retained their ownership of the lands. This kind of seizure – namely, requisition – is lawful under Article 52 of the Hague Regulations on which von Glahn comments that:

Under normal circumstances an occupant may not appropriate or seize on a permanent basis any immovable private property, but on the other hand a temporary use of land and buildings for various purposes appears permissible under a plea of military necessity...

The Court also adopts von Glahn's view regarding the question of how to deal with land which the occupant army does not really need for its own purposes but which must not be left in the possession of the owners lest it serve the interests of the enemy. According to the passage quoted by the Court "common sense would appear to dictate the need for preventive measures by the occupant against such use of private property by its owners." [...]

## DISCUSSION

1. a. When may private property be requisitioned in occupied territory, according to IHL? By whom? When may private property be confiscated? By whom? Which additional limitations does IHL impose both on requisition and confiscation? (HR, Arts 23(g), 46, 52 and 55; GC IV, Art. 49; CIHL, Rules 49-52)
- b. Is the opinion of the Court on the extent to which requisitions by an occupying power are admissible compatible with that of the US Military Tribunal at Nuremberg in **Case No. 94**, United States Military Tribunal at Nuremberg, *United States v. Alfred Krupp et al.*? Which decision is correct?
2. Was the land in this case requisitioned for a military or security purpose? Does establishment of a settlement at the initiative of the Israeli civilian government, and not the Military Commander, serve a military or security purpose? Supposing that the needs of the army of occupation or military necessity justify the temporary seizure of private land, does that permit the occupying power to settle its own civilians on that land? (GC IV, Art. 49(6); CIHL, Rule 130)
3. Because an occupation is deemed temporary, does the establishment of permanent settlements in occupied territory violate IHL? Except for security needs, when may the occupying power make permanent changes in the occupied territory? Would IHL permit the construction of such settlements if they benefited the local Palestinian population? (HR, Arts 43, 46, 52 and 55)
4. Regardless of whether the land requisition served a military purpose, do such settlements directly violate the IHL provision prohibiting the transfer of the occupying power's population into occupied

territory? (GC IV, Art. 49(6); CIHL, Rule 130) What is the underlying purpose of this IHL provision? Is this purpose humanitarian? Would a voluntary settlement by Israelis, not done or assisted by the government of the occupying power, be permissible? Could military necessity or security reasons justify a violation of the prohibition of the transfer of the occupying power's population into occupied territory?

5.
  - a. Why does the Court declare that it lacks the competence to deal with Convention IV? Why is the conventional or customary status of Convention IV relevant to its applicability in this case, particularly since Israel is a State Party? Are conventional rules less binding than customary ones?
  - b. May a State decide that international treaties become part of its internal law only if there is implementing legislation? Has the State an obligation to adopt such legislation? Does IHL oblige States Parties to allow the Conventions to be invoked before its courts? May Israel invoke its constitutional system, the absence of implementing legislation, or a decision of its Supreme Court to escape international responsibility for violations of Convention IV?
  - c. Are the Hague Regulations applicable in this case? As conventional or as customary law?
  - d. Does the Court explain how in its view (presumably all) provisions of the Hague Regulations are customary and (presumably all) provisions of the Fourth Geneva Convention are not? What could be the justification for such a distinction? How could Professor Dinstein justify the argument that all provisions of Convention IV are purely conventional? Are some customary law? Is Art. 49 of Convention IV customary law? How could one assess whether Art. 49(6) of Convention IV is customary or purely treaty-based, considering that out of more than 150 States less than 10 were not bound in 1978, as Contracting Parties, to respect that provision? Should one assess only the practice of those non-party States? Should one only assess whether Art. 49(6) was customary law in 1949? Were there no developments in customary law between 1949 and 1979? Why should Art. 49(6) of Convention IV not belong to customary law?

**Case No. 128, Israel, House Demolitions in the Occupied Palestinian Territory**

[N.B.: In 2004 Israel officially decided to no longer resort to punitive house destructions as they do not have a deterrent effect.]

**A. Sakhwil *et al.* Commander of the Judea and Samaria Region**

[Source: *Israeli Yearbook on Human Rights*, vol. 10, 1980, p. 345; footnotes omitted.]

**H.C. 434/79,  
SAKHWIL *ET AL.*  
v.**

**COMMANDER OF THE JUDEA AND SAMARIA REGION**

[...]

[...]

This petition was filed with the High Court of Justice by two Arab women from [...] the West Bank Region. The women asked the Court to issue an injunction preventing the respondent from sealing off or demolishing or expropriating the houses in which they and their families resided.

[...]

In respect to the house of the second petitioner, the respondent had indeed ordered the sealing off of one of its rooms – that which belonged to her son. The woman's counsel [...] argued before the High Court that the order to seal off a room was invalid because it was discriminatory, arbitrary and in violation of the 1949 (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War. The Court considered the fact that the son was convicted by the Military Court of Ramallah of membership in an unlawful organisation, of providing shelter to a person who had committed an offence in violation of security legislation, and of possessing explosives. It was proven to the Court that the son had knowingly used his room which the respondent had ordered sealed as a shelter for a member of the Al-Fatah organisation (one who had actually engaged in sabotage activity in Jerusalem) and as a hiding place for a sack of explosives.

Taking cognisance of the purpose for which the room had served, the Court found the argument on the illegality of the respondent's order to be groundless. The Court stated that the room could be lawfully sealed pursuant to Regulation 119(1) of the Defence (Emergency) Regulations, 1945, which "constitute Jordanian legislation that has remained in force since the period of the British Mandate, and which is consequently still in force in the Judea and Samaria Region". As to the content of Regulation 119 permitting destruction of private property in certain circumstances, the Court observed that "Regulation 119 applies to an unusual punitive action, whose main purpose is to deter the performance of similar acts".

Finally, the Court also rejected the counsel's allegation relating to the observance of the Geneva Convention. It found it unnecessary to look into the question of whether the respondent was bound to comply with the provisions of the Geneva Convention, for "even if it were so, there is no contradiction between the provisions of that Convention... and the use of the authority vested in the respondent by legislation which was in force at the time when the Judea and Samaria Region was under Jordanian rule and which has remained in force in Judea and Samaria to this day". Consequently this petition was rejected by the High Court, and the sealing off of a room by the respondent was upheld.

## **B. The Israeli Information Centre for Human Rights in the Occupied Territories, "Demolition for Alleged Military Purposes"**

[Source: The Israeli Information Centre for Human Rights in the Occupied Territories, "Demolition for Alleged Military Purposes", online: <http://www.btselem.org/>]

### **International humanitarian law**

Even following the transfer of parts of the West Bank and the Gaza Strip to the Palestinian Authority as part of the Oslo Accords, Israel remains the occupier of the Occupied Territories. As the occupier, it must comply with the duties of an occupying state, and act in accordance with the laws of occupation.

Hostilities are taking place in the Occupied Territories, but these events do not justify Israel's avoidance of its duties as the occupier, as if the occupation had ended. [...]

The occupying state must also protect the civilian population's property. Article 46 of the Hague Regulations provides that private property must be respected and that it cannot be confiscated. Article 53 of the Fourth Geneva Convention provides that the destruction of property by the occupying state is forbidden, "except where such destruction is rendered absolutely necessary by military operations." Because the occupier has special obligations toward the civilian population, it bears an extremely heavy burden of proof that the injury was necessary. Article 147 of the Convention provides that, "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is a grave breach of the Convention.

Israeli officials use article 23(g) of the Hague Regulations, of 1907, to justify the demolition of houses and destruction of agricultural land. This article states that it is forbidden "to destroy or seize the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war." Israeli officials argue that protecting security forces and settlers from Palestinian gunfire, and combating the digging of tunnels intended for smuggling weapons, are pressing military necessities that justify the demolition of property pursuant to article 23(g).

There is no significant difference between article 23(g) of the Hague Regulations, on which Israel relies, and Article 53 of the Fourth Geneva Convention, and the articles complement each other. The reason that Israel referred to the Hague Regulations is twofold: it seeks to emphasize that an armed conflict is currently being waged in the



Occupied Territories, and that the Fourth Geneva Convention does not apply in the Occupied Territories, an argument it has made continuously since 1967, contrary to the position of the international community.

Even in the case of military necessity, which can provide an exception to the sweeping prohibition on destruction of property, the occupier must comply with the other provisions of international humanitarian law. Indeed, jurists and international tribunals have firmly rejected the argument that military necessity prevails over every other consideration and nullifies application of these other provisions. Every act must comply with international humanitarian law, and the parties are not free to choose the ways and means to wage combat.

To ensure that the exception set forth in article 23(g) of the Hague Regulations and Article 53 of the Fourth Geneva Convention is not broadly construed, international humanitarian law provides, *inter alia*, that it is forbidden to damage property as a preventive means where the danger has not yet been realized. It further provides that destruction of property is forbidden unless alternative, less injurious, means are not available to achieve the objective. In addition, it is expressly forbidden to destroy property with the intent to deter, terrify, or take revenge against the civilian population. Injury to property intended to cause permanent or prolonged damage is also forbidden.

Even though the claim that some cases of destruction entailed military necessity cannot be outright rejected, there is strong reason to believe that many cases involved considerations that were extraneous to the narrow definition of military necessity. However, we shall not examine the question of whether military necessity indeed existed in the Gaza Strip to justify the exception to the prohibition on damaging private property. For even if military necessity exists, Israel's policy flagrantly violates other rules of international humanitarian law, the violation of which are sufficient to make the policy illegal.

In the past, too, Israel relied extensively on a broad construction of the "military necessity" exception. Israel claimed "pressing military necessity" to justify the house demolitions committed pursuant to Regulation 119 of the Emergency Defense Regulations. Israel made its claim even though it had declared that the demolitions were intended to punish persons suspected of attacks against Israel and to deter other Palestinians from performing similar acts. The prohibition on destruction of property set forth in international humanitarian law is intended precisely to prevent using such reasons to justify damage to property.

### **Principle of proportionality**

[...] [The] principle [of proportionality] also applies to Israel's policy discussed in this document. According to the commentary published by the ICRC on article 53 of the Fourth Geneva Convention, destruction of property is illegal if the occupier does not "try to keep a sense of proportion in comparing the military advantages to be gained with the damage done." This prohibition applies even in a situation of military necessity.

Examination of the circumstances in which Israel implemented its policy – the extreme magnitude of the house demolitions, the uprooting of trees, the destruction of agricultural fields, and the manner in which Israel chose to implement its policy – clearly and unequivocally indicate that these contentions are baseless. The injury to the civilian population was excessive in proportion to the military advantage that Israel ostensibly sought to achieve by implementing this policy.

One of the primary requirements of proportionality states that actions that will injure civilians may be taken only after alternative acts, whose resultant injury would be less, are considered and then rejected because they will not achieve the necessary military advantage. Israel ignores this rule and uses means whose injury to civilians is extremely severe. Furthermore, Israel declares that destruction of the agricultural land and demolition of houses constitute a future policy. Declaring these acts a policy indicates the lack of an intention to consider alternatives before carrying out the acts of destruction.

The IDF forces destroyed entire residential neighborhoods, claiming that, under some of the houses, tunnels had been dug through which weapons were being smuggled. In other cases, the army destroyed dozens of houses on the grounds that Palestinians were firing from the area at IDF soldiers. The demolition of houses based on this claim cannot be deemed to meet the conditions required by the principle of proportionality.

Israel destroyed crops and agricultural land, and uprooted fruit trees on the grounds that from these fields Palestinians fired at soldiers and settlers. In some of the cases, the IDF forces destroyed tomato and squash fields, in which people could not hide. The army's actions caused long-term, and in some instances irreversible, damage to the land, and affected the income of thousands of people for many years to come. Destruction of this kind certainly cannot be considered to be in accordance with the principle of proportionality. [...]

The argument that Israel breached the principle of proportionality when it implemented its policy in the Gaza Strip is supported by the comments made by Brigadier General Dov Zadka, head of the Civil Administration. In his response to a question from a reporter from B'Mahaneh [the IDF magazine] whether Israel did not overdo the demolitions that it carried out in the Occupied Territories, Zadka stated:

In Gaza – very much so. I think they did several things that were excessive. After the events in Aley Sinai and Dugit, they executed an extremely massive clearance in what they called "the northern sector." They uprooted hundreds of dunam of strawberries and orchards and greenhouses, and I think that wasn't right... In Judea and Samaria, too, there are places that we haven't acted properly. Sometimes I approve a specific scope of clearing, but when I go to the field I find a degree of hyper-activity by the troops... Did we overdo it in certain places? To tell the truth – yes. For sure. You approve the removal of thirty trees, and the next day you see that they removed sixty trees. The soldier or the company commander on the site got carried away. There have been such cases, and we must not ignore them.

### **C. Israel Ministry of Foreign Affairs, “The Demolition of Palestinian Structures Used for Terrorism – Legal Background”**

[Source: Israel Ministry of Foreign Affairs, “The Demolition of Palestinian Structures Used for Terrorism – Legal Background”, 18 May 2004, online: <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Terror+Groups>]

For nearly four years, Israelis have been the victims of a relentless and ongoing campaign by Palestinian terrorists to spread death and destruction, condemning our region to ongoing turmoil, killing more than 900 Israelis and injuring more than 6000.

In light of this unprecedented lethal threat, Israeli security forces have sought to find new effective and lawful counter-measures that would minimize the occurrence of such terrorist attacks in general, and suicide terrorism in particular, and to discourage potential suicide bombers.

Palestinian terrorists employ the most abhorrent and inhuman methods, including suicide terrorism in order to target Israeli civilians and soldiers, contrary to any notion of morality, and in grave breach of the international laws of armed conflict. Palestinian terrorists operate from within densely populated areas, abusing the protection granted by international law to the civilian population.

Faced with the failure of the Palestinian leadership to comply with its obligations to fight terrorism, stop incitement and prevent the smuggling of weapons, Israel has been compelled to combat the threat to the lives of Israelis, exercising its right to self defense while upholding its obligations under international law. One such security measure is the demolition of structures that pose a real security risk to Israeli forces.

Terrorists often operate from within homes and civilian structures. When terrorists fire from within these buildings or activate roadside charges from orchards and fields, military necessity dictates the demolition of these locations. Under International Law, these locations are considered legitimate targets. Therefore, in the midst of combat, when dictated by operational necessity, Israeli security forces may lawfully destroy structures used by terrorists.

A further instance necessitating the demolition of buildings is the use made by terrorist groups of civilian buildings in order to conceal openings of tunnels used to smuggle arms, explosives and terrorists from Egypt into the Gaza Strip. Similarly, buildings in the West Bank and Gaza Strip are used for the manufacturing and concealment of rockets, mortars, weapons and explosive devices to be used against Israel. The demolition of these structures is often the only way to combat this threat.

Another means employed by Israel against terrorists is the demolition of homes of those who have carried out suicide attacks or other grave attacks, or those who are responsible for sending suicide bombers on their deadly missions. Israel has few available and effective means in its war against terrorism. This measure is employed to provide effective deterrence of the perpetrators and their dispatchers, not as a punitive measure. This practice has been reviewed and upheld by the High Court of Justice.

Israel's security forces adhere to the rules of International Humanitarian Law and are subject to the scrutiny of Israel's High Court of Justice in hundreds of petitions made annually by Palestinians and human rights organizations.

Israeli measures are not a form of “collective punishment” as some have claimed, as if the intention were to cause deliberate hardship to the population at large. While the security measures taken in self-defense and necessitated by terrorist threats do unfortunately cause hardships to sectors of the Palestinian population, this is categorically not their intent. Wherever possible, even in the midst of military operations, Israel’s security forces go to great lengths to minimize the effects of security measures on the civilian population not involved in terrorism.

In this context, Israel adopts measures in order to ensure that only terrorists and the structures they use are targeted. Furthermore, though permissible under the laws of armed conflict, Israel refrains whenever possible from attacking terrorist targets from the air or with artillery, in order to minimize collateral damage, a policy which entails risking the lives of Israeli soldiers. The death of 13 soldiers in ground operations in the Gaza Strip in early May 2004 is an example of the heavy price Israel pays for its commitment to minimize Palestinian civilian casualties.

While there is no question that the Palestinian population is suffering from the ongoing conflict, that suffering is a direct result of Palestinian terrorism aimed at innocent Israelis, and the need for Israel to protect its citizens from these abhorrent attacks.

[...]

#### **D. Amnesty International, “House Demolition: Palestinian Civilians in Rafah Refugee Camp”**

[Source: Amnesty International, “House Demolition: Palestinian civilians in Rafah refugee camp”, 18 May 2004, online: <http://web.amnesty.org/library/print/ENGMD150532004>]

**18 May 2004**

##### **ISRAEL/OCCUPIED TERRITORIES**

##### **Palestinian civilians in Rafah refugee camp**

The Israeli army has accelerated its demolition of houses in the Rafah refugee camp in the past few days, making over 1,000 people homeless. The army intends to demolish more houses in the camp. [...]

United Nations Relief and Works Agency (UNRWA) officials estimate that the Israeli army has destroyed more than 80 buildings in the Rafah refugee camp during the past few days, leaving some 1,100 Palestinians homeless. Israeli army officials have announced their intention to demolish more homes, and on 16 May the Israeli Supreme Court rejected a petition, filed by human rights organizations on behalf of Palestinian families living in the refugee camp, to stop the demolitions.

The army say this latest wave of destruction of Palestinian homes is intended to expand the no-go area (referred to as the Philadelphi Route) along the Egyptian border in the southern Gaza Strip. The Israeli authorities contend that the massive scale of house demolition is necessary to uncover tunnels used by Palestinians to smuggle weapons

into the Gaza Strip from Egypt. The demolition plan was reportedly approved on 13 May by Prime Minister Ariel Sharon, Defense Minister Shaul Mofaz and other top officials.

The Rafah refugee camp, in existence since 1948, is very densely populated, with rows of houses separated by narrow alleyways. In late 2000 the Israeli army began the massive destruction of houses in the camp. Until then, houses had stood only a few meters from the border with Egypt: now houses are reduced to rubble for up to 300 meters from the border. The destruction has targeted row after row of houses, contrary to claims by the Israeli authorities that they only destroy houses used by Palestinians to attack Israeli soldiers patrolling the border, and houses used as cover for tunnels.

On 14 May, Israeli army Chief of Staff Moshe Yaalon reportedly said that “There’s a process whereby the first row of houses is abandoned and used for digging tunnels for smuggling weapons and cover for shooting. We’ve been forced to destroy houses here in the past and apparently we’ll have to destroy more houses in the future.” [...]

Amnesty International believes that the massive destruction in Rafah refugee camp and elsewhere in the Gaza Strip cannot be justified on the grounds of “absolute military necessity,” as the Israeli authorities claim, and constitutes a form of collective punishment against the tens of thousands of Palestinians who have been affected. Such measures are a violation of international humanitarian law, notably Article 33 of the Fourth Geneva Convention, which states: “No protected person [i.e. those living under foreign occupation] may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation...are prohibited...Reprisals against protected persons and their property are prohibited”. [...]

### **E. *Ha’aretz*, “High Court allows Gaza demolitions: Army’s ‘operational necessity’ takes precedence”**

[Source: *Ha’aretz*, Tel Aviv, 17 May 2004, Yuval Yoaz and Gideon Alon, “High Court allows Gaza demolitions: Army’s ‘operational necessity’ takes precedence”, online: [www.haaretz.com](http://www.haaretz.com)]

The High Court of Justice ruled yesterday that Israel has the right to demolish Palestinian homes without granting the residents a right to a court of appeal in the event of “immediate operational necessity” or when it endangers the lives of Israeli soldiers or jeopardizes military operations.

Justices Eliahu Mazza, Dorit Beinisch and Eliezer Rivlin rejected a petition by 13 residents of Rafah, whose homes are targeted for demolition by the Israel Defense Forces. The ruling cancels a temporary order issued by Mazza on Friday night that stopped the IDF from proceeding with plans to raze homes adjacent to the Philadelphia route on the southern border of the Gaza Strip.

The justices accepted the state’s position that it is impossible to promise that no additional homes will be demolished. The state is committed to granting legal recourse to Palestinians whose homes are slated for demolition – except when this entails an immediate military risk. But attorney Enar Helman, representing the state, admitted that the situation on the ground makes this distinction largely irrelevant.

"In 99 percent of the cases in the Rafah area, which is different from the West Bank or elsewhere in the Gaza Strip, the moment we announce our intention of razing a home, the Palestinians immediately set booby-traps there," Helman explains.

"The state declared to us that the demolition of homes by the IDF during the fighting on Friday on the Philadelphi route was not conducted as a means of deterrence but as an urgent military action required to defend the lives of soldiers operating in the field," the justices ruled.

Despite the rejection of the petition, the attorney for the petitioners, Yunis Tamim, voiced hope that the court's decision could ultimately limit the scope of destruction. "We are sure that the army will think very carefully about destroying houses in the future. This is a clear decision that there are certain conditions in which houses can be demolished," he told reporters.

### **Knesset reaction**

Zehava Gal-On, chairwoman of the Meretz faction, said she regretted the High Court's decision. The MK said the court was abandoning thousands of innocent people for what the army defines as security needs. "It was again demonstrated that in Israel, human rights stop at the Green Line border and are not extended to the residents of the occupied territories," Gal-On said.

MK Mohammed Barakeh (Hadash) also attacked the court's decision, claiming that it provided "a stamp of approval for war crimes."

In response to this criticism, Likud MK and coalition chairman Gideon Sa'ar said that he "regrets that the security of the state and IDF soldiers are not valued as highly as the property rights of Rafah residents in the eyes of the critics from the left." He called it a "pathetic attempt to terrorize the court for obvious political reasons."

## **DISCUSSION**

1. Why should an Israeli court apply Jordanian law? (GC IV, Art. 64) By applying Jordanian legislation (Regulation 119(1) of the Defence (Emergency) Regulations, 1945) does the Court admit the status of Judea and Samaria as occupied territory requiring application of the Geneva Conventions? (HR, Arts 23(h) and 43; GC I-IV, common Art. 2(2); GC IV, Art. 6; P I, Arts 1(3) and 3(b))
2.
  - a. "Regulation 119(1)" permits destruction of private property; is this consistent with the Geneva Conventions? Was such action justified by military necessity? (HR, Art. 53; GC IV, Arts 53 and 147; CIHL, Rules 50 and 51)
  - b. In the *Sakhwil* case, did the woman or her son own the house? Was the son the only resident in the house? Was the woman convicted of any crime? Are these relevant considerations? (HR, Art. 50; GC IV, Art. 33; CIHL, Rule 103) Do the Conventions not provide for the right to a fair trial? Was the woman being tried for any crime that carried a penalty permitting the destruction of her house? (GC IV, Art. 147; P I, Art. 85(4)(e))
  - c. If application of "Regulation 119(1)" contradicts the above-mentioned articles of the Conventions, must the Regulation, if constituting Jordanian law in force prior to occupation, be applied? May it be applied? (HR, Art. 43; GC IV, Art. 64)

3. Was the Gaza Strip an occupied territory in October 2003? Does the prohibition on destroying houses also apply outside occupied territories? (HR, Art. 42; GC IV, Arts 2, 4 and 53; P I, Art. 52; CIHL, Rules 50 and 51)
4. Does Art. 23(g) of the Hague Regulations apply only to the conduct of hostilities or also to occupied territories? Is B’Tselem correct in writing in Document B. that there is no significant difference between Art. 23(g) of the Hague Regulations and Art. 53 of Convention IV? Is Art. 23(g) of the Hague Regulations today replaced by Art. 52 of Protocol I and the corresponding customary international law?
5. Are the destructions described in documents B., C. and D. covered by the law of military occupation, by the law on the conduct of hostilities, or both? In each case, when is the demolition of a house justified? When can a civilian dwelling be a military objective? May a military objective only be destroyed if military operations make it absolutely necessary to do so? (GC IV, Art. 53; P I, Art. 52; CIHL, Rules 7-10)
6. Do the circumstances described by the Ministry of Foreign Affairs in stating when the military can demolish homes for reasons of military necessity conform to the rules of IHL? When are the homes “legitimate targets”? Discuss each of the categories. (GC IV, Art. 53; P I, 52; CIHL, Rules 7-10)
7. Do the measures the Israeli forces take to ensure only “terrorists” and their structures are targeted comply with their obligations under IHL? Is it permitted under IHL to attack civilian homes from the air? Even within an occupied territory? If those homes are being used by insurgents?
8. Is protecting Israeli soldiers a legitimate factor for determining what constitutes military necessity?

**Case No. 129, Israel, Al Nawar v. Minister of Defence**

[Source: Domb, F., "Judgments of the Supreme Court of Israel," in *Israel Yearbook on Human Rights*, vol. 16, 1986, pp. 321-328; footnotes omitted.]

**H.C. (High Court) 574/82****AL NAWAR****v.****MINISTER OF DEFENCE, ET AL.**

[...]

This is a leading judgment – delivered by Shamgar J.P. – on the question of the treatment of enemy property situated either on the battlefield or on territory subject to military occupation.

The petition was filed by a Lebanese citizen, complaining that during the "Peace for Galilee" operation, in 1982, the IDF (Israel Defence Forces) had illegally seized the equipment machines and stock of an enterprise manufacturing plastic products, situated near the village of Damur in South Lebanon. While the IDF Commander in Lebanon (the third respondent) contended that the enterprise belonged to the PLO and had been seized as enemy property, the petitioner claimed that he had purchased the enterprise in June 1982, prior to its seizure, so that it was his private property.

On the basis of the evidence submitted to the High Court, Shamgar J.P. made the following findings:

- a) The enterprise formed part of "Tzamd" enterprises, which constitute part of the economic infrastructure of the PLO.
- b) The enterprise was situated together with an ammunition depot and a military shoe factory in a building occupied and controlled by PLO forces.
- c) The IDF came upon the enterprise in July 1982; thereupon, it placed guards on the site for the purpose of declaring it seized.
- d) The petitioner signed the purchase contract for the enterprise in August 1982, after its seizure by the IDF; thus, at the time of the alleged purchase, the enterprise's owner had no right of disposition with respect to the property.

Given these facts, the central legal issue raised in the petition was the authority of the respondents to seize an enterprise owned by the PLO.

The first question analyzed by Shamgar J.P. concerned the law that applied at the time of seizure to the region where the enterprise was situated (hereinafter: the Region) and to the movables seized thereon. On this question Shamgar J.P. ruled that

during the relevant period of June-September 1982, the international rules of war on land, as formulated in the third Section of the Hague Regulations annexed to the 1907 Hague Convention (No. IV) respecting the Laws and Customs of War on



Land, and the 1949 Fourth Geneva Convention, applied to the Region where the enterprise was situated.

In reaching this conclusion, Shamgar J.P. relied principally on his judgment delivered in H.C. 593/82 (*Tzemel Adv. Case*), where he pointed out that the Hague Regulations and the Fourth Geneva Convention are applicable when (according to Article 42 of the Hague Regulations) a territory is “actually placed under the authority of the hostile army”, thereby acquiring the status of an “occupied territory”. Whether a given area is “actually placed under the authority of the hostile army” is a question of fact to be resolved along the lines of the two-part test proposed in the *British Manual of Military Law* (edited by H. Lauterpacht, 1958), according to which a belligerent occupation occurs when two conditions are fulfilled:

First, that the legitimate government should, by the act of the invader, be rendered incapable of publicly exercising its authority within the occupied territory; second, that the invader should be in a position to substitute his own authority for that of the legitimate government.

Applying this test, Shamgar J.P. rejected the petitioner’s allegation that there was no actual military occupation by Israel in Lebanon because of the temporary and non-durable nature of the IDF presence there.

Relying on Dinstein’s treatise *Laws of War*, Shamgar J.P. observed that the “Peace for Galilee” operation was not directed against the State of Lebanon. However, during the “Peace for Galilee” operation, the IDF had undisputedly controlled a part of Lebanon’s territory.

Given this, there is no need to determine the question whether a state of war between Israel and Lebanon existed in June 1982, because as stated in Dinstein’s treatise, even if it did not exist

as concerns operations between opposing armed forces, the fundamental laws of war (mainly on warfare)... shall apply.

Consequently, Shamgar J.P. held that during the “Peace for Galilee” operation, the activity of the IDF in Lebanon was initially subject to the international law of warfare and subsequently to the international law applicable to occupied territory. Shamgar J.P. therefore turned to an examination of the international law pertaining to enemy property on the battlefield (or in a combat zone) and in occupied territory.

#### **a) Enemy Property on the Battlefield (or Combat Zone)**

The starting point of this topic, as formulated by Shamgar J.P., is that under contemporary international law, the powers of a military force with respect to enemy property falling into its hands during or following combat are defined and restricted.

The main principle of international law in respect of enemy property was codified in Article 23 (g) of the Hague Regulations, which provides that

it is especially forbidden:

- (g) to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

Further rules on this topic – as elucidated by Shamgar J.P. – may be summarized as follows:

- (a) All movable State property captured on the battlefield may be appropriated by the capturing belligerent State as booty of war. This is in accordance with Dinstein's approach that all movable State property captured in a combat zone, such as arms and ammunition, depots of merchandise, machines, instruments and even cash, automatically become the property of the belligerent into whose hands it has fallen.
- (b) Further, all private property actually used for hostile purposes (or which may be useful for hostile purposes) found on the battlefield or in a combat zone may be appropriated by a belligerent State as booty of war.
- (c) As explained by Schwarzenberger, Article 23(g) of the Hague Regulations, while prohibiting the destruction or seizure of enemy property, does not accord protection to property used for hostile purposes. Such property enjoys protection from arbitrary destruction, but it is still subject to the enemy's right of appropriation as booty.
- (d) Article 46(2) of the Hague Regulations, providing that private property cannot be confiscated applies only to private property within the ordinary meaning of the term "private" and does not extend to property "actually in use by the hostile army".
- (e) State property includes not only property actually owned by the enemy State, but also property controlled or administered by it, and even the property of companies, institutions or bodies in which the State has a substantial interest or over which it exercises substantial control. This broad definition of State property was adopted in the *Governmental Property Order* (Judea and Samaria) (No. 59), 1967.
- (f) The distinction between State (governmental) property and private ordinary property should be based on the functional test applied in the 1921 Arbitral Award in the *Cession of Vessels and Tugs for Navigation on the Danube Case*, which determines the nature of the property in question according to its actual use. [...]

### **b) Enemy Property in an Occupied Territory**

Regarding State movable property, Article 53 (first paragraph) of the Hague Regulations provides:

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

This comprehensive list of seizable movables, together with the sweeping reference to property which may be used for military operations, leads to the conclusion that – as pointed out by Dinstein – with the exception of movables not expressly enumerated

in the Article and entirely beyond military use (like books and paintings), most of the governmental movables in an occupied territory may be lawfully seized.

Consequently, there is no practical difference between the status of movable governmental property captured on the battlefield and that seized in occupied territory: both constitute booty of war, so that the occupant acquires title to the property and may sell it in order to use the income for military purposes. Further, according to Article 53 (first paragraph), there is no duty of restoration or compensation for seizure of governmental property.

Regarding private property in occupied territory, Article 53 (second paragraph) provides that

Except in cases governed by naval law, all appliances adapted for the transmission of news, or for the transport of persons or goods, whether on land, at sea, or in the air, depots of arms, and, in general, *all kinds of war material may be seized, even if they belong to private individuals*, but they must be restored at the conclusion of peace, and indemnities must be paid for them. (Emphases added)

It follows that all private property in actual hostile use, even if not enumerated in this provision, may be seized. Consequently, the status of private property used for military purposes is identical to that of governmental property: both may be seized by the occupant.

\* \* \*

[...]

Applying the above-surveyed law to the facts as stated in the beginning of the judgment, Shamgar J.P. concluded that because the enterprise belonged to the PLO, the seizure in question was a lawful seizure effected on the battlefield and/or in occupied territory of movable enemy property which had been in actual hostile use and which was also useful for military purposes [...].

Shamgar J.P. also discussed the petitioner's contention that the international laws of war regarding enemy property are intended to apply to the property of a belligerent State and not to that of an organization, whose property should be regarded as purely private. Responding to this contention, Shamgar J.P. noted the modern tendency to extend the application of the international law of war beyond declared wars between States so as to include all armed conflicts, even those of a non-international character. Even independent of this tendency, however, the legal principles applying to this contention are as follows:

When a State acts in self-defence against terrorist organizations performing acts of murder and sabotage against its citizens, it is entitled to take towards such organizations and their property the same steps that it is entitled – according to the laws of war – to take against a hostile State army and its property. A comprehensive organization engaged in terrorist and military activity cannot expect to enjoy the immunities and protections granted by the laws of war to the property of civilians, who do not form part of enemy forces... Therefore the laws

of war placed on an equal footing governmental property and private property in hostile or military enemy use; both constitute booty of war (*Cession of Vessels and Tugs for Navigation on the Danube*). The law governing enemy State property and private property in hostile or military use applies also – with due modifications – to the property of a terrorist organization. [...]

The ultimate operative conclusion reached by Shamgar J.P. was that

Given the particular political and military circumstances that existed in Lebanon, the IDF was authorized by the laws of war to act towards the property of the PLO economic arm as if it were a property of a belligerent enemy State, or a private property serving the enemy – namely, it could be treated either as booty of war on a battlefield, or seized as enemy State property in an occupied territory according to Regulation 53 (first paragraph).

Thus the High Court, sitting as a bench of five judges, unanimously dismissed the petition.

## DISCUSSION

1. Why did the Court rule that the Hague Regulations and Convention IV applied? And that the region concerned acquired the status of occupied territory? What makes this case distinct from those concerning the West Bank and Gaza Strip? Is it truly a matter of the status of the territory prior to conflict? Even though the Court here agrees with Dinstein's treatise that "as concerns operations of opposing armed forces, the fundamental laws of war ... shall apply"? Does the Court believe that a state of war must be declared between States for the territory in the enemy State's control to be considered occupied? [See **Case No. 125**, Israel, Applicability of the Fourth Convention to Occupied Territories; **Case No. 127**, Israel, Ayub v. Minister of Defence; and **Case No. 132**, Israel, Cases Concerning Deportation Orders]
2. Even if the Hague Regulations and Convention IV apply here, does the Court have competence to try this case, as Israel has not adopted implementing legislation concerning Convention IV? Why does the Court not discuss its competence to try this case? If the Court has competence to try this case, is that because both the Hague Regulations and Convention IV are customary law? Why is the conventional or customary status of these Conventions relevant to their applicability in this case? [See **Case No. 127**, Israel, Ayub v. Minister of Defence]
3.
  - a. According to IHL, when may private property be requisitioned in occupied territory? By whom? When may private property be confiscated? By whom? Which additional limitations does IHL impose both on requisition and confiscation? (HR, Arts 23(g), 46, 52 and 55; GC IV, Art. 55(2); CIHL, Rules 49-52) Do IHL provisions correspond to the rules elucidated by Shamgar J.P. (concerning property captured on the battlefield), which this Court considers applicable in occupied territory?
  - b. Was the property in this case requisitioned for a military or security purpose? Or because it was not private property? Are these different questions? Of what significance are the answers to them?
  - c. Do you agree that the PLO should be considered as a State for the purposes of classifying private property as State property? If the PLO was not considered a State, could the IDF have seized the property?

**Case No. 130, Israel, Methods of Interrogation Used Against Palestinian Detainees****A. Report of the Landau Enquiry Commission of 1987**

[Source: Report of the Landau Commission, Report (Part I), Jerusalem, October 1987; translation from an unofficial French translation.]

**REPORT OF THE LANDAU COMMISSION – OCTOBER 1987**

Commission of inquiry on interrogation methods employed by the General Security Services with regard to terrorist acts – Extracts from the report [...]

- 3.24 Article 31 of the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War, the humanitarian clauses of which Israel has undertaken to respect, stipulates: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties". This provision should be read together with Article 5 of the Convention, under which a protected person definitely suspected of or engaged in activities hostile to the security of the State is deprived of the rights and privileges conferred by the Convention, where the exercise of such rights would be prejudicial to State security. These persons are nevertheless entitled to humane treatment and, if they are brought to justice, to a fair and regular trial. [...]
- 4.7 Means of coercion should generally be limited to the psychological, non-violent aspect of intensive and prolonged interrogation and to the use of stratagems, including deceit, but if these means do not suffice, a moderate degree of physical coercion cannot be avoided. The interrogators of the Service must be instructed to set themselves definite limits in this regard, so as to avoid excessive physical coercion administered arbitrarily by the interrogator. As mentioned in the second part of this report, instructions regarding these limits have existed in the Service since the increase in the number of terrorism-related interrogations, inevitable in the wake of the Six-Day War. These directives have been amended now and again, often at ministerial initiative and usually leading to the establishment of further safeguards in the use of physical coercion, to the point where authorized physical contact with the person under interrogation has been restricted to a minimum. [...]
- 4.8 These directives are scattered throughout various internal instructions of the Service; they should be collected in a single document. In a chapter which, for obvious reasons, will be included in the second, confidential, part of the report, we have compiled a set of directives for the attention of Service interrogators [...].
- [...]
- 4.13 *Concerning methods of interrogating persons suspected of acts of terrorism.* In the previous pages we have shown at length the vital importance that we attach to the protection of the principle of necessity in accordance with Article 22 of the Penal Code. We have analysed the "lesser evil" principle incorporated in the

provisions of the Code and have explained that the grave harm caused by hostile terrorist activities justifies counter-measures based on the need to take action within the meaning of Article 22, not only when such an act is imminent, but also as soon as it becomes virtual and likely to materialize at any moment. [...]

Made in Jerusalem, today, October 30, 1987

Moshe LANDAU  
President

Yacoov MALTZ  
Member of the Commission

Itzhak HOFFI  
Member of the Commission

## B. The Laws

[Source: B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, *Legitimizing Torture: The Israeli High Court of Justice Rulings in the Bilbeisi, Hamdan and Mubarak Cases: An Annotated Sourcebook*, January 1997, p.6]

### 1. Section 277 of the Israeli Penal Code (verbatim translation):

A public servant who commits one of the following is liable to imprisonment for three years:

- (1) uses or directs the use of force or violence against a person for the purpose of extorting from him or from anyone in whom he has interest a confession of an offense [*sic*] or information relating to an offence;
- (2) threatens any person, or directs any person to be threatened, with injury to his person or property, or to the person or property of anyone in whom he has interest, for the purpose of extorting from him a confession of an offence or information relating to an offence.

### 2. Article 34 (11) of the Penal Code (verbatim translation):

#### Necessity

A person shall not bear criminal liability for an act which was immediately necessary in order to save the life, freedom, person or property, be it his own or that of another, from a concrete danger of severe harm stemming from the conditions existing at the time of act, and having no other way but to commit it.

Relevant restrictions on the above (summary):

- 34(15) Obligation to withstand danger or threat (when a person is obliged by law or according to his official capacity to withstand danger or threat)
- 34(16) Exceeding the reasonable (when the act was not reasonable under the circumstances to prevent the harm) [...]

## C. Decisions of the Israeli High Court of Justice

### 1. *Muhammad 'Abd al-'Aziz Hamdam v. the General Security Service*

[Source: B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, *Legitimizing Torture: The Israeli High Court of Justice Rulings in the Bilbeisi, Hamdan and Mubarak Cases: An Annotated Sourcebook*, January 1997, pp. 14-16; footnotes omitted.]

**At the Supreme Court sitting as High Court of Justice  
HCJ 8049/96**

[...]

**Appellant: Muhammad 'Abd al-'Aziz Hamdan  
[an inhabitant of the Israeli Occupied Territories]**

[...]

**v.**

**Respondent: The General Security Service**

[...]

**Decision**

**President A. Barak:**

1. The Appellant is under administrative detention. He is interrogated by the Respondent. He presented (on 12.11.96) an appeal to this Court. In it he complained about the use of physical force against him during interrogation. He requested that the Respondent come and give reason why it does not stop using these means of interrogation. An interim injunction was also requested to prohibit the use of physical force pending a decision on the appeal. [...] It was [...] remarked that "from the inquiries conducted by telephone it has emerged that the Respondent has no intention of using physical force against the Appellant at this stage of the interrogation. Therefore, and without admitting the accuracy of the facts included in the appeal, the Respondent informs the Court that it agrees to the issuance of an interim injunction, which prohibits the use of physical force against the Appellant, pending a hearing of the appeal." On the basis of this statement an interim injunction was issued, as requested in the appeal (on 13.11.96).
2. Today (14.11.96) a request was presented to us on behalf of the Respondent for an urgent hearing of a request to annul the interim injunction. [...]
- [...]
4. The Respondent goes on to note in the request presented to us, that a few days prior to the Appellant's arrest [on 24.10.96] the Respondent received information from which emerged a well-founded suspicion that the Appellant possesses extremely vital information the immediate procurements of which would help save human lives and prevent serious terrorist attacks in Israel which there is real concern are to be carried out in the near future. The Appellant was therefore transferred to the detention centre in Jerusalem, and his interrogation began. In the course of the interrogation further data accumulated, which strengthened the information and

the concerns which the Respondent alludes to above. The Respondent noted [...] that such information was actually received during the last few days, including last night. The Respondent has reached the conclusion that a vital and urgent need exists to continue immediately the interrogation of the Appellant, without the needs of interrogation being subjected to the restriction imposed by the interim injunction. The removal of these restrictions is necessary, in the opinion of the Respondent, so that the information which Appellant possesses can be exposed immediately and the danger to human lives prevented. The Respondent noted further that, in it's opinion, the application of such force, in the present situation, is permitted by law, which allows the application of physical force as well, in a situation where the conditions for the defence of necessity provided for in article 34(11) of the Penal Code (1977) exist.

5. During the evening we discussed the request. We heard the arguments of Mr. Nitzan [the Counsel for the Respondent]. He stated before us that the physical means which the Respondent intends to use do not constitute "torture" (within the meaning of this term under the Convention Against Torture). Mr. Nitzan further noted that all these means fall under the defence of necessity (stipulated in article 34(11) of the Penal Code), the conditions for which exist in his opinion in the present circumstances. In contrast, Mr. Rosenthal [Representative of the Appellant] noted that this defence is not available to the interrogators of the Respondent. [...]
6. After having studied the classified material presented to us, we are satisfied that the Respondent indeed possesses information which could substantiate a substantiated suspicion that the Appellant possesses extremely vital information, the immediate procurement of which would prevent an awful disaster, would save human lives, and would prevent very serious terrorist attacks. Under these circumstances, we believe that there is no justification for the continued existence of the interim injunction [...]. Needless to add, the annulment of the interim injunction does not constitute permission to take during interrogation of the Appellant measures which are not in accordance with the law, and which are in breach of the law. On this point, no information has been provided to us regarding the ways of interrogation which the Respondent intends to pursue, and we do not express any opinion regarding them. Furthermore: Our decision is directed solely at the interim injunction and does not constitute a final position regarding the questions of principle which were put before us, and which relate to the applicability of the defence of necessity and its scope.

Therefore, we have decided to annul the interim injunction issued on 14.11.96.

**Justice E. Matza:** I agree.

**Justice M. Heshin:** I agree.

Decided in accordance with the ruling of President Barak.

Given today, 14.11.96



## 2. *Khader Mubarak, et al. v. the General Security Service*

[Source: B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, *Legitimizing Torture: The Israeli High Court of Justice Rulings in the Bilbeisi, Hamdan and Mubarak Cases: An Annotated Sourcebook*, January 1997, pp. 20-21]

### **At the Supreme Court sitting as High Court of Justice HCJ 3124/96**

[...]

#### **Appellants:**

**1. Khader Mubarak [an inhabitant of Israeli Occupied Territories]**

**2. The Public Committee against Torture in Israel**

**v.**

**Respondent: The General Security Service**

#### **Decision**

The Appellant has presented four arguments, each of which, according to him, could point to torture during interrogation.

The first argument is that he has been interrogated with his hands shackled, in a painful position whereby his arms are stretched backwards, through a low chair on which he sits. Regarding this issue we have heard the explanations of Counsel for the Respondent that shackling at the back during waiting for interrogation is done in order to safeguard the security of the interrogation facility and of the interrogators, and in order to prevent the interrogee from attacking his interrogators, which indeed has happened in the past. In any case, it was stated before us that shackling interrogees, including the Appellant, is not for purposes of interrogation, and that the interrogee's hands are not stretched backwards, and all measures are taken, as much as is possible, so that the shackles do not press or rub against the interrogee's hands. It is nevertheless clear, and agreed, that shackling the interrogee as described by the Appellant [...] is forbidden.

The second argument of the Appellant deals with covering his head with a sack which reaches his shoulders. Regarding this issue we have heard the explanations of the Security Service representative as to the nature of covering the head thus, which is principally intended to prevent the interrogee from identifying other interrogees during waiting, the identification of whom may harm the interrogation or cause other security harm. We are satisfied that this measure is used in a reasonable manner for the purposes of interrogation, and it does not deprive the interrogee of proper ventilation and normal breathing, and it does not, either by its intention or in actual practice, cause pain which constitutes torture.

The Appellant added that while he waits for interrogation loud music is sounded. It becomes clear from the statement by Attorney-General's Office that the music is sounded in the interrogation facility while the interrogee waits for interrogation with others, and this is done in order to prevent the interrogees waiting for their interrogation from communicating with each other. According to this explanation the music is heard by everyone present in the area, including the security personnel.

The Appellant raises a fourth argument, to wit that the interrogators deprive him of sleep for long hours during waiting his interrogation. We have heard, *in camera*, the explanations of the Security Service representative regarding this subject, and it emerges from them that the issue is not one of active sleep deprivation, but of periods of time during which the Appellant was held waiting for interrogation without being given a break designed especially for sleep. Regarding this subject it appears to us that the necessities of security, the reasons for which the Appellant was detained, and the pressing need to prevent loss of life, as brought to our attention in camera, justified an intensive interrogation of the Appellant in the way it was conducted, and when it became possible the Appellant was sent to his cell to sleep.

Subject to what we have said, to wit that painful shackling is a prohibited act, we do not find it necessary to issue an interim injunction in this case.

Given today, 17.11.96

### **3. *Wa'al Al Kaaqua, et al. v. The State of Israel***

[Source: Supreme Court of Israel, *Wa'al Al Kaaqua, et al. v. the State of Israel et al.*, 6 September 1999, available at: <http://elyon1.court.gov.il/eng/home/index.html>]

#### **The Supreme Court of Israel, sitting as the High Court of Justice**

[...]

**1. *Wa'al Al Kaaqua [et al.]***

**v.**

**1. *The State of Israel [et al.]***

[...]

#### **Judgment**

#### **President A. Barak**

The General Security Service [hereinafter the "GSS"] investigates individuals suspected of committing crimes against Israel's security. Authorization for these interrogations is granted by directives that regulate interrogation methods. These directives authorize investigators to apply physical means against those undergoing interrogation, including shaking the suspect and placing him in the "Shabach" position. These methods are permitted since they are seen as immediately necessary to save human lives. Are these interrogation practices legal? These are the issues before us.

[...]

#### ***The Petitions***

2. [...] [Petitioners] claim that the GSS is not entitled to employ those methods approved by the Report of the Commission of Inquiry [the Landau Commission], such as "the application of non-violent psychological pressure" and of "a moderate

degree of physical pressure.” [...] [They also argue] that the GSS should be ordered to cease shaking suspects during interrogations.

[...]

### ***Physical Means***

[...]

#### *Shaking*

9. A number of petitioners [...] claimed that they were subject to shaking. Among the investigation methods outlined in the GSS interrogation regulations, shaking is considered the harshest. The method is defined as the forceful and repeated shaking of the suspect’s upper torso, in a manner which causes the neck and head to swing rapidly. According to an expert opinion [...], the shaking method is likely to cause serious brain damage, harm the spinal cord, cause the suspect to lose consciousness, vomit and urinate uncontrollably and suffer serious headaches.

The state [...] admits the use of this method by the GSS. It contends, however, that shaking does not present an inherent danger to the life of the suspect [...]. In any event, they argue, doctors are present at all interrogation areas, and the possibility of medical injury is always investigated.

All agree that, in one particular case, [...] the suspect expired after being shaken. According to the state, that case was a rare exception. Death was caused by an extremely rare complication which resulted in pulmonary edema. In addition, the state argues that the shaking method is only resorted to in very specific cases, and only as a last resort. [...]

#### *Waiting in the “Shabach” Position*

10. [...] As per petitioners’ submission, a suspect investigated under the “Shabach” position has his hands tied behind his back. He is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair’s seat and back support. His second hand is tied behind the chair, against its back support. The suspect’s head is covered by a sack that falls down to his shoulders. Loud music is played in the room. According to the briefs submitted, suspects are detained in this position for a long period of time, awaiting interrogation.

Petitioners claim that prolonged sitting in this position causes serious muscle pain in the arms, the neck and headaches. The state did not deny the use of this method. It submits that both crucial security considerations and the safety of the investigators require the tying of the suspect’s hands as he is being interrogated. The head covering is intended to prevent contact with other suspects. Loud music is played for the same reason.

*The "Frog Crouch"*

11. [...] This refers to consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals. The state did not deny the use of this method, and the Court issued an order nisi in the petition. Prior to hearing the petition, however, this interrogation practice ceased.

*Excessively Tight Handcuffs*

12. In a number of petitions [...], several petitioners complained of excessively tight hand or leg cuffs. They contended that this practice results in serious injuries to the suspect's hands, arms and feet, due to the length of the interrogations. [...]

*Sleep Deprivation*

13. In a number of petitions [...] petitioners complained of being deprived of sleep as a result of being tied in the "Shabach" position, while subject to the playing of loud music, or of being subjected to intense non-stop interrogations without sufficient rest breaks. They claim that the purpose of depriving them of sleep is to cause them to break from exhaustion. While the state agrees that suspects are at times deprived of regular sleep hours, it argues that this does not constitute an interrogation method aimed at causing exhaustion, but rather results from the long amount of time necessary for conducting the interrogation.

[...]

***The Means Employed for Interrogation Purposes***

[...]

23. [...] The "law of interrogation" by its very nature, is intrinsically linked to the circumstances of each case. This having been said, a number of general principles are nonetheless worth noting.

First, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever. There is a prohibition on the use of "brutal or inhuman means" in the course of an investigation. [...] Human dignity also includes the dignity of the suspect being interrogated. [...] This conclusion is in accord with international treaties, to which Israel is a signatory, which prohibit the use of torture, "cruel, inhuman treatment" and "degrading treatment." [...] These prohibitions are "absolute." There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can lead to the investigator being held criminally liable. [...]

***From the General to the Particular***

24. [...] Clearly, shaking is a prohibited investigation method. It harms the suspect's body. It violates his dignity. It is a violent method which can not form part of a legal investigation. It surpasses that which is necessary. Even the state did not argue that shaking is an "ordinary" investigatory method which every investigator, whether in the GSS or the police, is permitted to employ. [...]
25. It was argued before the Court that one of the employed investigation methods consists of compelling the suspect to crouch on the tips of his toes for periods of five minutes. The state did not deny this practice. This is a prohibited investigation method. It does not serve any purpose inherent to an investigation. It is degrading and infringes an individual's human dignity.
26. The "Shabach" method is composed of several components: the cuffing of the suspect, seating him on a low chair, covering his head with a sack, and playing loud music in the area. Does the general power to investigate authorize any of the above acts? Our point of departure is that there are actions which are inherent to the investigatory power. [...] Therefore, we accept that the suspect's cuffing, for the purpose of preserving the investigators' safety, is included in the general power to investigate. [...] Provided the suspect is cuffed for this purpose, it is within the investigator's authority to cuff him. [...] The cuffing associated with the "Shabach" position, however, is unlike routine cuffing. [...] This is a distorted and unnatural position. The investigators' safety does not require it. Similarly, there is no justification for handcuffing the suspect's hands with especially small handcuffs, if this is in fact the practice. The use of these methods is prohibited. [...] Moreover, there are other ways of preventing the suspect from fleeing which do not involve causing pain and suffering.
27. The same applies to seating the suspect in question in the "Shabach" position. We accept that seating a man is inherent to the investigation. This is not the case, however, when the chair upon which he is seated is a very low one, tilted forward facing the ground, and when he is seated in this position for long hours. This sort of seating is not authorized by the general power to interrogate. [...] All these methods do not fall within the sphere of a "fair" interrogation. They are not reasonable. They infringe the suspect's dignity, his bodily integrity and his basic rights in an excessive manner. They are not to be deemed as included within the general power to conduct interrogations.
28. We accept that there are interrogation related concerns regarding preventing contact between the suspect under interrogation and other suspects, and perhaps even between the suspect and the interrogator. These concerns require means to prevent the said contact. [...] For this purpose, the power to interrogate – in principle and according to the circumstances of each particular case – may include the need to prevent eye contact with a given person or place. In the case at bar, this was the explanation provided by the state for covering the suspect's head with a sack, while he is seated in the "Shabach" position. [...] Indeed, even if such contact is prevented, what is the purpose of causing the suspect to suffocate?

Employing this method is not related to the purpose of preventing the said contact and is consequently forbidden. Moreover, the statements clearly reveal that the suspect's head remains covered for several hours, throughout his wait. For these purposes, less harmful means must be employed, such as letting the suspect wait in a detention cell. [...] For it appears that, at present, the suspect's head covering – which covers his entire head, rather than eyes alone – for a prolonged period of time, with no essential link to the goal of preventing contact between the suspects under investigation, is not part of a fair interrogation. It harms the suspect and his dignity. It degrades him. It causes him to lose his sense of time and place. It suffocates him. All these things are not included in the general authority to investigate. In the cases before us, the State declared that it will make an effort to find a "ventilated" sack. This is not sufficient. The covering of the head in the circumstances described, as distinguished from the covering of the eyes, is outside the scope of authority and is prohibited.

29. Cutting off the suspect from his surroundings can also include preventing him from listening to what is going on around him. We are prepared to assume that the authority to investigate an individual may include preventing him from hearing other suspects under investigation or voices and sounds that, if heard by the suspect, risk impeding the interrogation's success. [...] In the case at bar, the detainee is placed in the "Shabach" position while very loud music is played. Do these methods fall within the scope or the general authority to conduct interrogations? Here too, the answer is in the negative. Being exposed to very loud music for a long period of time causes the suspect suffering. Furthermore, the entire time, the suspect is tied in an uncomfortable position with his head covered. This is prohibited. It does not fall within the scope of the authority to conduct a fair and effective interrogation. In the circumstances of the cases before us, the playing of loud music is a prohibited.
30. To the above, we must add that the "Shabach" position employs all the above methods simultaneously. This combination gives rise to pain and suffering. This is a harmful method, particularly when it is employed for a prolonged period of time. For these reasons, this method is not authorized by the powers of interrogation. It is an unacceptable method. [...]
31. The interrogation of a person is likely to be lengthy, due to the suspect's failure to cooperate, the complexity of the information sought, or in light of the need to obtain information urgently and immediately. [...] Indeed, a person undergoing interrogation cannot sleep like one who is not being interrogated. The suspect, subject to the investigators' questions for a prolonged period of time, is at times exhausted. This is often the inevitable result of an interrogation. This is part of the "discomfort" inherent to an interrogation. This being the case, depriving the suspect of sleep is, in our opinion, included in the general authority of the investigator. [...]

The above described situation is different from one in which sleep deprivation shifts from being a "side effect" of the interrogation to an end in itself. If the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of

tiring him out or “breaking” him, it is not part of the scope of a fair and reasonable investigation. Such means harm the rights and dignity of the suspect in a manner beyond what is necessary.

[...]

### **Physical Means and the “Necessity” Defense**

33. [...] Can the authority to employ these methods be anchored in a legal source beyond the authority to conduct an interrogation? [...] An authorization of this nature can, however, in the state’s opinion, be obtained in specific cases by virtue of the criminal law defense of “necessity,” as provided in section 34(1) of the Penal Law. [...]

The state’s position is that by virtue of this defense against criminal liability, GSS investigators are authorized to apply physical means – such as shaking – in the appropriate circumstances and in the absence of other alternatives, in order to prevent serious harm to human life or limb. The state maintains that an act committed under conditions of “necessity” does not constitute a crime. Instead, the state sees such acts as worth committing in order to prevent serious harm to human life or limb. [...] In this, society is choosing the lesser evil. [...]

In the course of their argument, the state presented the “ticking bomb” argument. A given suspect is arrested by the GSS. He holds information regarding the location of a bomb that was set and will imminently explode. There is no way to diffuse the bomb without this information. If the information is obtained, the bomb may be neutralized. If the bomb is not neutralized, scores will be killed and injured. Is a GSS investigator authorized to employ physical means in order to obtain this information? The state answers in the affirmative. The use of physical means should not constitute a criminal offence, and their use should be sanctioned, according to the state, by the “necessity” defense.

35. [...] [W]e are prepared to accept that, in the appropriate circumstances, GSS investigators may avail themselves of the “necessity defense” if criminally indicted. This, however, is not the issue before this Court. [...] The question before us is whether it is possible, *ex ante*, to establish permanent directives setting out the physical interrogation means that may be used under conditions of “necessity.” Moreover, we must decide whether the “necessity defense” can constitute a basis for the authority of a GSS investigator to investigate, in the performance of his duty. According to the state, it is possible to imply from the “necessity defense” – available *post factum* to an investigator indicted of a criminal offence – the *ex ante* legal authorization to allow the investigator to use physical interrogation methods. Is this position correct?
36. In the Court’s opinion, [...] the “necessity defense” does not constitute a source of authority, which would allow GSS investigators to make use physical means during the course of interrogations. The reasoning underlying our position is anchored in the nature of the “necessity defense.” The defense deals with cases involving an individual reacting to a given set of facts. It is an improvised reaction to an

unpredictable event. [...] Thus, the very nature of the defense does not allow it to serve as the source of authorization. [...]

37. In other words, general directives governing the use of physical means during interrogations must be rooted in an authorization prescribed by law and not in defenses to criminal liability. The principle of "necessity" cannot serve as a basis of authority. [...] If the state wishes to enable GSS investigators to utilize physical means in interrogations, it must enact legislation for this purpose. This authorization would also free the investigator applying the physical means from criminal liability. [...]
38. We conclude, therefore, that [...] the individual GSS investigator – like any police officer – does not possess the authority to employ physical means that infringe a suspect's liberty during the interrogation, unless these means are inherent to the very essence of an interrogation and are both fair and reasonable.

An investigator who employs these methods exceeds his authority. His responsibility shall be fixed according to law. His potential criminal liability shall be examined in the context of the "necessity defense." Provided the conditions of the defense are met by the circumstances of the case, the investigator may find refuge under its wings. Just as the existence of the "necessity defense" does not bestow authority, the lack of authority does not negate the applicability of the necessity defense or of other defenses from criminal liability. The Attorney-General can establish guidelines regarding circumstances in which investigators shall not stand trial, if they claim to have acted from "necessity." [...]

### ***A Final Word***

39. This decision opened with a description of the difficult reality in which Israel finds herself. [...] We are aware that this decision does make it easier to deal with that reality. This is the destiny of a democracy – it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties. This having been said, there are those who argue that Israel's security problems are too numerous, and require the authorization of physical means. Whether it is appropriate for Israel, in light of its security difficulties, to sanction physical means is an issue that must be decided by the legislative branch, which represents the people. We do not take any stand on this matter at this time. [...]
40. Deciding these petitions weighed heavily on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. The possibility that this decision will hamper the ability to properly deal with terrorists and terrorism disturbs us.



We are, however, judges. We must decide according to the law. This is the standard that we set for ourselves. When we sit to judge, we ourselves are judged. [...]

The Commission of Inquiry pointed to the “difficult dilemma between the imperative to safeguard the very existence of the State of Israel and the lives of its citizens, and between the need to preserve its character – a country subject to the rule of law and basic moral values.” Report of the Commission, at 326. The commission rejected an approach that would consign our fight against terrorism to the twilight shadows of the law. The commission also rejected the “ways of the hypocrites, who remind us of their adherence to the rule of law, even as they remain willfully blind to reality.” *Id.* at 327. Instead, the Commission chose to follow “the way of truth and the rule of law.” *Id.* at 328. In so doing, the Commission of Inquiry outlined the dilemma faced by Israel in a manner open to examination to all of Israeli society.

Consequently, it is decided that the order nisi be made absolute. The GSS does not have the authority to “shake” a man, hold him in the “Shabach” position (which includes the combination of various methods, as mentioned in paragraph 30), force him into a “frog crouch” position and deprive him of sleep in a manner other than that which is inherently required by the interrogation. Likewise, we declare that the “necessity defense,” found in the Penal Law, cannot serve as a basis of authority for interrogation practices, or for directives to GSS investigators, allowing them to employ interrogation practices of this kind. Our decision does not negate the possibility that the “necessity defense” will be available to GSS investigators – either in the choice made by the Attorney-General in deciding whether to prosecute, or according to the discretion of the court if criminal charges are brought.

Decided according to the opinion of the President.

September 6, 1999

## D. Report of Human Rights Organizations

[Source: B'Tselem and HaMoked, “Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees,” Report, May 2007, available at: <http://www.hamoked.org.il/>]

### ABSOLUTE PROHIBITION

#### The Torture and Ill-treatment of Palestinian Detainees

May 2007

[...]

### Executive Summary

In recent years, Israel has openly admitted that Israel Security Agency (formerly the General Security Service) interrogators employ “exceptional” interrogation methods

and “physical pressure” against Palestinian detainees in situations labeled [*sic*] “ticking bombs.” B’Tselem and HaMoked – Center for the Defence of the Individual have examined these interrogation methods and other harmful practices and the frequency with which they are used. The report’s findings are based on the testimonies of seventy-three Palestinian residents of the West Bank who were arrested between July 2005 and January 2006 and interrogated by the ISA. Although it is not a representative sample, it does provide a valid indication of the frequency of the reported phenomena.

### **The ISA Interrogation Regime: Routine Ill-treatment**

The ISA interrogation regime includes seven key elements that harm, to varying degrees, the dignity and bodily integrity of the detainees. This injury is intensified given the combined use of these elements during the interrogation period which, for the detainees in the sample, lasted an average of thirty-five days.

1. *Isolation from the outside world* – prohibiting meetings between detainees and their attorneys or International Red Cross representatives;
2. *The use of the conditions of imprisonment as a means of psychological pressure* – holding in solitary confinement and in putrid, stifling cells;
3. *The use of conditions of imprisonment as a means for weakening the body* – preventing physical activity, sleep disturbance, inadequate food supply;
4. *Cuffing in the “shabah” position* – painful binding of the detainee’s hands and feet to a chair;
5. *Cursing and humiliation* – such as cursing, strip searches, shouting, and spitting;
6. *Threats and intimidation* – for example, the threat of physical torture and arrest of family members;
7. *The use of informants to extract information* – this method is not harmful, as such, but its efficacy largely depends on the ill-treatment of detainees immediately preceding its implementation.

These methods were employed against the vast majority of detainees included in the sample. These measures are not inevitable side-effects of the necessities of detention and interrogation, but are intended to break the spirit of the interrogees. As such, they deviate from the High Court’s ruling in PCATI and constitute, under international law, prohibited ill-treatment. Moreover, under certain circumstances, these measures may amount to torture.

### **“Special” Interrogation Methods**

In addition to routine measures, in some cases, probably those considered “ticking bombs,” ISA interrogators also use “special” methods that mostly involve direct physical violence. The sample group described seven such methods:

1. Sleep deprivation for over twenty-four hours (15 cases);

2. “Dry” beatings (17 cases);
3. Painful tightening of handcuffs, sometimes cutting off blood flow (5 cases);
4. Sudden pulling of the body, causing pain in the arms, wrists, and hands, which are cuffed to the chair (6 cases);
5. Sharp twisting of the head sideways or backwards (8 cases);
6. The “frog” crouch (forcing the detainees to crouch on tiptoes), accompanied by shoving (3 cases);
7. The “banana” position – bending the back of the interrogee in an arch while he is seated on a backless chair (5 cases).

These measures are deemed torture under international law. Though not routine, their use is not negligible. The High Court held that ISA interrogators who abused interrogees in “ticking bomb” situations may be exempted from criminal liability, but this only when the ill-treatment was used as a spontaneous response by an individual interrogator to an unexpected occurrence. In practice, all evidence points to the fact that “special” methods are preauthorized and used according to fixed instructions.

[...]

## DISCUSSION

1.
  - a. Does IHL apply to the interrogation methods described in the case? Does it apply because Israel is considered to be an occupying power? Does IHL apply to all detentions of Palestinians by Israeli forces?
  - b. If IHL applies, how does it protect Palestinian detainees? Do the interrogation methods used by the General Security Service (GSS) amount to inhuman treatment? Do they amount to torture? (GC IV, Arts 32 and 147)
  - c. Does IHL prohibit the interrogation methods described? Does international human rights law (HRL) apply to them? If so, does it replace IHL or apply in addition to IHL? Does it make a difference in terms of protection for the Palestinian detainees which body of law, IHL or HRL, applies to the interrogation methods? Is the obligation to treat protected persons humanely more restrictive than the prohibition of cruel, inhuman or degrading treatment? Is there a difference between the protection against torture afforded by IHL and that afforded by HRL? (GC I-IV, Art. 3; GC IV, Arts 32 and 147; P I, Art. 11, 75(2)(a), and 85; P II, Art. 4(2))
2.
  - a. Under IHL, may physical violence be used in order to obtain information from a detainee? May it be used insofar as it does not reach the level of cruel, inhuman or degrading treatment, or of torture? Does the obligation to treat protected persons humanely exclude all forms of physical violence? Does it exclude psychological violence? (GC IV, Art. 31)
  - b. Do you think that psychological, non-violent pressure and a moderate degree of physical coercion may be tolerated? (*Landau Commission*, para. 4.7) May they be tolerated for the sake of security requirements? Do you think that physical or moral coercion may be compatible with humane treatment?

- c. Taken individually, do you think that the methods used by the GSS may amount to torture? Do you think they may amount to cruel, inhuman or degrading treatment? Do they amount to torture only when used in combination?
3. Does Art. 5 of GC IV allow a State to violate other provisions of the Convention? Do you agree with the Landau Commission that Art. 5 of GC IV allows States Parties to derogate from Art. 31 thereof? Which paragraph of Art. 5 is applicable to the situation of Palestinian detainees? Does it make a difference in terms of protection whether the person is arrested on Israeli territory or on occupied Palestinian territory? Under Art. 5 of GC IV, which rights may a protected person be deprived of if arrested on Israeli territory? Which rights may the person be deprived of if arrested on occupied territory? May the prohibition of torture and ill-treatment ever be waived?
4.
  - a. Can a state of necessity justify violations of IHL? Since IHL is already meant to regulate situations of armed conflict, in which States are by definition in a state of necessity, should “state of necessity” be accepted as a defence?
  - b. May a State invoke the defence of necessity when it instructs its agents in a foreseeable situation to violate domestic and international law? Or is the defence of necessity only a defence for individuals who violate penal laws in an unforeseeable, immediate situation of danger? May an individual invoke a state of necessity to avoid punishment for an act of torture?
  - c. What is the difference between instructions to interrogators that they may use physical pressure (rejected by the High Court of Justice in Document C) and guidelines by the Attorney-General regarding circumstances in which investigators shall not stand trial, if they claim to have used physical pressure in a state of “necessity” (admitted by the High Court of Justice in Document C, para. 38)? Do not both condone *ex ante* torture?
  - d. How does an interrogator know that he will save lives (and that he is therefore in a state of necessity) when he starts to apply the condoned “pressure”, but before he obtains the information which enables lives to be saved? Must the interrogator be punished under Art. 277 of the Israeli Penal Code if it emerges from the interrogation that the detainee had no such information? Or is it sufficient that the interrogator thought the detainee had such information?
  - e. How does the interrogator know that he is interrogating a terrorist before that person has given information or is sentenced by a court for acts of terrorism? Are the described practices compatible with the presumption of innocence?
  - f. Has a terrorist a right to fair trial? Can the trial of an accused who did not have the right to remain silent during interrogation be fair? Is the “pressure” described in the present case compatible with the ban on compelling a suspect to testify against himself?
5. Do the described interrogation methods constitute grave breaches of IHL? (GC IV, Art. 147)

**Case No. 131, Israel, Cheikh Obeid *et al.* v. Ministry of Security**

[**N.B.:** As from June 2002, the detainees were no longer held in “administrative detention,” but as “unlawful combatants.” End June 2002, the ICRC was able to hold its first visit to Mr. Dirani since his arrest and the first visit in two years to Mr. Obeid. Both detainees have since been released and repatriated.]

[**Source:** High Court of Justice, *Cheikh Abdal Karim Obeid and Mustafa Dib Mar'i Dirani v. The Ministry of Security*, H.C.J. 794/98, 23 August 2001; unofficial translation.]

**In the Supreme Court in its capacity as the High Court of Justice**

**H.C.J. 794/98**

**Before:**

**The Honorable President A. Barak  
The Honorable Vice President Sh. Levin  
The Honorable Justice T. Or  
The Honorable Justice M. Heshin  
The Honorable Justice Y. England**

**The Applicants: 1. Sheik Abdal Karim Obeid  
Mustafa Dib Mar'i Dirani**

**v.**

**The Respondents: 1. The Minister of Security  
Batya Arad  
Tami Arad  
Chen Arad  
David Arad**

**Hearing**

Date of the hearing: January 11, 2001, 16<sup>th</sup> of Tevet – 5761 [...]

**Judgment**

**President A. Barak**

1. The Applicants are held in administrative detention: Applicant No. 1 (Obeid) since 1989, Applicant No. 2 (Dirani) since 1994. The legality of their administrative detention has been examined in the Courts. It was held that the administrative detention of the Petitioners was lawful, and that their release, at this time, poses a danger of causing a real damage to the security of the State and the well-being of the inhabitants. The danger posed by the Applicants is learned both from the nature of their acts prior to their detention and from their senior status in the organizations to which they belong (Administrative Detention Appeal 5652/00) *Obeid and others v. The Minister of Security* (as yet unpublished). While in administrative detention, the Applicants requested to be permitted to meet with Red Cross representatives. The request was denied. The Petition before

us was submitted against that decision and an *order nisi* was granted. While the Application was still pending, the Respondent notified that he decided to allow meetings between Applicant No. 1 (Obeid) and Red Cross representatives. Based on this notification, Obeid's Application was struck off [the record]. We continued to hear Dirani's application, while first waiting for a ruling to be handed down (in Administrative Detention Appeal 5652/00) concerning the legality of the administrative detention. After it was ruled that the administrative detention was valid, we continued to hear his claims concerning meetings with the Red Cross representatives. At their request, we added the Arad family [N.B.: Ron Arad is an Israeli soldier who has disappeared. Israel considers that the organizations which the detainees belonged to hold Arad, held him or disposed of his body if he is dead or at least have information on his fate.] as additional Respondents (2-5). While Dirani's Application was pending, it was again decided to prevent the Red Cross visits to Obeid. At his request, we again added Obeid as an Applicant in the application.

2. Counsel for the Applicants bases his application on international law as well as our own internal law. As for the first source, he claims for the application of Article 143 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Times of War. He also maintains that this provision has a customary force, therefore constituting part of Israel's internal law. It has also been argued that under our internal law (Regulation 11, State of Emergency Powers Regulations (Detention) (Administrative Detention – Detention Conditions))-1981 (hereinafter: "the Regulations"), the requested visits have to be allowed.
3. Mr. Nitzan claims for Respondent No. 1, and counsel for Respondents 2-5 joins in these claims, that the provisions of the Fourth Geneva Convention in general, and the provision of Article 143 of this Convention in particular, are of mere conventional force and, therefore, do not constitute part of the law of the State. In addition, he claims that even if this provision applies in the case before us, then, by virtue of the provision of the first sentence of Article 5 of the Convention, it is possible to deny "such rights and privileges under the present Convention" as would "be prejudicial to the security of such State", and that such is the case before us. As regards Article 11 of the Regulations, it was argued before us that the decision to prevent the meeting of the Applicants and the Red Cross personnel is reasonable. At the basis of this decision lies the position of Respondent No. 1, according to which the holding of visits of the Red Cross to the Applicants might harm the security of the State. In this regard we heard, with the consent of the Applicant's Counsel and in their absence, information concerning the security considerations which form the basis for Respondent No. 1's position.
4. Concerning the reasonableness of the decision to prevent a meeting between the Applicants and Red Cross personnel, there has been a change in the position of the Attorney General. At first we were told that while the Chief of Staff is of the opinion that the Applicants should not be allowed meetings with Red Cross personnel, whereas the position of the Attorney General differed. The Attorney General was of the opinion that, taking into consideration all of the circumstances of the matter, and especially the period of time that has elapsed since the Applicants

were first detained, it was right and proper to enable a meeting of Red Cross representatives with them. The Attorney General emphasized that “the passing of time is a substantial consideration. Another consideration is that at the end of the day, Israel, in its behavior, is not like those who hold Ron Arad captive. Israel will do its best to obtain his liberation and to achieve this it will continue to demand the right to hold in administrative detention people whose detention can help in this. However, in these very circumstances, it is appropriate to allow the meeting with Red Cross representatives.” Summarizing his position, the Attorney General noted that the reasonable approach would be to preserve the framework of the administrative detention and to enable the Applicants to meet with Red Cross representatives. “This manner of proceeding would be reasonable given, on one hand, the weight that must be given to the humanitarian aspect, and on the other hand, to the real possibility that today, with the passing of time, the prevention of a meeting with Red Cross representatives [will not] aid in the matter of Ron Arad in any way.”

5. While the Application before us was pending, three IDF soldiers (Staff Sergeant Binyamin Avraham, Staff Sergeant Omar Sawayid and Sergeant Adi Avitan) were abducted by the Hizbullah (on October 7, 2000). At about the same time Colonel (Reserve) Elhanan Tannenbaum was also abducted. The Hizbullah organization refuses to provide Israel with any information whatsoever about the abductees, their welfare and their health. It also refuses to allow Red Cross representatives to visit them. Against this backdrop, the Attorney General reached the conclusion that for the time being, it would not be reasonable to allow the Red Cross to conduct visits to the Applicants. The Attorney General emphasized before us (in a Supplementary Notification dated January 4, 2001) that “these developments constitute a substantial change of circumstances as regards the relief sought by the application, since it is obvious that the State of Israel has a supreme interest – and a supreme obligation – to make every effort to obtain information on the welfare and health of the abductees. Therefore, for the time being, it would not be reasonable to allow the Red Cross to hold visits to the Applicants.” In this, he joined his position to that of the Chief of Staff. In this context it was emphasized that the Applicants are not cut off from the outside world. They have been seen by the public. They have been photographed by the media. All of these clarified to the world that they are healthy and well. They regularly meet with their attorney. They turn to the courts in their concerns. Under these circumstances, the importance of allowing the Red Cross visits to the Applicants is much decreased, as opposed to the situation where all these steps are not permitted to people held in detention.
6. We heard interesting and comprehensive legal claims during the hearings in which we deliberated on this application in its various stages. We wish to leave most of these claims for future determination. Our position is founded on the perception that, at the end of the day, the real question before us is the reasonableness of the decision to not to allow the Applicants to meet the Red Cross representatives. This is certainly the case if the rules of international law do not apply in our case, and the ruling [of the Court] must be taken based on the exercise of the discretion of the security authorities according to Article 11(a)(2) of the Regulations, which states:

"a) a detainee is permitted to see visitors in a place determined by the commander for a period of half an hour as set forth below:

- (1) one visit of members of the family once in two weeks [...];
- (2) for a visitor of another degree of family relation or any other visitor who does not fall under Article 12 [dealing with visits by an attorney] – with special permission that the commander may grant at his discretion."

Even if the rules of international law apply in this matter, the exercise of security considerations (according to Article 5 of the Fourth Geneva Convention) must be made within the range of reasonableness. Hence, the key question is whether or not the decision not to allow the Applicants to meet with Red Cross representatives is reasonable.

7. In determining the reasonableness of this decision, two opposing considerations must be balanced: the first, the humanitarian consideration connected with the visits of Red Cross personnel to the applicants. The other, which is the security consideration, on which we have received information, and which concerns information on the navigator Ron Arad, and our four captives, we are not free to divulge the detailed contents of. Here also, we can leave for future determination [the question of] the proper balance between these opposing considerations during the time when the position of Respondent No. 1 was that the visits should continue to be prevented (in 1998), or when there has been a change in the Attorney General's position (at the beginning of 2001). What we have to determine is what the proper balance is now, after three years have elapsed from the time of the first decision, and after more than half a year has elapsed since the Attorney General changed his position. Moreover, it is appropriate to take into account the general context of a very prolonged administrative detention. To this question, our answer is that now, there is no longer any possibility to justify the prevention of the meeting of the Applicants with Red Cross representatives. With the passing of the years and months, the humanitarian consideration becomes weightier and weightier. On the other hand, the passing of time lessens the weight of the security consideration. In this matter we have asked the representatives of the army who appeared before us and we thoroughly examined the considerations. We were convinced that in the proper balance between the humanitarian considerations and the security considerations, the humanitarian considerations prevail.
8. One may ask: are the Applicants entitled to have humanitarian considerations weighed in their matter? They are members of terror organizations. Humanity is beyond them and harming innocent people is the bread of their subsistence. Are the Applicants worthy of having humanitarian considerations made on their behalf, when Israeli soldiers and civilians are held by the organizations to which the Applicants belong, and these organizations do not weigh humanitarian considerations at all, and refuse to provide any information on our men whom they hold captive? Our answer to these questions is this: The State of Israel is a State of law; the State of Israel is a democracy that respects human rights, and gives serious weight to humanitarian considerations. We weigh these considerations, for compassion and humanity are ingrained in our character as a Jewish and



democratic State; we weigh these considerations, for a person's dignity is precious in our eyes, even if he is one of our enemies (compare with High Court of Justice Case 320/80 *Kawasama v. The Minister of Defense*, P.D. 35(3) 113, 132). We are aware that such an approach seemingly gives an "advantage" to the terror organizations that are without any humanity. But this is a transient "advantage". Our moral approach, the humanity in our position, the rule of law that guides us – these are all important components of our security and our strength. At the end of the day, this is our own advantage. Things that were said elsewhere are appropriate here too:

"We are well aware that this judgment does not make it easier to deal with this reality. That is the fate of democracy, that not all means are legitimate to it, and not all methods employed by its enemies are open to it. Often democracy fights with one of its hands tied behind its back. Despite this, the hand of democracy prevails, since observing the rule of law and recognizing the liberties of the individual are an important component in democracy's perception of its security. At the end of day, these values strengthen democracy's spirit and strength *and enable it to overcome its difficulties.*" (*High Court of Justice 5100/94, Public Committee Against Torture in Israel v. The State of Israel*, P.D. 53(4) 817, 845).

9. It was not easy for us to reach our decision. We are aware of the efforts made on behalf of Ron Arad and our abducted soldiers and civilians. We are convinced that our decision cannot harm these efforts. It is this conviction that enables us, in the overall balance, to determine that the humanitarian considerations prevail. We are aware that many – who did not see the security information that was presented to us – may think otherwise. [...]

The result is that we allow the Application, in the sense that Respondent No. 1 has to make the acceptable arrangements to enable a visit of Red Cross representatives to the Applicants.

### **The President [...]**

#### **Justice Y. England**

[...] The two Applicants [...] have been held in administrative detention in Israel for many years. Applicant No. 1 has been in detention since 1989, that is for twelve years; Applicant No. 2 since 1994. The question before us is whether to allow the Red Cross to visit them.

The heart revolts against the inhuman and cynical behavior of the terror organizations that cause additional pain and sorrow to the families of the abductees who know nothing on the fate of their loved ones. Our hearts are also with the Arad family, from whom the fate of their son has been hidden by the terror organization and the governments who stand behind them. This behavior is not only inhuman and inconsistent with the behavior of civilized people, but it also stands in explicit contradiction to international conventions, and it is doubtful whether the

international organizations and enlightened countries do enough to rectify this intolerable situation.

All of this lies in the background of the decisions by the security authorities, who try in every way to bring about a solution to the humanitarian and political problem of the abduction of civilians and soldiers by terror organizations and holding them in captivity, and who act in a manner contrary to all humanitarian rules. The honest belief of the State of Israel's authorities is that the prevention of visits to the Applicants could help in the struggle for the basic rights of the abductees. If not for the hope that the pressure of the prevention of these visits might bring about a similar response on the part of terror organizations, the security entities would not have even considered taking this step against the Applicants.

As my colleague President Barak set forth in detail, Red Cross visits are a clear humanitarian matter, to which the State of Israel considers itself bound subject, of course, to urgent and vital security needs. I would like to add a number of remarks from the viewpoint of Judaism, as they are expressed in the Halachic tradition. It is ruled as Halacha in the Code of Jewish Law (Shulhan Aruch, Yoreh Dea, Samech' Resh-Nun-Bet,) that "there is no greater Mitzva than the redemption of prisoners" and that

"anyone who ignores the redemption of prisoners, transgresses [the rule] you shall not harden your heart (*Deuteronomy 15, 7*) or close your hand (*Deuteronomy 15, 7*). [And the rule] you shall not stand aside while your fellow's blood is shed (*Leviticus 19, 16*). [And the rule] he shall not subjugate him through hard labor in your sight (*Leviticus 25, 53*) [And] negates the rule you shall open your hand to him (*Deuteronomy 15, 8*). And the Mitzva of let your brother live with you (*Leviticus 25, 36*). [And the rule] you should love your fellow as yourself (*Leviticus 19, 18*). [And the rule] deliver them that are drawn into death. (*Proverbs 24, 11*). And many things of this kind (*Code of Jewish Law – Shulhan Aruch, Yoreh Dea, Mark Resh-Nun-Bet, Section B*)"

It was also ruled that "any moment of delay in the redemption of the prisoners, where it can be made earlier, it is like the shedding of blood". (*ibid.*, Section).

With all of the great importance attached to the Mitzva of the redemption of prisoners, Jewish law sets some exceptions to the manner in which prisoners shall be released. This means that, in choosing the manner in which the prisoner shall be released, we must weigh wider considerations, such as the influence of the act of release on future prisoners who will fall into the hands of evil men. In our time, we also see ourselves as obligated to the maintenance of humanitarian values as a form of restoration of the world order in the wide sense of the word. There is no need to elaborate on this. In the special circumstances of this case, it seems, for the time being, that this consideration compels giving permission to Red Cross visit to the Applicants.

Therefore I join in the conclusion of my colleague, President A. Barak. [...]

**DISCUSSION**

1.
  - a. Is the internment of the Applicants lawful under IHL? Can the acts imputed to the Applicants justify their administrative internment without trial, or only their criminal prosecution? (GC IV, Arts 42, 43 and 78)
  - b. Since the Applicants were arrested in southern Lebanon, is it acceptable to intern them in Israel? After Israel withdrew from southern Lebanon, could it continue to hold the Applicants? (GC IV, Art. 49(1); CIHL, Rule 129)
2.
  - a. Why was the family of Ron Arad involved in this trial?
  - b. Do the families of Ron Arad, the three Israeli soldiers captured on 7 October 2000, and Colonel Tannenbaum have the right to know the fate of their loved ones? Does the ICRC have the right to visit these persons? Can a violation of these rights justify the Applicants' detention? Can it justify the refusal to allow the ICRC to visit the Applicants? Can it justify the denial of the right of the Applicants' families to know the Applicants' fate via the ICRC? Is the demand for reciprocity an acceptable way of obtaining compliance with IHL? Does it contribute towards compliance? Can reciprocity take the form of reprisals? Would such reprisals be acceptable? (GC III, Arts 70, 71, 122, 123 and 126; GC IV, Arts 25, 33(3), 106, 107, 136, 137, 140 and 143; P I, Arts 32 and 33; CIHL, Rules 146-148; Vienna Convention on the Law of Treaties (available at <http://untreaty.un.org>), Art. 60(5); Part I, Chapter 13, IX. 2. c) dd) but no reciprocity, p. 301)
  - c. Would it be acceptable to detain the Applicants for as long as they fail to provide information on the fate of Ron Arad (and other missing persons) for the families concerned? For as long as the organizations to which the Applicants belong fail to provide such information? Does Israel have "the right to hold in administrative detention people whose detention can help in" the release of Ron Arad? Did the judges violate IHL when they decided that this was the case? Did they commit a grave breach of Convention IV? (GC IV, Arts 34, 42, 78 and 147; CIHL, Rules 125-126)
  - d. How do you view the ban on ICRC visits to the Applicants and the claim that such a ban furthers the cause of Ron Arad?
3.
  - a. Does IHL give the Applicants the right to be visited by the ICRC? Does it give the ICRC the right to visit the Applicants? (GC IV, Art. 143(5); CIHL, Rule 124)
  - b. What is the real issue to be decided by the Court: whether the ban on such visits is reasonable, or whether the right to conduct such visits is guaranteed by international law?
4. Why is it important to know whether Art. 143 of Convention IV is customary law, given that Israel and Lebanon are both party to this Convention? Can Israel – which belongs to the dualist tradition in terms of the relationship between international treaties and domestic law – argue that because it has not adopted national legislation to enact and implement Convention IV it is under no obligation to comply with it?
5.
  - a. Can security reasons justify depriving a protected person of the rights laid down in Convention IV? Does the first paragraph of Art. 5 of Convention IV apply to the Applicants arrested in southern Lebanon? Can Art. 5(2) of Convention IV be invoked to ban ICRC visits to protected persons?
  - b. What security reasons could justify a ban on ICRC visits? Can these reasons be invoked in the case in point?
6. What is the "humanitarian aspect" of ICRC visits to the Applicants? Which rights are more easily exercised because of ICRC visits?

7. What are the advantages and disadvantages of showing, as does Judge England, that the requirements of IHL correspond to those of the Code of Jewish Law?

**Case No. 132, Israel, Cases Concerning Deportation Orders**

[Source: *ILM*, vol. 29 (1), 1990, pp. 139-181; footnotes omitted.]

**ISRAEL: SUPREME COURT JUDGMENT IN  
CASES CONCERNING DEPORTATION ORDERS**

**[April 10, 1988]**

[...]

**The Supreme Court Sitting As the High Court of Justice**

**H.C. 785/87**

**H.C. 845/87**

**H.C. 27/88**

[...]

**Judgment****Shamgar P.**

1. These three petitions, which we have heard together, concern deportation orders under Regulation 112 of the *Defence (Emergency) Regulations*, 1945 [...].

On March 13, 1988 we decided to dismiss the petitions [...]. The following are the reasons for the Judgment.

2. [W]e shall first examine the general contentions which essentially negate the existence of a legal basis for the issue of a deportation order to a resident of the above-mentioned territories. For if the conclusion will be that under the relevant law the issue of a deportation order is forbidden, then obviously there will be no need to examine whether a substantive justification exists for the issue of the specific order, through the application of this question to the factual data pertaining to each of the petitioners. [...]
3. (a) The petitioners raised, as a central reason for their petitions, the argument that Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: the Fourth Geneva Convention) forbids the deportation of any of the petitioners from Judea, Samaria or the Gaza Strip, as the case may be. According to the argument, an absolute prohibition exists, with regard to a resident of one of the territories occupied by the I.D.F. [Israel Defence Force], against the application of Article 112 of the *Defence (Emergency) Regulations*, 1945 or of any other legal provision (if such exists) whose subject is deportation. This is due to the provisions of the above-mentioned international convention which, according to the contention,

should be seen as a rule of public international law, binding upon the State of Israel and the Military Government bodies acting on its behalf and granting those injured the right of access to this Court.

The legal premise underlying this argument has been raised time and again before this Court and has been discussed either directly or partially and indirectly in a number of cases; [...].

[...]

- (c) My comments will relate to the following areas:
  - (1) The accepted approach to interpretation under internal Israeli law;
  - (2) Principles of interpretation applicable to international conventions;
  - (3) Interpretation of the above-mentioned Article 49.
- (d) *The accepted interpretation in our law:* [...]

In a nutshell, what has been said until now may be summarized thus: We have referred to the guidelines used in establishing the relation between the literal meaning of the written word and the correct legal interpretation, as far as this applies to our legal system. Interpretation in this sector seeks, as was said, to pave the way to a revelation of the legislative purpose. Setting the purpose in this form is directed to the sources which one may turn to in order to ascertain the purpose. It is customary in this matter to examine more than the text and, *inter alia*, also the legislative history; the legal and substantive context, and the meanings stemming from the structure of the legislation [...].

- (e) *Interpretation in Public International Law:* Now the second question arises, which is: What are the rules of interpretation relevant to our matter that are used in public international law.

Israel has not yet ratified the Vienna Convention of 23 May 1969 on the Law of Treaties, which came into force in 1980 for those who joined it (hereinafter: the Vienna Convention). [available on [untreaty.un.org](http://untreaty.un.org)]

[...] Nonetheless, there is value, even if only for the sake of comparison, in an examination of the provisions of the Convention regarding interpretation.

On the issue of interpretation, Articles 31 and 32 of the said Convention state:

*"31. General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connexion [*sic*] with the conclusion of the treaty; [...]

### 32. *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.” [...]

It seems that from the first part of Article 31 (1) one could conclude that the Convention sought to support that school of interpretation which emphasizes the text, as opposed to the alternative school of interpretation, no less accepted, which focuses on the intentions of the draftsmen of the Convention [...]. Yet, the second part of Article 31(1) and Article 32 form the bridge to the other theories of interpretation, also familiar to us from the earlier examination of our municipal law.

That is, the provisions of the Convention leave ample space to enable examination of the purpose which led to its making. It is even possible to reflect upon the preparatory work describing the background to the making of the Convention, as material which can complement the plain understanding of the text, its purpose and scope of application.

[...]

And freely translated [from Professor Mustafa Kamil Yasseen]: The method of interpretation cannot be uniform and identical and it may change in accordance with a series of factors. It is fundamentally dictated by the approach of the interpreter to interpretive methodology, by the substance of the instrument being interpreted, and by the characteristics of the particular field of law (i.e. public international law – m.s.) with which one is dealing. This and more, as far as treaties are concerned, a method of interpretation must see itself as a declarative act and not as a formative one (i.e. not judicial legislation – m.s.). The method must take into account that the treaty is an act stemming from the free will of the treaty makers, and that it is not a one-sided act; that the parties to the treaty are sovereign states, and that it is not a contract between individuals, nor the internal law of the state. Lastly this method must keep in mind the characteristics [*sic*] of the international legal order, a field in which formalism does not have the upper hand, a field in which states enjoy a great deal of freedom of action, a field in which states are not only parties to a treaty, but also the ones to whom the treaty is directed (i.e. the states must be its executors – m.s.), and a field in which the preference for peaceful means to settle disputes depends upon the free will of states. Therefore, it is not surprising that the method of interpreting [*sic*] a treaty is different from that applicable to a law or a contract. [...]

- (f) [...] Beyond that: When for the purpose of the issue before us we adopt the interpretive approach as expressed in the specific area of law that we are presently discussing, namely public international law, we should recall Professor Yasseen's interpretive guidelines [...] from which emerges, *inter alia*, a stand rejecting the constriction of state authority and rejecting formalism, or an approach which ignores the special qualities of the field of law that we are discussing.

We shall now proceed to the application of the rules of interpretation to the issue before us.

- (g) *Article 49 of the Fourth Geneva Convention*: What is the dispute regarding the interpretation of the above-mentioned Article 49.

The relevant portions of the Articles state:

"Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.

...

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

In *H.C. 97/79* (pp. 316-317) [*Abu Awaad v. Commander of the Judea and Samaria Region*], Sussman P. comments regarding the argument that the application of Regulation 112 of the *Defence (Emergency) Regulations* is contrary to Article 49 of the Fourth Geneva Convention:

"...I have not found substance in the argument that the use of the above-mentioned Regulation 112 stands in contradiction to Article 49 of the Fourth Geneva Convention [...]. It is intended, as Dr. Pictet in his commentary on the Convention (p. 10) writes, to protect the civilian from arbitrary action by the occupying army, and the purpose of the above-mentioned Article 49 is to prevent acts such as the atrocities perpetrated by the Germans in World War II, during which millions of civilians were deported from their homes for various purposes, generally to Germany in order to enslave them in forced labour for the enemy, as well as Jews and others who were deported to concentration camps for torture and extermination.

It is clear that the above-mentioned Convention does not detract from the obligation of the Occupying Power to preserve public order in the occupied territory, an obligation imposed by Article 43 of the 1907 Hague Convention, nor does it detract from its right to employ the necessary



means to ensure its own security, see Pictet, *Humanitarian Law and the Protection of War Victims*, at p. 115.

...

It has nothing whatsoever in common with the deportations for forced labour, torture and extermination that were carried out in World War II. Moreover, the intention of the respondent is to place the petitioner outside the country and not to transfer him to the country, to remove him because of the danger that he poses to public welfare and not to draw him nearer for the purpose of exploiting his manpower and deriving benefit from him for the State of Israel."

Landau P. again referred to this subject in *H.C. 698/80 [Kawasme and Others v. Minister of Defence and Others]* at pp. 626-628. The following are the relevant passages from his remarks:

[...] Ms Langer has more forcefully repeated that same argument. In her opinion, the Court in *H.C. 97/79* ignored the difference between the first and second paragraphs of said Article 49: Whereas the prohibition against evacuating civilian populations generally carried out by displacement within the occupied territory is permitted for purposes of the population's security or for imperative military reasons, as is stated in the second paragraph of the Article, the prohibition against deportation beyond the border is absolute, 'regardless of their motive' as is stated in the latter part of the Article. The book *The Geneva Convention of August 12, 1949, Commentary* (Geneva, ed. by J.S. Pictet, vol. IV, 1958) 279 is cited. Regarding the prohibition against deportations, it states:

'The prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2'. [...]

It has been argued before us that one must distinguish between the reason for the prohibitions in Article 49 of the Convention, which was, as was said, founded in the memory of those atrocities, and between that which stems from the unambiguous wording of the prohibition in the first paragraph of the Article, which applies, according to its language, not only to mass deportation, but also to deportation of individuals. As opposed to this, one can say that the deportation of individuals was also carried out occasionally under the Hitler regime for the realization of the same policy which led to mass deportation, and therefore none of the provisions of Article 49 are in any way applicable to the deportation of persons who endanger public welfare – as this Court has ruled in *H.C. 97/79*. [...]

[...]

But whatever the correct interpretation of the first paragraph of Article 49 of the Convention may be, the Convention, as Article 49 in its entirety, does not in any case form a part of customary international law. Therefore, the deportation orders which were issued do not violate internal Israeli

law, nor the law of the Judea and Samaria Region, under which this Court adjudicates . ...

Ms. Langer recalled to us a passage from G. Schwarzenberger's book, *International Law as Applied by International Courts and Tribunals* (London, vol. II, 1968) 165-166, which was cited in [...] *H.C. 606, 610/78 [Oyev and Others v. Ministry of Defence and Others]*, at p. 121. The learned writer expresses the belief that the prohibition against the deportation of residents of an occupied territory is but 'an attempt to clarify existing rules of international customary law'. I assume that here too, the reference is to arbitrary deportations of population, akin to the Hitler regime. If the author was also referring to deportation of individuals in order to preserve the security of the occupied territory, then that is the opinion of an individual author, stated in vague terms with no substantiation whatsoever." [...]

- (h) *What were the considerations guiding the draftsmen of the Convention:* An examination of *Actes de la Conférence Diplomatique de Genève de 1949*, [...] shows incontrovertibly that in choosing the term "deportations", the participants in the deliberations referred to deportations such as those carried out during World War II. [...]

The Convention draftsmen referred to deportations "as those that took place during the last war" and in the framework of the deliberations sought a text that would reflect the ideas that were expressed in different ways and in different languages. [...]

Article 49, which prohibited deportations was connected therefore with such provisions. As Pictet describes [...] [i]n his words: When one thinks about the millions of people who were forcibly transferred from place to place during the last conflict (i.e. World War II – m.s.), and about their suffering, both physical and moral, one cannot but thankfully bless the text (of the Convention – m.s.) which put an end to these inhuman practices.

Here then deportations, concentration camps and the taking of hostages were linked together and the word "deportations" was used in the context described above. [...]

One is not speaking in this regard, not even by inference, about the removal from the territory of a terrorist, infiltrator or enemy agent, but rather about the protection of the entire civilian population as such from deportation, since the civilian population has more and more frequently become direct victim of war [...].

The conclusion, stemming from all of the above, is that the purpose which the draftsmen of the Convention had in mind was the protection of the civilian population, which had become a principal victim of modern-day wars, and the adoption of rules which would ensure that civilians would not serve as a target for arbitrary acts and inhuman exploitation. What guided the draftsmen of the

Convention were the mass deportations for purposes of extermination, mass population transfers for political or ethnic reasons or for forced labour. This is the “legislative purpose” and this is the material context.

It is reasonable to conclude that the reference to mass and individual deportations in the text of the Article was inserted in reaction also to the Nazi methods of operation used in World War II, in which mass transfers were conducted, sometimes on the basis of common ethnic identity, or by rounding up people in Ghettos, in streets or houses, at times on the basis of individual summonses through lists of names. Summons by name was done for the purpose of sending a person to death, to internment in a concentration camp, or for recruitment for slave labour in the factories of the occupier or in agriculture. Moreover, it seems that the summons to slave labour was always on an individual basis.

- (i) The gist of the petitioners’ argument is that the first paragraph prohibits any transfer of a person from the territory against his will.

The implications of this thesis are that Article 49 does not refer only to deportations, evacuations and transfers of civilian populations, as they were commonly defined in the period of the last war, but also to the removal of any person from the territory under any circumstances, whether after a legitimate judicial proceeding (e.g. an extradition request), or after proving that the residence was unlawful and without permission [...], or for any other legal reason, based upon the internal law of the occupied territory.

According to the said argument, from the commencement of military rule over the territory there is a total freeze on the removal of persons, and whosoever is found in a territory under military rule cannot be removed for any reason whatsoever, as long as the military rule continues. In this matter there would be no difference between one dwelling lawfully or unlawfully in the territory, since Article 49 extends its protection to anyone termed “protected persons”, and this expression embraces, according to Article 4 of the Convention, all persons found in the territory, whether or not they are citizens or permanent residents thereof and even if they are there illegally as infiltrators (including armed infiltrators), [...].

The petitioners’ submission rests essentially on one portion of the first paragraph of the Article, i.e. on the words “... transfers ... deportations ... regardless of their motive”. That is, according to this thesis, the reason or legal basis for the deportation is no longer relevant. Although the petitioners would agree that the background to the wording of Article 49 is that described above, the Article must now be interpreted according to them in its *literal and simple* meaning, thus including any forced removal from the territory.

- (j) I do not accept the thesis described for a number of reasons:

It is appropriate to present the implications of this argument in all its aspects. In this respect we should again detail what is liable to happen, according to

the said argument, and what is the proper application of Article 49 in the personal sense and in the material sense. [...]

From the personal aspect, Article 49 refers, as was already mentioned, and as is universally accepted, to all those falling under the category of protected persons. This term is defined in Article 4 of the Convention, which in the relevant passage states:

*“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”*

(emphasis added – m.s.)

The definition employs a negative test, i.e. for our purposes, anyone who is not an Israeli national and is found in a territory occupied by our forces, is *ipso facto* a protected person. This includes an infiltrator, spy and anyone who entered the territory in any illegal manner. [...]

The acceptance of the argument that the prohibition in Article 49 applies, whatever the motive for its personal application, means that if someone arrives in the territory for a visit of a limited period, or as a result of being shipwrecked on the Gaza coast, or even *as an infiltrator for the purpose of spying or sabotage* (and even if he is not a resident or national of the territory, for that is not a requirement of Article 4), it is prohibited to deport him so long as the territory is under military rule. In other words, the literal, simple and all-inclusive definition of Article 49, when read together with Article 4, leads to the conclusion that the legality of a person's presence in the territory is not relevant, for his physical presence in the territory is sufficient to provide him with absolute immunity from deportation. According to this view, it is prohibited to deport an armed infiltrator who has served his sentence. [...]

[F]rom the thesis offered by the petitioners, it would follow that an infiltrator for sabotage purposes could not be deported before or after serving his sentence. The same would be true, according to this approach, of a person who came for a visit over the open bridges, yet stayed beyond the expiration of his permit. The literal and simple interpretation leads to an illogical conclusion.

(k) [...]

If [...] one accepts the proposed interpretation of the petitioners, according to which deportation means any physical removal from the territory, then the above would apply, for instance, to deportation for the purposes of extradition of the protected person, for this too requires removing a person from the territory. Laws, judicial decisions and legal literature use, in the context of extradition, the term deportation to refer to the stage of carrying out the extradition or the rendition. A murderer who escaped to the occupied territory would have a safe haven, which would preclude his transfer to the authorized jurisdiction. [...]

- (l) Regarding the issue before us, the petitioners have directed our attention to the remarks of Pictet in *Commentary, supra*, at 368, who adopts the literal interpretation, according to which all deportations are prohibited no matter what the reason. One should see this interpretive view, which would apply Article 49 to as broad a group of circumstances as possible, in its context and within its limits. The desire for a literal and simple meaning, which may find expression in scholarly opinions in professional literature, does not bind the courts. Not only are there other and contradictory viewpoints [...], but, more essentially, the Court deals with the law as it exists and clarifies the meaning of a law or of a treaty, as appropriate by adopting accepted rules of interpretation [...].

Were we to adopt the rules of interpretation used in our law, we could not accept the thesis proposed by the petitioners. The Court would consider the flaw which the Convention was intended to correct [...]; would examine the material context and the structure of Article 49, which in its other provisions refers clearly and openly to evacuations and transfers of population [...], would attempt to lift the veil from over the legislative purpose in order to adopt it as a standard of interpretation [...]; and would be wary of and refrain from the adoption of a literal interpretation which is, so to speak, simple but in law and in fact so simplistic that it leads the language of the law or the Convention, as appropriate, to a range of applicability that confounds reason [...] e.g. the absolute prohibition against the deportation of an infiltrator or spy, since deportations are prohibited, as it were, “regardless of their motive”.

Essentially, even reference to the rules of interpretation of international conventions does not help the petitioners’ argument: For even the Vienna Convention does not submit to the literal interpretation, but rather sees the words of the convention “in their context and in the light of its object and purpose” (Article 31(1) of the Vienna Convention). The Convention permits us to examine the preparatory work and shies away from an interpretation whose outcome is “manifestly absurd or unreasonable”, and this description would apply at once to a prohibition against the deportation of an infiltrator [...].

[...]

- (m) By contrast with this answer to the petitioners’ contention, the opposite question naturally arises, namely, what then is the alternate interpretation of the words “regardless of their motive”.

If we adopt the interpretation by which the term “deportation” refers to the mass and arbitrary deportations whose descriptions are familiar to us, then the words referring to the motive do not change the essence; the reference to some possible motive simply serves to preclude the raising of arguments and excuses linking the mass deportations to, as it were, legitimate motives. In other words, whatever the motive, the basic essence of the prohibited act (deportation), to which the words of Article 49 are directed, does not change.

The opposite is true: There is basis for the claim that the reference to “some motive” is also among the lessons of World War II.

The words “regardless of their motive” were intended to encompass all deportations of populations and mass evacuations for the purposes of labour, medical experiments or extermination, which were founded during the war on a variety of arguments and motives, including some which were but trickery and deceit (such as relocation, necessary work, evacuation for security purposes etc...). Furthermore, the draftsmen of the Convention took into account the existing right of the military government to utilize manpower during wartime (see Regulation 52 of the 1907 Hague Regulations which deals with compulsory services, and Article 51 of the Fourth Geneva Convention which even today permits the forcing of labour on protected persons), but sought to clarify that mass deportation, as it was carried out, is prohibited even when the motive is seemingly legitimate, except in the event of evacuation in accordance with the qualifications set out in paragraph 2 of Article 49. [...]

To summarize, this Court had the authority to choose the interpretation that rests upon the principles explained above over the literal interpretation urged by the petitioners. This Court has done so in *H.C. 97/79* [...]. [...]

4. (a) This Court has indicated in its judgments that the above-mentioned Article 49 is within the realm of conventional international law. In consequence of this determination, the petitioners have now raised a new thesis which holds that this Court’s approach [...] is founded in error. This approach holds that the rules of conventional international law (as opposed to customary international law) do not automatically become part of Israeli law, unless they first undergo a legal adoption process by way of primary legislation. [...]
- (b) The petitioners submit that not only does customary international law automatically become part of the country’s laws (barring any contradictory law), but that there are also parts of conventional international law which are automatically incorporated, without the need for adoption by way of legislation as a substantive part of Israeli municipal law. These are those parts of conventional international law which are within the realm of “law-making treaties”. [...]
5. [...]
- (b) The legal situation in Israel: Israeli law on the question of the relationship between international law and internal law – that is in order to settle the question of whether a given provision of public international law has become part of Israeli law – distinguishes between conventional law and customary law [...].

[...]

According to the consistent judgments of this Court, customary international law is part of the law of the land, subject to Israeli legislation setting forth a contradictory provision. [...]

Lord Alverstone expressed the [...] idea in the *West Rand* case mentioned above when he said that in order to be considered a part of English law, a rule of international law must:

“... be proved by satisfactory evidence, which must shew [*sic*] either that the particular proposition put forward has been recognised or acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it.”

That is, in fact, a standard similar to the one adopted in the definition appearing in Article 38(1)(b) of the Statute of the International Court, which deals with international custom. [...]

(c) [...]

The clear meaning of these remarks is that the adoption of international treaties – in order to incorporate them as part of internal law and in order to open them to enforcement through the national tribunals – is conditional upon a prior act of the legislator. As we shall see, international treaties may constitute a declaration of the valid customary law – but then their content will be binding by virtue of the said customary status of the rule found therein and not by virtue of its inclusion in the treaty. [...]

(d) [...]

To summarize, according to the law applying in Israel, an international treaty does not become part of Israeli law unless –

- (1) Its provisions are adopted by way of legislation and to the extent that they are so adopted, or,
- (2) The provisions of the treaty are but a repetition or declaration of existing customary international law, namely, the codification of existing custom. [...]

(e) If we apply what was said above to the issue before us, we must remember that Article 49 has been categorized in our judgments as conventional law which does not express customary international law. [...]

Regarding the fact that Article 49 did not reflect customary law, Landau P. adds at p. 629:

“In fact the occupation forces in the Rhineland in Germany, after World War I, used the sanction of deportation from the occupied territory against officials who broke the laws of the occupation authorities or who endangered the maintenance, security or needs of the occupying army: Fraenkel, *Military Occupation and the Rule of Law*, Oxford University Press, 1944. Under this policy the French deported during the armistice following that war 76 officials and the Belgians – 12, and during the dispute over the Ruhr (1923) no less than 41,808 German officials were deported (*ibid.*, at 130-131). In the face of these facts, it is clear that the

prohibition against the deportation of civilians did not constitute a part of the rules of customary international law accepted by civilized states, as if the Geneva Convention simply gave expression to a pre-existing law." [...]

7. [...]

(c) [...]

[C]ountries, which are signatories to the treaty, are obligated to adhere to their said obligations in relations among themselves; however, in the system of relations between the individual and government, one can lean in court only upon rules of customary public international law. This approach formed the basis for Witkon J.'s remarks in *H.C. 390/79 [Dvikat v. Government of Israel and Others]*, when he said at p. 29:

"One must view the Geneva Convention as part of conventional international law; and therefore – according to the view accepted in common law countries and by us – an injured party cannot petition the court of a state against which he has grievances to claim his rights. This right of petition is given solely to the states who are parties to such a convention, and even this litigation cannot take place in a state's court, but only in an international forum."

(d) Mr. Rubin questions [...] whether grounds exist to assume that the Hague Regulations were considered at the time of the Convention's signing as merely an international obligation undertaken by the state becoming a party to the Regulations and that *only subsequently* did they turn into binding customary international law and as such a part of the internal law. The answer to this question emerges, in my view, from the words of the International Tribunal in Nuremburg, which stated the following in its judgment:

"The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention (Hague Convention Concerning the Laws and Customs of War on Land) expressly stated that it was an attempt 'to revise the general laws and customs of war' which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilised nations and were regarded as being declaratory of the laws and customs of war. ..." (*I.M.T. Judgment, supra*, at 65).

(emphasis added – m.s.)

In other words, there has been development in terms of the status of the Hague rules as customary law in the period that has elapsed since the signing of the Convention in 1907. [...]

11. Let us now turn to the specific submissions of each of the petitioners:

12. *H.C. 785/87*: (a) The petitioner Abd al Nasser Abd al Aziz Abd al Affo, born in 1956, is a resident of the city of Jenin.



The deportation order [...] reads as follows:

“By virtue of my authority under Regulation 112 (1) of the *Defence (Emergency) Regulations*, 1945, and my authority under any law or security legislation, and whereas I believe the matter is necessary to ensure the security of the Region, public welfare and public order, I hereby order that:

Abd al Nasser Abd al Affo Muhamad Abd al Aziz, [...] be deported from the Region.

[He] is a senior operative in the ‘National Front’ organization, who has been sentenced three times in the past to prison terms for his terrorist activity. He is about to finish a third prison term of five years and three months. During his stay in prison, he assiduously continues his hostile activity in order to further the purposes of the organization.” [...]

13. H.C. 845/87: (a) Abd al Aziz Abd Alrachman Ude Rafia, born in 1950, is a resident of Gaza.

On November 15, 1987 a deportation order was issued against him which included the following reasons:

“This order is issued since the above serves as a spiritual leader of the Islamic Jihad movement in the Gaza Strip, which supports a violent Islamic revolution on the Iranian model, armed struggle and the liberation of Palestine through Jihad. In the framework of his sermons in the mosques, he calls for action against the Israeli rule by military struggle.”

Immediately upon receipt of this order, the petitioner was arrested and jailed in Gaza. The petitioner applied to the Advisory Committee [...].

[...]

The Committee noted in its reasoned and detailed decision the following, *inter alia*:

“The applicant is mentioned as responsible for the Islamic Jihad in the Gaza Strip and perhaps beyond that area. He is depicted as a guide of that organization and as an influential figure among the residents of the area in general and among those who belong to that organization in particular. They look to him constantly and often wait by his doorway to hear his words. He acquired his status through his activities as a lecturer at the university and as a preacher in the mosque, where he delivered extreme religious and nationalist addresses laden with incitement and hatred against Israeli rule. These contained on occasion calls for violent struggle, including encouragement of civil disorder and even extreme acts of violence, such as murder. There is no doubt, therefore, that the applicant constitutes an actual danger to the security of the Region and its inhabitants and to the maintenance of public order; and that the deportation order was given, therefore, within the framework of considerations enumerated in Regulation 108 of the Regulations.

...

The question remains whether in the applicant's case, the most severe step, namely deportation, is in order.

In view of the applicant's "history" and personality, we are convinced that the answer to this question is affirmative. [...]

Even placing him in prison, such as in administrative detention, will not counter his influence. There are grounds for fearing that precisely in such a place he will be even more accessible to the extremists among his followers and that his stay in prison will have a most dangerous and negative influence on what takes place both within the prison and outside it.

The most efficient and suitable measure in this case is, therefore, to deport the applicant outside the Region and the country.

Even if he were free to go about in a foreign land and no one would constrain him, his harmful influence on the Region would be immeasurably smaller and less perceptible and immediate than would be the case, were he to walk about in our midst." [...]

I, therefore see no grounds for the intervention by this Court in the decision of respondent [...].

14. (a) *H.C. 27/88*: (a) The petitioner J'mal Shaati Hindi is a resident of Jenin and is studying at Al Najah University. On 1 December 87 a deportation order was issued against him [...].

[...]

- (d) The petitioner complained about the legal procedure, in the framework of which classified evidence was presented to the Advisory Committee in his absence and in the absence of his counsel. On a similar issue the Court has stated in [...] *H.C. 513, 514/85 and H.C.M. 256/85 [Nazzal and Others v. Commander of I.D.F. Forces in the Judea and Samaria Region]* at p. 658:

"The petitioners complained that they were not privy to the secret material that was presented to the Advisory Board, but as this Court has already explained regarding a similar case in *A.D.A. 1/80*, this is the sole reasonable arrangement that strikes a balance between the two interests, which are: On the one hand maintaining an additional review of the considerations and decisions of the Military Commander; and on the other hand preventing damage to State security through disclosure of secret sources of information. It indeed does not provide an opportunity to respond to every factual contention and the Advisory Board (or a court under given circumstances) must take this fact into consideration when it examines the weight or the additional degree of corroboration of the information. However, the legislator could not find a more reasonable and efficient manner to guard against the disclosure of secret information in circumstances where such is vital in order to prevent severe damage to security; [...]."

The Committee examined, on this occasion as well, what would be the maximal information that it could place at the disposal of the petitioner without damaging vital security interests, and one has no cause for complaint against the Committee. We have nothing to add in this matter, because we have not examined the secret material and in any case do not know its details. [...]

Therefore, I would dismiss the petitions and set aside the orders issued on their basis. [...]

**Bach J.:**

1. I concur in the final conclusion that my esteemed colleague, the President, has reached regarding these petitions; however, on one point of principal importance I must dissent from his opinion.

The issue concerns the proper interpretation of Article 49 of the Fourth Geneva Convention (hereinafter "The Convention"). [...]

[...]

5. After examining the question in all its aspects, I tend to accept the position of the petitioners on this matter, and my reasons are as follows:
  - a) The language of Article 49 is unequivocal and explicit. The combination of the words "*Individual or mass forcible transfers as well as deportations*" in conjunction with the phrase "*regardless of their motive*", (emphasis added – g.b.), admits in my opinion no room to doubt, that the Article applies not only to mass deportations but to the deportation of individuals as well, and that the prohibition was intended to be total, sweeping and unconditional – "*regardless of their motive.*"
  - b) I accept the approach, which found expression in Sussman P.'s judgment in *H.C. 97/79*, namely that the Convention was framed in the wake of the Hitler period in Germany, and in face of the crimes which were perpetrated against the civilian population by the Nazis during World War II. Similarly, I would subscribe to the opinion that one may consider the historical facts accompanying the making of a convention and the purpose for its framing in order to find a suitable interpretation for the articles of the convention. Even the Vienna Convention, upon which Professor Kretzmer relied in this context, does not refute this possibility [Article 31] [...].

[...] I find no contradiction between this "historical approach" and the possibility of giving a broad interpretation to the Article in question.

The crimes committed by the German army in occupied territories emphasized the need for concluding a convention that would protect the civilian population and served as a lever (and quasi "trigger") for its framing. But this fact does not in any way refute the thesis that, when they proceeded to draw up that convention, the draftsmen decided to formulate it in a broad

fashion and in a manner that would, *inter alia*, totally prevent the deportation of residents from those territories either to the occupying state or to another state.

The text of the Article, both in terms of its context and against the backdrop of the treaty in its entirety, cannot admit in my opinion the interpretation, that it is directed solely towards preventing actions such as those that were committed by the Nazis for racial, ethnic or national reasons.

We must not deviate by way of interpretation from the clear and simple meaning of the words of an enactment when the language of the Article is unequivocal and when the linguistic interpretation does not contradict the legislative purpose and does not lead to illogical and absurd conclusions.

- c) The second portion of Article 49 supports the aforesaid interpretation. Here the Convention allows the evacuation of a population *within the territory*, i.e. from one place to another in the occupied area, if it is necessary to ensure the security of the population or is vital for military purposes. It teaches us that the draftsmen of the Convention were aware of the need for ensuring security interests, and allowed for this purpose even the evacuation of populations within the occupied territories. The fact that in the first portion this qualification was not introduced, i.e. the deportation of residents beyond the borders for security reasons was not permitted, demands our attention.
- d) Additionally, a perusal of other articles of the Convention illustrates an awareness by the draftsmen of the security needs of the occupying state and indirectly supports the aforesaid broad interpretation of Article 49.

This is what the first part of Article 78 states:

"If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment."

I accept Professor Kretzmer's contention that Articles 78 and 49 should be read together and that one should infer from them as follows: Where a person poses a foreseeable security danger, one may at most restrict his freedom of movement within the territory and arrest him, but one cannot deport him to another country. [...]

A study of Article 5 of the Convention, which deals specifically with spies and saboteurs, leads to the same conclusion. The second paragraph of Article 5 reads:

"Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention." [...]

We see that under the Convention, the rights of spies and saboteurs can be denied in various ways, if the matter is deemed necessary for security reasons. Yet despite the alertness of the Convention's draftsmen to the security needs of the occupying power, there is no Article qualifying the sweeping prohibition in Article 49, and there is no allusion to the right to deport such persons to another state.

The above-mentioned Articles of the Geneva Convention supplement the provisions of Regulation 43 of the Hague Regulations, which obligates the occupying power to ensure public order and public welfare in the occupied territories, in the sense that they indicate the measures which may be adopted in order to fulfil this obligation. In any event, nothing in Regulation 43 of the Hague Regulations stands in contradiction to the simple and broad interpretation suggested for Article 49.

- e) A clear direction is discernible in the Convention. The freedom of movement of a "protected person" can be limited, and he can even be arrested without trial, if it is necessary in order to protect public security or another vital interest of the occupying state; this is in addition to the possibility of placing him on trial, punishing him and even condemning him to death. But the "protected person" cannot be deported; for the moment deportation to another country is carried out, the occupying state has no further control over him, and he therefore ceases to be a "protected person".
- f) [...]

This interpretation of Article 49 of the Convention has won nearly universal acceptance and I accept it as well. [...]

- 6. [...] My esteemed colleague, the President, also relies on the argument that, in light of the sweeping formulation of Article 4 of the Convention which includes a definition of the term "protected persons" under the Convention, a literal interpretation of Article 49 would lead to the conclusion that one could not even deport terrorists who illegally infiltrate into the territory during the occupation, and similarly that it would not be possible to extradite criminals from the territories to other states in accordance with extradition treaties.

The question regarding infiltrators could arise because of a certain difficulty in the interpretation of Article 4 of the Convention, which is not free of ambiguity. Thus when that same Article 4 states that "Persons protected by the Convention are those who *find themselves* in case of a conflict or occupation in the hands of a Party to the conflict or an Occupying Power..." (emphasis added – g.b.) then there is perhaps room to argue that the reference is to people who due to an armed conflict or belligerence between states, have fallen into a situation where against their will they *find themselves* in the hands of one of the parties to the conflict or in the hands of the occupying power; whereas people who subsequently penetrate into that territory with malicious intent are not included in that definition. If and when this problem arises in an actual case, there will be a need to resolve it through an appropriate interpretation of Article 4 of the Convention, but this does

not suffice, in my opinion, to raise doubts concerning the interpretation of Article 49. In the matter before us, the aforesaid difficulty is in any case non-existent, since the petitioners are, by all opinions, permanent residents of the territories controlled by the I.D.F.; and if the Convention under discussion applies to those territories, then they are undoubtedly included in the definition of "protected persons".

The same applies to the problem of extraditing criminals. The question of to what extent an extradition treaty between states is feasible, when it concerns people who are located in territories occupied by countries which are parties to the treaty, is thorny and complicated in itself; and whatever may be the answer to this question, one can not draw inferences from this regarding the interpretation of Article 49. In any case, should it be established that it is indeed possible to extradite persons who are residents of occupied territories on the basis of the *Extradition Law*, 5714-1954 and the treaties that were signed in accordance with it, then regarding the possibility of actually extraditing the persons concerned, I would arrive at the same ultimate conclusion as I do regarding the petitioners against whom the deportation orders were issued under Regulation 112 of the *Defence (Emergency) Regulations*, as will be detailed below.

7. Despite the aforesaid I concur with the opinion of my esteemed colleague, the President, that these petitions should be dismissed. [...] I do not see any grounds for deviating from the rule that was established and upheld in an appreciable number of judgments under which Article 49 of the Convention is solely a provision of conventional international law as opposed to a provision of customary international law. Such a provision does not constitute binding law and cannot serve as a basis for petitions to the courts by individuals. [...]
8. I would further add that I see no grounds for our intervention in the decisions of the respondents in this matter for the sake of justice. [...]

I have not ignored the fact that representative of the state have declared on a number of occasions before this Court, that it is the intention of the Government to honour as policy the humanitarian provisions of the Convention. [...]

However, each case will be examined in accordance with its circumstances, and in contrast with the interpretation of laws and conventions which at times require strict adherence to the meaning of words and terms, the Court enjoys a flexible and broad discretion when it examines a Government policy declaration in accordance with its content and spirit.

It should not be overlooked that the Fourth Geneva Convention, with which we are dealing, includes a variety of provisions, the major portion of which are surely humanitarian in substance. But some are of public and administrative content and the Convention also contains articles which can only partially be considered of a humanitarian nature. Article 49 of the Convention is indeed primarily of a humanitarian nature, but it seems that this aspect cannot predominate when it attempts, due to its sweeping formulation, to prevent the deportation of individuals, whose removal was decided upon because of their systematic incitement of other

residents to acts of violence and because they constitute a severe danger to public welfare. [...]

9. In the light of the aforesaid and as I also agree with those portions of the President's opinion which deal with the factual aspects of the petitions, I concur in the conclusion reached by my esteemed colleague in his judgment regarding the fate of these petitions.

Rendered today 23 Nissan 5748 (April 10, 1988)

### DISCUSSION

1.
  - a. Are all provisions of Convention IV purely treaty-based? Are some customary law? Is Art. 49 of Convention IV customary law? How is this assessed? How could it be assessed, taking into account that 164 out of 170 States were bound in 1985, as Contracting Parties, to respect that provision? Should one assess the practice of the 6 States not party to the Convention? Does the Court not assess instead whether Art. 49 was customary in 1949? Or in 1923? Was there no development in customary law between 1949 and 1988?
  - b. Why is the status, whether conventional or customary, of Art. 49 relevant to the Convention's applicability in this case if Israel is party to Convention IV?
  - c. May a State adopt the Israeli system under which international treaties to which Israel is party are not automatically part of Israeli law, but only become so if there is implementing legislation? Has Israel an obligation to adopt such legislation? Does IHL oblige Israel to allow the Conventions to be invoked before its courts? May Israel invoke its constitutional system, the absence of implementing legislation, or this decision of its Supreme Court to escape international responsibility for violations of Convention IV? (GC IV, Arts 145 and 146)
  - d. Are the Hague Regulations applicable in this case? As conventional or as customary law?
  - e. Is Art. 49 of Convention IV self-executing? Is the answer to this question relevant in this case? Does such a question, however, explain e.g. the inclusion of Arts 49/50/129/146 or 48/49/128/145 respectively, concerning national legislation, in the four Conventions?
2.
  - a. Assuming applicability of the Conventions to Israel, do the deportations violate Art. 49 of Convention IV? To what cases of deportations does the Court consider Art. 49 applicable? Why? Is this understanding consistent with the "ordinary meaning to be given to the terms of the treaty"? (Vienna Convention on the Law of Treaties, Art. 31(1)) Why does the Court determine that the "ordinary meaning" of Art. 49 leads to "manifestly absurd or unreasonable" outcomes, allowing for supplementary means of interpretation? (Vienna Convention on the Law of Treaties, Art. 32(b))
  - b. Could you conceive of different wording for Art. 49(1) that would more clearly prohibit individual deportations than the present wording? Is the result of the literal interpretation (that individual deportations are prohibited, regardless of their motive) unreasonable in light of the object and purpose of Convention IV? Do Pictet's and other drafters' recollections of the mass deportations by Nazi Germany mean that they wanted Art. 49 to cover only such deportations? Would such an intention be decisive for today's interpretation of the rule?
  - c. In his separate opinion, how does Bach interpret Art. 49? If the majority had adopted Bach's opinion, would the deportations addressed in this case still occur? Why?

3. Israel has declared that, regardless of whether it is legally bound by the Geneva Conventions, in general it intends to honour the humanitarian provisions of Convention IV. What are these humanitarian provisions? Do articles prohibiting deportation not constitute humanitarian provisions? Or only in certain instances? Are the three petitioners in this case protected persons according to Art. 4 of Convention IV? Does a literal interpretation of Arts 4 and 49 lead to an absurd result in the case of the three petitioners?
4.
  - a. Petitioners objected to the evidentiary use of “classified material”, as it denied their right to a fair trial, e.g., para. 14(d) of the majority’s opinion. Notwithstanding a determination concerning utilization of “classified material”, would Art. 49 permit deportations following a legitimate judicial proceeding?
  - b. Is deportation not permissible when repeat offenders (such as the present petitioners) place the public order and safety of the occupied territory at risk and no alternative measures appear available? (HR, Art. 43; GC IV, Art. 49)
5. May protected persons never be transferred, according to Convention IV? Is this how Art. 49 distinguishes between deportation and evacuation? What is this distinction? (*See also* GC IV, Art. 78)
6. Are the deportations condoned by the High Court of Justice grave breaches of IHL? (GC IV, Art. 147)



**Case No. 133, Israel, Ajuri v. IDF Commander**

[Source: *Ajuri v. IDF Commander*, The Supreme Court sitting as the High Court of Justice, 3 September 2002, HCJ 7019/02; HCJ 7015/02, available on <http://www.court.gov.il/>]

**HCJ 7015/02**

- 1. Kipah Mahmad Ahmed Ajuri**  
**2. Abed Alnasser Mustafa Ahmed Asida [et al.]**

**v.**

- 1. IDF Commander in West Bank**  
**2. IDF Commander in Gaza Strip [et al.]**

**HCJ 7019/02**

- 1. Amtassar Muhammed Ahmed Ajuri [et al.]**

**v.**

- 1. IDF Commander in Judaea and Samaria**  
**2. IDF Commander in Gaza Strip [et al.]**

**The Supreme Court sitting as the High Court of Justice**  
**[3 September 2002]**

**Before President A. Barak, Vice-President S. Levin, Justices T. Or, E. Mazza,  
M. Cheshin, T. Strasberg-Cohen, D. Dorner, Y. T. Prkel, D. Beinisch**

**Petition to the Supreme Court sitting as the High Court of Justice**

**Facts:** The IDF Commander in Judaea and Samaria made orders requiring three residents of Judaea and Samaria to live, for the next two years, in the Gaza Strip. The orders were approved by the Appeals Board. The three residents of Judaea and Samaria petitioned the High Court of Justice against the orders.

The petitioners argued that the orders were contrary to international law. In particular the petitioners argued that Judaea and Samaria should be regarded as a different belligerent occupation from the one in the Gaza Strip, and therefore the orders amounted to a deportation from one territory to another, which is forbidden under international law (art. 49 of the Fourth Geneva Convention).

The respondents, in reply, argued that the orders complied with international law. The respondents argued that the belligerent occupation of Judaea, Samaria and the Gaza Strip should be considered as one territory, and therefore the orders amounted merely to assigned residence, which is permitted under international law (art. 78 of the Fourth Geneva Convention).

A further question that arose was whether the IDF commander could consider the factor of deterring others when making an order of assigned residence against any person.

**Held:** Article 78 of the Fourth Geneva Convention empowers an occupying power to assign the place of residence of an individual for imperative reasons of security. Assigned residence is a harsh measure only to be used in extreme cases. However, the current security situation in which hundreds of civilians have been killed by suicide bombers justifies the use of the measure in appropriate cases.

Judaea and Samaria and the Gaza Strip are effectively one territory subject to one belligerent occupation by one occupying power, and they are regarded as one entity by all concerned, as can be seen, *inter alia*, from the Israeli-Palestinian interim agreements. Consequently, ordering a resident of Judaea and Samaria to live in the Gaza Strip amounts to assigned residence permitted under art. 78 of the Fourth Geneva Convention, and not to a deportation forbidden under art. 49 of the Fourth Geneva Convention.

An order of assigned residence can be made against a person only if there is a reasonable possibility that the person himself presents a real danger to the security of the area. If he does not, considerations of deterring others are insufficient for making an order of assigned residence. But if such a danger does exist, the IDF commander is authorized to make an order of assigned residence, and he may consider the deterrent factor in deciding whether actually to make the order or not.

The Appeals Board found that the petitioner in HCJ 7019/02 had sewn explosive belts. The Appeals Board found that the first petitioner in HCJ 7015/02 had acted as a lookout for a terrorist group when they moved explosive charges. In both these cases, the Supreme Court held that the deeds of the petitioners justified assigned residence, and it upheld the orders. However, with regard to the second petitioner in HCJ 7015/02, the Appeals Board found only that he had given his brother, a wanted terrorist, food and clothes, and had driven him in his car and lent him his car, without knowing for what purpose his brother needed to be driven or to borrow his car. The Supreme Court held that the activities of the second petitioner were insufficient to justify the measure of assigned residence, and it set aside the order of assigned residence against him.

HCJ 7019/02 – petition denied.

HCJ 7015/02 – petition of the first petitioner denied; petition of the second petitioner granted.

[...]

## Judgment

### President A. Barak

The military commander of the Israel Defence Forces in Judaea and Samaria made an 'order assigning place of residence'. According to the provisions of the order, the petitioners, who are residents of Judaea and Samaria, were required to live for the next two years in the Gaza Strip. Was the military commander authorized to make the order assigning place of residence? Did the commander exercise his discretion lawfully? These are the main questions that arise in the petitions before us.

**Background**

1. Since the end of September 2000, fierce fighting has been taking place in Judaea, Samaria and the Gaza Strip. This is not police activity. It is an armed struggle. Within this framework, approximately 14,000 attacks have been made against the life, person and property of innocent Israeli citizens and residents, the elderly, children, men and women. More than six hundred citizens and residents of the State of Israel have been killed. More than 4,500 have been wounded, some most seriously. The Palestinians have also experienced death and injury. Many of them have been killed and wounded since September 2000. [...] Bereavement and pain overwhelm us.
2. Israel's fight is complex. The Palestinians use, *inter alia*, guided human bombs. These suicide bombers reach every place where Israelis are to be found (within the boundaries of the State of Israel and in the Jewish villages in Judaea and Samaria and the Gaza Strip). They sow destruction and spill blood in the cities and towns. Indeed, the forces fighting against Israel are terrorists; they are not members of a regular army; they do not wear uniforms; they hide among the civilian Palestinian population in the territories, including in holy sites; they are supported by part of the civilian population, and by their families and relatives. The State of Israel faces a new and difficult reality, as it fights for its security and the security of its citizens. This reality has found its way to this court on several occasions (see HCJ 2936/02 *Doctors for Human Rights v. IDF Commander in West Bank*; HCJ 2117/02 *Doctors for Human Rights v. IDF Commander in West Bank*; HCJ 3451/02 *Almadani v. Minister of Defence*, at p. 36).
3. In its struggle against terrorism, Israel has undertaken – by virtue of its right of self-defence – special military operations (Operation 'Protective Wall' which began in March 2002 and Operation 'Determined Path' which began in June 2002 and has not yet ended). The purpose of the operations was to destroy the Palestinian terrorism infrastructure and to prevent further terrorist attacks. In these operations, IDF forces entered many areas that were in the past under its control by virtue of belligerent occupation and which were transferred pursuant to agreements to the (full or partial) control of the Palestinian Authority. The army imposed curfews and closures on various areas. Weapons and explosives were rounded up. Suspects were arrested. [...]
4. The special military operations did not provide an adequate response to the immediate need to stop the grave terrorist acts. The Ministerial Committee for National Security sought to adopt several other measures that were intended to prevent further terrorist acts from being perpetrated, and to deter potential attackers from carrying out their acts. [...]
5. One of the measures upon which the Ministerial Committee for National Security decided – all of which within the framework of the Attorney-General's opinion – was assigning the place of residence of family members of suicide bombers or the perpetrators of serious attacks and those sending them from Judaea and Samaria to the Gaza Strip, provided that these family members were themselves involved in the terrorist activity. This measure was adopted because, according to the

evaluation of the professionals involved (the army, the General Security Service, the Institute for Intelligence and Special Tasks (the *Mossad*), and the police), these additional measures might make a significant contribution to the struggle against the wave of terror, resulting in the saving of human life. This contribution is two-fold: *first*, it can prevent a family member involved in terrorist activity from perpetrating his scheme (the preventative effect); *second*, it may deter other terrorists – who are instructed to act as human bombs or to carry out other terror attacks from perpetrating their schemes (the deterrent effect).

### ***The Amending Order assigning place of residence***

6. In order to give effect to the new policy, on 1 August 2002 the military commander of the IDF forces in Judaea and Samaria amended the Security Provisions (Judaea and Samaria) Order (no. 378), 5730-1970 (hereafter – the Original Order). This Order determined provisions, *inter alia*, with regard to special supervision (s. 86). These allow instructions to be given that a person should be placed under special supervision. According to the provisions of the Original Order, no authority should be exercised thereunder unless the military commander is of the opinion ‘that it is imperative for decisive security reasons’ (s. 84(a)). An order of special supervision may be appealed before the Appeals Board (s. 86(e)). The Appeals Board is appointed by the local commander. The chairman of the Appeals Board is a judge who is a jurist. The Board’s role is to consider the order made under this section and to make recommendations to the military commander. If a person appeals an order and the order is upheld, the Appeals Board will consider his case at least once every six months whether that person submitted a further appeal or not (s. 86(f)). The application of the Original Order was limited to Judaea and Samaria. The amendment that was made extended its application to the Gaza Strip as well (the Security Provisions (Judaea and Samaria) (Amendment no. 84) Order (no. 510), 5762-2002 (hereafter – the Amending Order)). The provisions of the Amending Order (s. 86(b)(1) after the amendment) provide:

#### *‘Special supervision and assigning a place of residence’*

- a. A military commander may direct in an order that a person shall be subject to special supervision.
- b. A person subject to special supervision under this section shall be subject to all or some of the following restrictions, as the military commander shall direct:
  - (1) He shall be required to live within the bounds of a certain place in Judaea and Samaria or in the Gaza Strip, as specified by the military commander in the order.

In the introduction to the Amending Order it is stated that it was made ‘in view of the extraordinary security conditions currently prevailing in Judaea and Samaria [...]’. It was also stated in the introduction that the order was made ‘after I obtained the consent of the IDF military commander in the Gaza Strip’. Indeed, in conjunction with the Amending Order, the IDF commander in the Gaza Strip

issued the Security Provisions (Gaza Strip) (Amendment no. 87) Order (no. 1155), 5762-2002. Section 86(g) of this order provided that:

‘Someone with regard to whom an order has been made by the military commander in Judaea and Samaria under section 86(b)(1) of the Security Provisions (Judaea and Samaria) Order (no. 378), 5730-1970, within the framework of which it was provided that he will be required to live in a specific place in the Gaza Strip, shall not be entitled to leave that place as long as the order is in force, unless the military commander in Judaea and Samaria or the military commander in the Gaza Strip so allow.’

Under the Amending Order, orders were made assigning the place of residence of the three petitioners before us. Let us now turn to these orders and the circumstances in which they were made.

### ***The proceedings before the military commander and the Appeals Board***

7. On 1 August 2002, the IDF commander in Judaea and Samaria (hereafter – the Respondent) signed orders assigning the place of residence of each of the petitioners. [...] These orders require each of the petitioners to live in the Gaza Strip. The orders state that they will remain valid for a period of two years. The orders further state that they may be appealed to the Appeals Board. Underlying each of the orders are facts – which we will consider below – according to which each of the petitioners was involved in assisting terrorist activity that resulted in human casualties. In the opinion of the Respondent, assigning the place of residence of the petitioners to the Gaza Strip will avert any danger from them and deter others from committing serious acts of terror. The petitioners appealed the orders before the Appeals Board. A separate hearing was held with regard to the case of each of the petitioners, before two Appeals Boards. Each of the Boards held several days of hearings. The Boards decided on 12 August 2002 to recommend to the Respondent that he approve the validity of the orders. The Respondent studied the decision of the Boards and decided on the same day that the orders would remain valid. On 13 August 2002, the petitions before us were submitted against the Respondent’s decision.

### ***The proceedings before us***

[...]

9. Counsel for the petitioners argued before us that the Amending Order, the individual orders issued thereunder and the decisions of the Appeals Boards should be set aside, for several reasons. [...] *Third*, the Amending Order was made without authority, because the Respondent was not competent to make an order concerning the Gaza Strip. Finally – and this argument was the focus of the hearing before us – the Amending Order is void because it is contrary to international law. Counsel for the Respondent argued before us that the petitions should be denied. According to him, the Amending Order, and the individual orders made thereunder, are proper and they and the proceeding in which they were made are

untainted by any defect. The Respondent was competent to make the Amending Order, and the individual orders are lawful, since they are intended to prevent the petitioners from realizing the danger that they present, and they contain a deterrent to others. The orders are proportionate. They are lawfully based on the factual basis that was presented to the commander and the Appeals Boards. According to counsel for the Respondent, the Amending Order and the orders made thereunder conform to international law, since they fall within the scope of article 78 of the Fourth Geneva Convention of 1949 (Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 1949; hereafter – the Fourth Geneva Convention). [...]

12. As we have seen, the arguments before us concern various aspects of the decision of the Respondent and the Appeals Board. We should state at the outset that we found no basis to the arguments about procedural defects in the decision of the Respondent or in the decisions of the Appeals Boards. [...] Indeed, the main matters on which the parties concentrated their arguments – and on which we too will focus – concern the following three questions: *first*, was the military commander competent, under the provisions of international law, to make the Amending Order? This question concerns the authority of a military commander under international law to make arrangements with regard to assigning a place of residence. *Second*, if the answer to the first question is yes, what are the conditions required by international law for assigning a place of residence? This question concerns the scope of the military commander's discretion under international law in so far as assigning a place of residence is concerned. *Third*, do the conditions required by international law for making the orders to assign a place of residence exist in the case of the petitioners before us? This question concerns the consideration of the specific case of the petitioners before us in accordance with the laws that govern their case. Let us now turn to consider these questions in their proper order.

### ***The authority of the military commander to assign a place of residence***

13. Is the military commander of a territory under belligerent occupation competent to determine that a resident of the territory shall be removed from his place of residence and assigned to another place of residence in that territory? It was argued before us that the military commander does not have that authority, if only for the reason that this is a forcible transfer and deportation that are prohibited under international law (article 49 of the Fourth Geneva Convention). Our premise is that in order to answer the question of the military commander's authority, it is insufficient to determine merely that the Amending Order (or any other order of the commander of the territory) gives the military commander the authority to assign the place of residence of a resident of the territory. The reason for this is that the authority of the military commander to enact the Amending Order derives from the laws of belligerent occupation. They are the source of his authority, and his power will be determined accordingly. I discussed this in one case, where I said:

'From a legal viewpoint the source for the authority and the power of the military commander in a territory subject to belligerent occupation is in the

rules of public international law relating to belligerent occupation (*occupatio bellica*), and which constitute a part of the laws of war' (HCJ 393/82 *Almashulia v. IDF Commander in Judea and Samaria*, at p. 793).

In this respect, I would like to make the following two remarks: *first*, all the parties before us assumed that in the circumstances currently prevailing in the territory under the control of the IDF, the laws of international law concerning belligerent occupation apply [...]; *second*, the rules of international law that apply in the territory are the customary laws (such as the appendix to the (Fourth) Hague Convention respecting the Laws and Customs of War on Land of 1907, which is commonly regarded as customary law; hereafter – the Fourth Hague Convention). With regard to the Fourth Geneva Convention, counsel for the Respondent reargued before us the position of the State of Israel that this convention – which in his opinion does not reflect customary law – does not apply to Judea and Samaria. Notwithstanding, Mr Nitzan told us – in accordance with the long-established practice of the Government of Israel (see M. Shamgar, 'The Observance of International Law in the Administered Territories', 1 *Isr. Y. H. R.* 1971, 262) – that the Government of Israel decided to act in accordance with the humanitarian parts of the Fourth Geneva Convention. In view of this declaration, we do not need to examine the legal arguments concerning this matter, which are not simple, and we may leave these to be decided at a later date. It follows that for the purpose of the petitions before us we are assuming that humanitarian international law – as reflected in the Fourth Geneva Convention (including article 78) and certainly the Fourth Hague Convention – applies in our case. We should add that alongside the rules of international law that apply in our case, the fundamental principles of Israeli administrative law, such as the rules of natural justice, also apply. Indeed, every Israeli soldier carries in his pack both the rules of international law and also the basic principles of Israeli administrative law that are relevant to the issue. [...]

14. The fundamental premise is that the displacement of a person from his place of residence and his forcible assignment to another place seriously harms his dignity, his liberty and his property. A person's home is not merely a roof over his head, but it is also a means for the physical and social location of a person, his private life and his social relationships [...]. Several basic human rights are harmed as a result of an involuntary displacement of a person from his home and his residence being assigned to another place, even if this assigned residence does not involve him crossing an international border (see F. M. Deng, *Internally Displaced Persons: Compilation and Analysis of Legal Norms*, 1998, 14). These human rights derive in part from the internal law of the various countries, and are in part enshrined in the norms of international law.
15. The rights of a person to his dignity, his liberty and his property are not absolute rights. They are relative rights. They may be restricted in order to uphold the rights of others, or the goals of society. [...]
16. The extent of the restriction on human rights as a result of the forcible assignment of a person's residence from one place to another varies in accordance with the reasons that underlie the assigned residence. [...] In the case before us, we are



concerned with the assigned residence of a person from his place of residence to another place in the same territory for security reasons in an area subject to belligerent occupation. The extent of the permitted restriction on human rights is determined, therefore, by the humanitarian laws contained in the laws concerning armed conflict [...]. These laws are mainly enshrined in the Fourth Hague Convention and the Fourth Geneva Convention. We will now turn to these laws.

17. We were referred to various provisions in the Fourth Hague Convention (mainly article 43) and in the Fourth Geneva Convention (mainly articles 49 and 78). In our opinion, the case before us is governed entirely by the provisions of article 78 of the Fourth Geneva Convention [...].

This provision concerns assigned residence. It constitutes a special provision of law (*lex specialis*) to which we must refer and on the basis of which we must determine the legal problems before us. Whatever is prohibited thereunder is forbidden even if a general provision may *prima facie* be interpreted as allowing it, and what is permitted thereunder is allowed even if a general provision may *prima facie* be interpreted as prohibiting it [...]. Indeed, a study of the Amending Order itself and the individual orders made thereunder shows that the maker of the Order took account of the provisions of article 78 of the Convention, and acted accordingly when he made the Amending Order and the individual orders. The Respondent did not seek, therefore, to make a forcible transfer or to deport any of the residents of the territory. The Respondent acted within the framework of 'assigned residence' (according to the provisions of article 78 of the Fourth Geneva Convention). Therefore we did not see any reason to examine the scope of application of article 49 of the Fourth Geneva Convention, which prohibits a forcible transfer or a deportation. In any event, we see no need to consider the criticism that the petitioners raised with regard to the ruling of this court, as reflected in several decisions, the main one being HCJ 785/87 *Abed El-Apu v. IDF Commander in West Bank*, with regard to the interpretation of article 49 of the Fourth Geneva Convention. We can leave this matter to be decided at a later date.

18. Article 78 of the Fourth Geneva Convention does not deal with a forcible transfer or deportation. It provides a comprehensive and full arrangement with regard to all aspects of assigned residence and internment of protected persons. This provision integrates with several other provisions in the Fourth Geneva Convention (arts. 41, 42 and 43) that also discuss internment and assigned residence. When the place of residence of a protected person is assigned from one place to another under the provisions of art. 78 of the Fourth Geneva Convention, it is a lawful act of the military commander, and it does not constitute a violation of human rights protected by humanitarian international law. Indeed, art. 78 of the Fourth Geneva Convention constitutes both a source for the protection of the right of a person whose residence is being assigned and also a source for the possibility of restricting this right. This can be seen, *inter alia*, in the provisions of art. 78 of the Fourth Geneva Convention that determines that the measures stipulated therein are the measures that the occupying power (i.e., the military commander) may 'at most' carry out.



***The conditions for exercising the authority of the military commander with regard to assigned residence***

19. Article 78 of the Fourth Geneva Convention stipulates several (objective and subjective) conditions with which the military commander must comply, if he wishes to assign the place of residence of a person who is protected by the Convention. We do not need, for the purposes of the petitions before us, to consider all of these conditions. Thus, for example, art. 78 of the Fourth Geneva Convention stipulates an objective condition that a regular procedure for exercising the authority must be prescribed; this procedure shall include a right of appeal; decisions regarding assigned residence shall be subject to periodic review, if possible every six months. These provisions were upheld in the case before us, and they are not the subject of our consideration. We should add that under the provisions of art. 78 of the Fourth Geneva Convention, someone whose place of residence was assigned 'shall enjoy the full benefit of article 39 of the present convention'. We have been informed by counsel for the Respondent, in the course of oral argument, that if in the circumstances of the case before us the Respondent is subject to duties imposed under the provisions of art. 39 of the Convention, he will fulfil these duties. Two main arguments were raised before us with regard to the conditions stipulated in art. 78 of the Fourth Geneva Convention. Let us consider these. The *first* argument raised before us is that art. 78 of the Fourth Geneva Convention refers to assigned residence within the territory subject to belligerent occupation. This article does not apply when the assigned residence is in a place outside the territory. The petitioners argue that assigning their residence from Judaea and Samaria to the Gaza Strip is removing them from the territory. Consequently, the precondition for the application of art. 78 of the Fourth Geneva Convention does not apply. The petitioners further argue that in such circumstances the provisions of art. 49 of the Fourth Geneva Convention apply, according to which the deportation of the petitioners is prohibited. The *second* argument raised before us concerns the factors that the military commander may take into account in exercising his authority under the provisions of art. 78. According to this argument, the military commander may take into account considerations that concern the danger posed by the resident and the prevention of that danger by assigning his place of residence (preventative factors). The military commander may not take into account considerations of deterring others (deterrent factors). Let us consider each of these arguments.

***Assigned residence within the territory subject to belligerent occupation***

20. It is accepted by all concerned that art. 78 of the Fourth Geneva Convention allows assigned residence, provided that the new place of residence is in the territory subject to belligerent occupation that contains the place of residence from which the person was removed. The provisions of art. 78 of the Fourth Geneva Convention do not apply, therefore, to the transfer of protected persons outside the territory held under belligerent occupation. This is discussed by J. S. Pictet in his commentary to the provisions of art. 78 of the Fourth Geneva Convention:

‘the protected persons concerned can therefore only be interned, or placed in assigned residence, within the frontiers of the occupied country itself’ (J. S. Pictet, *Commentary: Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1958, at p. 368).

It was argued before us that the Gaza Strip – to which the military commander of Judaea and Samaria wishes to assign the place of residence of the petitioners – is situated outside the territory.

21. This argument is interesting. According to it, Judaea and Samaria were conquered from Jordan that annexed them – contrary to international law – to the Hashemite Kingdom, and ruled them until the Six Day War. By contrast, the Gaza Strip was conquered from Egypt, which held it until the Six Day War without annexing the territory to Egypt. We therefore have two separate areas subject to separate belligerent occupations by two different military commanders in such a way that neither can make an order with regard to the other territory. According to this argument, these two military commanders act admittedly on behalf of one occupying power, but this does not make them into one territory.
22. This argument must be rejected. The two areas are part of mandatory Palestine. They are subject to a belligerent occupation by the State of Israel. From a social and political viewpoint, the two areas are conceived by all concerned as one territorial unit, and the legislation of the military commander in them is identical in content. Thus, for example, our attention was drawn by counsel for the Respondent to the provisions of clause 11 of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, which says:

‘The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which shall be preserved during the interim agreement.’

This provision is repeated also in clause 31(8) of the agreement, according to which the ‘safe passage’ mechanisms between the area of Judaea and Samaria and the area of the Gaza Strip were determined. Similarly, although this agreement is not decisive on the issue under discussion, it does indicate that the two areas are considered as one territory held by the State of Israel under belligerent occupation. Moreover, counsel for the Respondent pointed out to us that ‘not only does the State of Israel administer the two areas in a coordinated fashion, but the Palestinian side also regards the two areas as one entity, and the leadership of these two areas is a combined one’. Indeed, the purpose underlying the provisions of art. 78 of the Fourth Geneva Convention and which restricts the validity of assigned residence to one territory lies in the societal, linguistic, cultural, social and political unity of the territory, out of a desire to restrict the harm caused by assigning residence to a foreign place. In view of this purpose, the area of Judaea and Samaria and the area of the Gaza Strip should not be regarded as territories foreign to one another, but they should be regarded as one territory. In this territory there are two military commanders who act on behalf of a single occupying power. Consequently, one military commander is competent to assign the place of residence of a protected person outside his area, and the other military commander is competent to agree

to receive that protected person into the area under his jurisdiction. The result is, therefore, that the provisions of art. 78 of the Fourth Geneva Convention does apply in our case. Therefore there is no reason to consider the provisions of art. 49 of that Convention.

### ***The considerations of the area commander***

23. The main question that arose in this case – and to which most of the arguments were devoted – concerns the scope of the discretion that may be exercised by the occupying power under the provisions of art. 78 of the Fourth Geneva Convention. This discretion must be considered on two levels: *one* level – which we shall consider immediately – concerns the factual considerations that the military commander should take into account in exercising his authority under the provisions of art. 78 of the Fourth Geneva Convention. The *other* level – which we shall consider later – concerns the applicability of the considerations that the military commander must take into account to the circumstances of the cases of each of the petitioners before us.
24. With regard to the first level, it is accepted by all the parties before us – and this is also our opinion – that an essential condition for being able to assign the place of residence of a person under art. 78 of the Fourth Geneva Convention is that the person himself constitutes a danger, and that assigning his place of residence will aid in averting that danger. It follows that the basis for exercising the discretion for assigning residence is the consideration of preventing a danger presented by a person whose place of residence is being assigned. The place of residence of an innocent person who does not himself present a danger may not be assigned, merely because assigning his place of residence will deter others. Likewise, one may not assign the place of residence of a person who is not innocent and did carry out acts that harmed security, when in the circumstances of the case he no longer presents any danger. Therefore, if someone carried out terrorist acts, and assigning his residence will reduce the danger that he presents, it is possible to assign his place of residence. One may not assign the place of residence of an innocent family member who did not collaborate with anyone, or of a family member who is not innocent but does not present a danger to the area. This is the case even if assigning the place of residence of a family member may deter other terrorists from carrying out acts of terror. This conclusion is required by the outlook of the Fourth Geneva Convention that regards the measures of internment and assigned residence as the most severe and serious measures that an occupying power may adopt against protected residents (see Pictet, *ibid.*, at p. 257). Therefore these measures may be adopted only in extreme and exceptional cases. Pictet rightly says that:

‘In occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately their exceptional character must be preserved’ (*ibid.*, at pp. 367, 368).

He adds that it is permitted to adopt a measure of assigned residence only towards persons whom the occupying power 'considers dangerous to its security' (*ibid.*, at p. 368). This approach – which derives from the provisions of the Convention – was adopted by this court in the past. We have held repeatedly that the measures of administrative internment – which is the measure considered by art. 78 of the Fourth Geneva Convention together with assigned residence – may be adopted only in the case of a 'danger presented by the acts of the petitioner to the security of the area' [...]. In one case Justice Bach said:

'The respondent may not use this sanction of making deportation orders merely for the purpose of deterring others. Such an order is legitimate only if the person making the order is convinced that the person designated for deportation constitutes a danger to the security of the area, and that this measure seems to him essential for the purpose of neutralizing this danger' (HCJ 814/88 *Nasralla v. IDF Commander in West Bank*, at p. 271).

This conclusion is implied also by the construction of the Amending Order itself, from which it can be seen that one may only adopt a measure of assigned residence on account of a danger presented by the person himself. But beyond all this, this conclusion is required by our Jewish and democratic values. From our Jewish heritage we have learned that 'Fathers shall not be put to death because of their sons, and sons shall not be put to death because of their fathers; a person shall be put to death for his own wrongdoing' (Deuteronomy 24, 16). 'Each person shall be liable for his own crime and each person shall be put to death for his own wrongdoing' [...]; 'each person shall be arrested for his own wrongdoing – and not for the wrongdoing of others' [...]. It should be noted that the purpose of assigned residence is not penal. Its purpose is prevention. It is not designed to punish the person whose place of residence is assigned. It is designed to prevent him from continuing to constitute a security danger. This was discussed by President Shamgar, who said:

'The authority is preventative, i.e., it is prospective and may not be exercised unless it is necessary to prevent an anticipated danger... The authority may not be exercised unless the evidence brought before the military commander indicates a danger that is anticipated from the petitioner in the future, unless the measures designed to restrict his activity and prevent a substantial part of the harm anticipated from him are adopted' [...].

25. What is the level of danger that justifies assigning a person's place of residence, and what is the likelihood thereof? The answer is that any degree of danger is insufficient. In view of the special nature of this measure, it may usually only be exercised if there exists administrative evidence that – even if inadmissible in a court of law – shows clearly and convincingly that if the measure of assigned residence is not adopted, there is a reasonable possibility that he will present a real danger of harm to the security of the territory (see Pictet, at p. 258, and the examples given by him [...]). Moreover, just as with any other measure, the measure of assigned residence must be exercised proportionately. 'There must be an objective relationship – a proper relativity or proportionality – between the forbidden act of the individual and the measures adopted by the Government' [...].

An appropriate relationship must exist between the purpose of preventing danger from the person whose place of residence is being assigned and the danger that he would present if this measure were not exercised against him [...]; the measure adopted must be the one that causes less harm; and it is usually necessary that the measure of assigned residence is proportionate to the benefit deriving from it in ensuring the security of the territory [...].

26. Within the framework of proportionality we should consider two further matters that were discussed by President Shamgar in a case that concerned the administrative internment of residents from Judaea and Samaria, where he said:

‘The internment is designed to prevent and frustrate a security danger that arises from the acts that the internee may perpetrate and which may not reasonably be prevented by adopting regular legal measures (a criminal proceeding) or by an administrative measure that is less severe from the viewpoint of its consequences (for the purpose of reaching conclusions from past acts with regard to future danger)’ [...].

These remarks are also relevant to the issue of assigned residence. Therefore each case must be examined to see whether filing a criminal indictment will not prevent the danger that the assigned residence is designed to prevent. Moreover, the measure of assigned residence – as discussed in art. 78 of the Fourth Geneva Convention – is generally a less serious measure than the measure of internment. This matter must be considered in each case on its merits, in the spirit of Pictet’s remarks that:

‘Internment is the more severe as it generally implies an obligation to live in a camp with other internees. It must not be forgotten, however, that the terms “assigned residence” and “internment” may be differently interpreted in the law of different countries. As a general rule, assigned residence is a less serious measure than internment’ (*ibid.*, at p. 256).

27. May the military commander, when making a decision about assigned residence, take into account considerations of deterring others? As we have seen, what underlies the measure of assigned residence is the danger presented by the person himself if his place of residence is not assigned, and deterring that person himself by assigning his place of residence. The military commander may not, therefore, adopt a measure of assigned residence merely as a deterrent to others. Notwithstanding, when assigning a place of residence is justified because a person is dangerous, and the question is merely whether to exercise this authority, there is no defect in the military commander taking into account considerations of deterring others. Thus, for example, this consideration may be taken into account in choosing between internment and assigned residence. This approach strikes a proper balance between the essential condition that the person himself presents a danger – which assigned residence is designed to prevent – and the essential need to protect the security of the territory. It is entirely consistent with the approach of the Fourth Geneva Convention, which regards assigned residence as a legitimate mechanism for protecting the security of the territory. It is required by the harsh

reality in which the State of Israel and the territory are situated, in that they are exposed to an inhuman phenomenon of 'human bombs' that is engulfing the area.

28. [...] These provisions give the military commander broad discretion. He must decide whether decisive security reasons – or imperative reasons of security – justify assigned residence. In discussing this, Pictet said:

'It did not seem possible to define the expression "security of the State" in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence' (*ibid.*, at p. 257).

Note that the considerations that the military commander may take into account are not merely 'military' reasons (see, for example, arts. 5, 16, 18, 53, 55, 83 and 143 of the Fourth Geneva Convention). Article 78 of the Fourth Geneva Convention extends the kind of reasons to 'reasons of security' (see, for example, arts. 9, 42, 62, 63, 64 and 74 of the Fourth Geneva Convention). Indeed, the Fourth Geneva Convention clearly distinguishes between 'imperative reasons of security' and 'imperative military reasons'. The concept of reasons of security is broader than the concept of military reasons.

29. The discretion of the military commander to order assigned residence is broad. But it is not absolute discretion. The military commander must exercise his discretion within the framework of the conditions that we have established in this judgment and as prescribed in art. 78 of the Fourth Geneva Convention and the Amending Order. The military commander may not, for example, order assigned residence for an innocent person who is not involved in any activity that harms the security of the State and who does not present any danger, even if the military commander is of the opinion that this is essential for decisive reasons of security. He also may not do so for a person involved in activity that harms the security of the State, if that person no longer presents any danger that assigned residence is designed to prevent. Indeed, the military commander who wishes to make use of the provisions of art. 78 of the Fourth Geneva Convention must act within the framework of the parameters set out in that article. These parameters create a 'zone' of situations – a kind of 'zone of reasonableness' – within which the military commander may act. He may not deviate from them.
30. The Supreme Court, when sitting as the High Court of Justice, exercises judicial review over the legality of the discretion exercised by the military commander. [...] In exercising this judicial review, we do not appoint ourselves as experts in security matters. We do not replace the security considerations of the military commander with our own security considerations. We do not adopt any position with regard to the manner in which security matters are conducted [...].

Admittedly, 'security of the State' is not a 'magic word' that prevents judicial review [...]. [W]e will not be deterred from exercising review of the decisions of the military commander under art. 78 of the Fourth Geneva Convention and the Amending Order merely because of the important security aspects on which the commander's decision is based. Notwithstanding, we will not replace the discretion

of the military commander with our discretion. We will consider the legality of the military commander's discretion and whether his decisions fall into the 'zone of reasonableness' determined by the relevant legal norms that apply to the case. [...]

### ***From the general to the specific***

#### **Amtassar Muhammed Ahmed Ajuri (HCJ 7019/02)**

31. Amtassar Muhammed Ahmed Ajuri (an unmarried woman aged 34) is the sister of the terrorist Ahmed Ali Ajuri. Much terrorist activity is attributed to the brother, Ahmed Ali Ajuri, including sending suicide bombers with explosive belts, and responsibility, *inter alia*, for the terrorist attack at the Central Bus Station in Tel-Aviv in which five people were killed and many others were injured. The Appeals Board (chaired by Col. Gordon), in its decision of 12 August 2002, held – on the basis of privileged material presented to it and on the basis of testimonies of members of the General Security Service – that the petitioner directly and substantially aided the unlawful activity of her brother, which was intended to harm innocent citizens. The Board determined that there was more than a basis for the conclusion that the petitioner knew about the forbidden activity of her brother – including his being wanted by the Israeli security forces – and that she knew that her brother was wounded when he was engaged in preparing explosives, and *prima facie* she also knew that her brother was armed and had hidden in the family apartment an assault rifle. It was also held that the petitioner aided her brother by sewing an explosive belt. The Board pointed out that, on the basis of privileged evidence, which it found 'reliable and up-to-date', it transpired that the petitioner indeed aided her brother in his unlawful activity. It held that this was a case of 'direct and material aid in the preparation of an explosive belt, and the grave significance and implications of this aid were without doubt clear and known [to the petitioner]'. Admittedly, the petitioner testified before the Board that she was not involved in anything and did not aid her brother, but the Board rejected this testimony as unreliable. It pointed out that 'we found her disingenuous and evasive story totally unreasonable throughout her testimony before us, and it was clear that she wished to distance herself in any way possible from the activity of her brother her disingenuous story left us with a clear impression of someone who has something to hide and this impression combines with the clear and unambiguous information that arises from the privileged material about her involvement in preparing an explosive belt. 'For these reasons, the appeal of the petitioner to the Appeals Board was denied. It should also be pointed out that in the Respondent's reply in the proceeding before us – which was supported by an affidavit – it was stated that 'the petitioner aided her brother in the terrorist activity and, *inter alia*, sewed for his purposes explosive belts' – explosive belts, and not merely one explosive belt.
32. It seems to us that in the case of the petitioner, the decision of the Respondent is properly based on the provisions of art. 78 of the Fourth Geneva Convention and the provisions of the Amending Order. Very grave behaviour is attributed to the petitioner, and the danger deriving therefrom to the security of the State is very real. Thus, for example, the petitioner prepared more than one explosive



belt. It was argued before us that the petitioner did not know about her brother's activity. This story was rejected by the Appeals Board, and we will not intervene in this finding of the Appeals Board. The behaviour of the petitioner is very grave. It creates a significant danger to the security of the area, and it goes well beyond the minimum level required by the provisions of art. 78 of the Fourth Geneva Convention and the Amending Order. Indeed, assigning the place of residence of the petitioner is a rational measure – within the framework of the required proportionality – to reduce the danger she presents in the future. We asked counsel for the State why the petitioner is not indicted in a criminal trial. The answer was that there is no admissible evidence against her that can be presented in a criminal trial, for the evidence against her is privileged and cannot be presented in a criminal trial. We regard this as a satisfactory answer. Admittedly, the petitioner is subject to administrative internment (which will end in October 2002). However the possibility of extending this is being considered. It seems to us that the choice between administrative internment and assigned residence, in the special case before us, is for the Respondent to make, and if he decided to terminate the administrative internment and determine instead assigned residence, there is no basis for our intervention in his decision. This is the case even if his decision was dictated, *inter alia*, by considerations of a general deterrent, which the Respondent was entitled to take into account.

**Kipah Mahmad Ahmed Ajuri (the first petitioner in HCJ 7015/02)**

33. Kipah Mahmad Ahmed Ajuri (hereafter – the first petitioner) (aged 38) is married and is the father of three children. He is the brother of the petitioner. His brother is, as stated, the terrorist Ahmed Ali Ajuri, to whom very grave terrorist activity is attributed (as we have seen). The petitioner before us admitted in his police interrogation (on 23 July 2002) that he knew that his brother Ali Ajuri was wanted by the Israeli security forces 'about matters of explosions' and was even injured in the course of preparing an explosive charge. The first petitioner said in his interrogation that his brother stopped visiting his home because he was wanted, and also that he carried a pistol and had in his possession two assault rifles. Later on during his interrogation (on 31 July 2002) he admitted that he knew that his brother was a member of a military group that was involved 'in matters of explosions'. He also said that he saw his brother hide a weapon in the family home under the floor, and that he had a key to the apartment in which the group stayed and prepared the explosive charges. He even took from that apartment a mattress and on that occasion he saw two bags of explosives and from one of these electric wires were protruding. On another occasion, the first petitioner said in his police interrogation that he acted as look-out when his brother and members of his group moved two explosive charges from the apartment to a car that was in their possession. On another occasion – so the first petitioner told his interrogators – he saw his brother and another person in a room in the apartment, when they were making a video recording of a person who was about to commit a suicide bombing, and on the table in front of him was a Koran. The first petitioner said in his interrogation that he brought food for his brother's group. [...]



36. We think that also in the case of the first petitioner there was no defect in the decision of the Respondent. The first petitioner helped his brother, and he is deeply involved in the grave terrorist activity of that brother, as the Appeals Board determined, and we will not intervene in its findings. Particularly serious in our opinion is the behaviour of the first petitioner who acted as a look-out who was supposed to warn his brother when he was involved at that time in moving explosive charges from the apartment where he was staying – and from which the first petitioner took a mattress in order to help his brother – to a car which they used. By this behaviour the first petitioner became deeply involved in the grave terrorist activity of his brother and there is a reasonable possibility that he presents a real danger to the security of the area. Here too we asked counsel for the Respondent why the first petitioner is not indicted in a criminal trial, and we were told by him that this possibility is not practical. The measure of assigning the place of residence of the first petitioner is indeed a proportionate measure to prevent the danger he presents, since the acts of this petitioner go far beyond the minimum level required under the provisions of art. 78 of the Fourth Geneva Convention. Since this is so, the respondent was entitled to take into account the considerations of a general deterrent, and so to prefer the assigned residence of this petitioner over his administrative internment. There is no basis for our intervention in this decision of the Respondent.

**Abed Alnasser Mustafa Ahmed Asida (the second petitioner in HCJ 7015/02)**

37. Abed Alnasser Mustafa Ahmed Asida (hereafter – the second petitioner) (aged 35) is married and a father of five children. He is the brother of the terrorist Nasser A-Din Asida. His brother is wanted by the security forces for extensive terrorist activity including, *inter alia*, responsibility for the murder of two Israelis in the town of Yitzhar in 1998 and also responsibility for two terrorist attacks at the entrance to the town of Immanuel, in which 19 Israelis were killed and many dozens were injured. The second petitioner was interrogated by the police. He admitted in his interrogation (on 28 July 2002) that he knew that his brother was wanted by the Israeli security forces for carrying out the attack on Yitzhar. The second petitioner said that he gave his brother food and clean clothes when he came to his home, but he did not allow him to sleep in the house. He even said that he gave his private car on several occasions to his brother, although he did not know for what purpose or use his brother wanted the car. He further said that he stopped giving his brother the car because he was afraid that the Israeli security forces would assassinate his brother inside his car. On another occasion, he drove his wanted brother to Shechem (Nablus), although on this occasion too the second petitioner did not know the purpose of the trip. The second petitioner also said that he saw his brother carrying an assault rifle. On another occasion he helped another wanted person, his brother-in-law, by giving him clean clothes, food and drink when he visited him in his home, and even lent him his car and drove him to Shechem several times. While the second petitioner claimed that he did not know for what purpose the car was used and what was the purpose of the trips to Shechem, the second petitioner told the police that he drove his brother to the hospital when

he was injured in the course of preparing an explosive charge and he lent his car – on another occasion – in order to take another person who was also injured while handling an explosive charge; at the same time, the second petitioner claimed in his interrogation that he did not know the exact circumstances of the injury to either of those injured.

38. In his evidence before the Appeals Board, the second petitioner confirmed that he knew that his brother was wanted. He testified that he did indeed drive his brother but he did not give him the car. He testified that he saw his brother with a weapon and that he wanted to give him food during the brief visits to him, but he did not have time. The Appeals Board, in its decision (on 12 August 2002), held that the second petitioner did indeed know of the deeds of his brother and that he possessed a weapon and that he was in close contact with him, including on the occasions when he gave him – at his home – clean clothes and food. The Board held that the second petitioner did not only drive his wanted brother in his car but also lent the car to his brother and to another wanted person. The Board pointed out that ‘we are not dealing with minor offences’, but it added that ‘the contact between the [second petitioner] and his brother and his material help to him are significantly less grave than those of [the first petitioner]’. The Board added, against this background, that ‘we direct the attention of the area commander to the fact that his personal acts are less grave than those of [the first petitioner], for the purpose of the proportionality of the period’.
39. We are of the opinion that there was no basis for assigning the place of residence of the second petitioner. Admittedly, this petitioner was aware of the grave terrorist activity of his brother. But this is insufficient for assigning his place of residence. The active deeds that he carried out, in helping his brother, fall below the level of danger required under the provisions of art. 78 of the Fourth Geneva Convention and the provisions of the Amending Order. His behaviour does not contain such a degree of involvement that creates a real danger to the security of the area, thereby allowing his place of residence to be assigned. This petitioner claimed – and the Appeals Board did not reject this – that he did not know what use his brother made of the car that the second petitioner made available to him, and that he did not know, when he drove his brother, what was the brother’s purpose. It should be noted that we think that the behaviour of the second petitioner – even though it derived from close family ties – was improper. It is precisely that help that family members give to terrorists that allows them to escape from the security forces and perpetrate their schemes. Nonetheless, the mechanism of assigned residence is a harsh measure that should be used only in special cases in which real danger to security of the area is foreseen if this measure is not adopted (cf. HCJ 2630/90 *Sarachra v. IDF Commander in Judaea and Samaria* [33]). We do not think that the case of the second petitioner falls into this category. It seems to us that the danger presented to the security of the area by the actions of the second petitioner does not reach the level required for adopting the measure of assigned residence. It appears that the Appeals Board was also aware of this, when it considered the possibility of reducing the period of the assigned residence. In our opinion, the case of the second petitioner does not fall within the ‘zone of reasonableness’

prescribed by art. 78 of the Fourth Geneva Convention and the Amending Order, and there is no possibility of assigning the residence of this petitioner. Admittedly, we are prepared to accept that assigning the place of residence of the second petitioner may deter others. Nonetheless, this consideration – which may be taken into account when the case goes beyond the level for adopting the mechanism of assigned residence – cannot be used when the conditions for exercising art. 78 of the Fourth Geneva Convention and the Amending Order do not exist.

### Conclusion

40. Before we conclude, we would like to make two closing remarks. *First*, we have interpreted to the best of our ability the provisions of art. 78 of the Fourth Geneva Convention. According to all the accepted interpretive approaches, we have sought to give them a meaning that can contend with the new reality that the State of Israel is facing. We doubt whether the drafters of the provisions of art. 78 of the Fourth Geneva Convention anticipated protected persons who collaborated with terrorists and 'living bombs'. This new reality requires a dynamic interpretive approach to the provisions of art. 78 of the Fourth Geneva Convention, so that it can deal with the new reality.
41. *Second*, the State of Israel is undergoing a difficult period. Terror is hurting its residents. Human life is trampled upon. Hundreds have been killed. Thousands have been injured. The Arab population in Judeaea and Samaria and the Gaza Strip is also suffering unbearably. [...] The State seeks to act within the framework of the lawful possibilities available to it under the international law to which it is subject and in accordance with its internal law. As a result, not every effective measure is also a lawful measure. Indeed, the State of Israel is fighting a difficult war against terror. It is a war carried out within the law and with the tools that the law makes available. The well-known saying that 'In battle laws are silent' (*inter arma silent leges* – Cicero, *pro Milone* 11; see also W. Rehnquist, *All the Laws but One*, 1998, at p. 218) does not reflect the law as it is, nor as it should be. This was well-expressed by Lord Atkin in *Liversidge v. Anderson* [37], at p. 361, when he said:

'In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which we are now fighting, that the judges stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.'

[...]

The result is that we are denying the petition in HCJ 7019/02, and the petition in HCJ 7015/02, in so far as it concerns the first petitioner. We are making the show-cause order absolute with regard to the second petitioner in HCJ 7015/02. [...]

## DISCUSSION

1. Is there an armed conflict in the West Bank (Judea and Samaria)? Do you agree that it is not a police action but an armed struggle? Does this classification have an impact upon the case? If it was not an armed struggle, would the assignment to residence be unlawful? And would IHL still apply? (GC IV, Arts 2 and 6(3))
2. Is it conceivable that, as argued by the respondent, the provisions of the Hague Regulations on belligerent occupation apply to a territory, but those of Convention IV do not? (HR, Art. 42; GC IV, Art. 2)
3. Was the procedure that assigned the petitioners to residence in conformity with the requirements of Art. 78 of Convention IV? Even the fact that they did not have access to the evidence existing against them?
4. Is Art. 78 of Convention IV *lex specialis* in respect to Article 49? May an occupying power therefore assign protected persons to residence even outside the occupied territory? On its own territory? On another occupied territory? According to the HCJ? In your opinion? Do not Arts 49 and 78 deal with two distinct issues? In order to respect IHL must not a measure comply with both?
5.
  - a. Is Gaza situated within the same occupied territory as the West Bank? Which factors tend to favour such an understanding, and which are against it? Is it conceivable for Gaza to be deemed a separate occupied territory so that Convention IV can be applied according to its object and purpose, and for them to be deemed one single territory for the purpose of peace negotiations? (GC IV, Arts 2, 47 and 78)
  - b. Was Gaza (or rather the parts of Gaza no longer controlled by Israeli forces) in any way still occupied, although it was under the effective control of the Palestinian Authority? According to the HCJ? In your opinion? If it was no longer an occupied territory, was it lawful, according to the HCJ, to subject the petitioners to assigned residence? (HR, Art. 42; GC IV, Arts 6 and 78)
  - c. How can the Israeli military commander ensure respect for Article 39 of Convention IV in the parts of Gaza he does not control?
6.
  - a. May a protected person be subjected to assigned residence in order to punish him or her for past behaviour? To prevent him or her from posing a threat to the security of the occupying power? To deter him or her? To deter other persons? (GC IV, Arts 33(1) and 78)
  - b. May the deterrent effects of internment or assigned residence be taken into account when deciding to subject a protected person to those measures? When choosing between those two measures? (GC IV, Arts 33(1) and 78)
  - c. Is assignment to residence a subsidiary measure to criminal indictment? Is it admissible if evidence relating to a past crime is inadmissible in a court of law? (GC IV, Arts 71, 72 and 78)
7.
  - a. What explanation would you give as to why the evidence that Amtassar Muhammed Ahmed Ajuri sewed explosive belts cannot be presented in a criminal trial? Why is the option of indicting Kipah Mahmud Ahmed Ajuri for his knowledge of his brother's terrorist activities or for acting as a lookout (according to his own confession) "[...] not practical" (*para. 36 of the judgement*)? What potential future danger does each of these explanations present? (GC IV, Arts 31, 71, 72 and 78)
  - b. What potential future threat does Abed Alnasser Mustafa Ahmed Asida present? What is the difference between him and the other two petitioners? May the gravity of his past involvement in terrorist acts be taken into account in evaluating the future danger he may present? (GC IV, Art. 78)

**Case No. 134, Israel, Evacuation of Bodies in Jenin**

[See also on “Operation Defensive Wall”: United Nations, A/ES-10/186, Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/10 (Report on Jenin), 30 July 2002, <http://www.un.org/peace/jenin>]

[Source: “Evacuation of bodies in Jenin – Decision of the Supreme Court Sitting as a High Court of Justice – April 14, 2002”, available on <http://www.court.gov.il>]

**Evacuation of bodies in Jenin  
Decision of the Supreme Court  
Sitting as a High Court of Justice**

**14 Apr 2002**

**H.C. 3114/02**

**MOHAMMED BARAKEH, M.K. [Member of the Israeli Parliament]**

**v.**

**THE MINISTER OF DEFENCE, BENJAMIN BEN ELIEZER  
THE CHIEF OF THE GENERAL STAFF OF THE I.D.F., SHAUL MOFAZ  
THE COMMANDER OF I.D.F. FORCES IN THE JENIN AREA**

**H.C. 3115/02**

**AHMED TIBI, M.K. [Member of the Israeli Parliament]**

**v.**

**THE PRIME MINISTER, ARIEL SHARON  
THE MINISTER OF DEFENCE, BENJAMIN BEN ELIEZER  
THE CHIEF OF THE GENERAL STAFF OF THE I.D.F., SHAUL MOFAZ  
THE COMMANDER OF THE CENTRAL COMMAND, YITZCHAK EITAN**

**H.C. 3116/02**

**ADALAH – THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL  
LAW – THE PALESTINIAN ORGANIZATION FOR THE DEFENCE OF HUMAN RIGHTS**

**v.**

**THE COMMANDER OF I.D.F. FORCES IN THE WEST BANK**

**In the Supreme Court sitting as the High Court of Justice  
Barak P., Or J., and Beinisch J.**

**Judgment**

**Barak P.**

1. Combat activities have been taking place during the recent days in the areas of Judea and Samaria (“operation Defensive Wall”). The operation began (on March 29<sup>th</sup> 2002) as a result of a government decision. Its objective – to defeat

the Palestinian terror infrastructure, and to prevent the reoccurrence of the multiple terrorist attacks which have plagued Israel. In the framework of this activity, I.D.F. forces entered (on April 3<sup>rd</sup>, 2002) the area of the city of Jenin, and the refugee camp adjacent to it. According to the information relayed to us by the Respondents' counsel, Mr. Blass, a widespread terror infrastructure (a *bona fide* "Palestinian Military Industries", in the words of Mr. Blass) has developed in the city of Jenin and in the refugee camp. More than twenty-three suicide bombers have come from that area, about one fourth of all of the terrorists who have committed suicide bombing attacks (including the attacks during Passover, in the Matza Restaurant in Haifa and in the Sbarro Restaurant in Jerusalem; the train station in Benyamina; the bus attack at the Mosmos junction and the attack at the junction adjacent to Army Base 80).

2. As I.D.F. forces entered the refugee camp, they found that a large proportion of the houses were empty. The civilian population was mainly in the center of the camp. As I.D.F. forces arrived, they called out a general appeal to residents to come out of the houses. According to what has been relayed to us, the call was not answered until the night of April 7, 2002. At that point, approximately one hundred people left the camp. In order to apprehend the terrorists, weapons, and explosives, I.D.F. forces began combat activity from house to house. Among other reasons, this technique was adopted in order to prevent massive casualties to innocent civilians. A skirmish developed. It turned out that empty houses had been booby-trapped. As a result of this fighting, 23 of our soldiers fell in battle. After a few days of combat, from house to house, the army achieved control of the camp. According to the claim of Respondents' counsel, after a stage in which a call was given to evacuate the houses, bulldozers destroyed the houses during the fighting, and some Palestinians were killed.
3. Bodies of Palestinians remained in the camp. Until the camp was completely under control of the I.D.F., it was impossible to evacuate them. When the camp was under control, a process of searching began, during which the explosive charges which the Palestinians had scattered around the refugee camp were neutralized and removed. Up to the point when these petitions were served, thirty-seven bodies had been found. Eight bodies were given over to the Palestinian side. Twenty-six bodies have not yet been evacuated.
4. In the three petitions before us, we were asked to order the Respondents to refrain from locating and evacuating the bodies of Palestinians in the Jenin refugee camp. In addition, we were asked to order the Respondents to refrain from burying the bodies of those determined to be terrorists in a cemetery in the Jordan Valley. The Petitioners request that the task of locating and collecting the bodies be given to medical teams and representatives of the Red Cross. In addition, they request that the family members of the deceased be allowed to bring their dead to a timely, appropriate and respectable burial.
5. [...] [T]he President of this Court decided to give a temporary order forbidding the evacuation of bodies of Palestinians from the places where they lay, until the hearing. [...]

7. The principle which serves as a starting point, is that in the circumstances of this case, the responsibility for the location, identification, evacuation and burial of the bodies belongs to the Respondents. These are their obligations according to the rules of international law. The Respondents accept this position, and it guides their action. In the framework of this position – and according to the procedures which were decided upon – teams were assembled, including the bomb squad unit, medical representatives and other professionals. These teams will locate the bodies. They will expedite the identification process. They will evacuate the bodies to a central point. In response to our questions, Mr. Blass responded that the Respondents are willing to include representatives of the Red Cross in the various teams. In addition, they are willing to consider, with a positive outlook – according to the judgment of the Military Commander, in consideration of the changing circumstances – the participation of a representative of the Red Crescent in the location and identification process. We suggest that a representative of the Red Crescent be included, subject, of course, to the judgments of the military commanders. It is also acceptable to the Respondents that the process of identification, during the stage after the location and evacuation of the bodies, will include local representatives who are capable of assisting in this matter. Identification activities on the part of the I.D.F. will include, among other things, photography and documentation according to standard procedure. These activities will be done as quickly as possible, with respect for the dead and while safeguarding the security of the acting forces. These principles are also acceptable to the Petitioners.
8. At the end of the identification process, the burial stage will begin. The position of the Respondents is that burial will be performed in a timely manner, by the Palestinian side. Successful expedition obliges agreement between the Respondents and the Palestinian side, of course. If it turns out that the Palestinian side is refraining from bringing the bodies to immediate burial, the possibility of bringing the bodies to immediate burial by the Respondents – in light of the concern that such a situation will compromise security – will be weighed. Needless to mention, the Respondents' position is that such burial, if performed by the Respondents, will be done in an appropriate and respectful way, while ensuring respect for the dead. In this, no differentiation will be made between located bodies, and no differentiation will be made between bodies of armed terrorists and civilians. This position is acceptable to the Petitioners.
9. Indeed, there is no real argument between the parties. The location, identification and burial of bodies are very important humanitarian acts. They are deduced from the principle of respect for the dead. Respect for all dead. They are placed at the base of our existence as a state whose values are Jewish and democratic. The Respondents declared that they are acting in accordance with this attitude, and their attitude seems to us to be appropriate. That is to say: in order to prevent rumors, it is fitting to include, in the body location stage, representatives of the Red Crescent. It is also fitting – and this is acceptable to the Respondents – that during the identification of bodies, local Palestinian authorities will be included. Finally, it is fitting – and this is even the original position of the Respondents – that the burial should be done respectfully, according to the religious customs, by local Palestinian

authorities. All these acts need to be done in as timely a manner as possible. All the parties are in agreement in that regard. Needless to say, all the above is subject to the security situation in the field, and to the judgment of the Military Commander.

10. On the humanitarian issues, it is indeed usually possible to arrive at understanding and arrangement. Respect for the dead is important to us all, for humankind was created in the likeness of God. All the parties hope to finish the location, identification, and burial process as soon as possible. The Respondents are willing to include representatives of the Red Cross, and, during the identification stage after the location and evacuation stages, even local authorities (subject to specific decision of the Military Commander). All are in agreement that burial should be done with respect, according to religious custom, in a timely manner.
11. It was claimed in the petitions that a massacre had been committed in the Jenin refugee camp. The Respondents disagree most strongly. In Jenin there was a battle – a battle in which many of our soldiers fell. The army fought from house to house, not by bombing from the air, in order to prevent, to the extent possible, civilian casualties. Twenty-three I.D.F. soldiers lost their lives. Scores of soldiers were wounded. The Petitioners did not lift the burden of evidence which laid on their shoulders. A massacre is one thing. A difficult battle is something else. The Respondents repeat their claim before us, that they wish to hide nothing, and that they have nothing to hide. The pragmatic arrangement to which we have arrived is an expression of that position.
12. It is good that the parties to these petitions before us reached understanding. This understanding is desirable. It respects the living, and the dead. It avoids rumors. Of course, legal rules apply always and immediately. Mr. Blass relayed to us that in all their activities, the military authorities are advised by the Chief Military Attorney. This is how it should be. Even in a time of combat, the law applying to combat must be upheld. Even in a time of combat, all must be done in order to protect the civilian population [...]. Clearly this court will take no position regarding the way the combat is being managed. As long as the soldiers' lives are in danger, these decisions will be made by the commanders. In the case before us, it was not claimed that the arrangement at which we arrived endangers the soldiers. Nor was the claim made before us that by giving the temporary order there is any danger to soldiers. On the contrary; the arrangement to which we arrived is an arrangement in which all are interested.

In light of the arrangement detailed above, it is acceptable to all the parties before us, that the petitions are rejected.

Judgment given on April 14, 2002

## DISCUSSION

1. How would you qualify the hostilities that took place in Jenin? Was it an international or a non-international armed conflict? Is Jenin's location in Palestinian occupied territory or in autonomous Palestinian territory crucial in determining the applicable humanitarian law? Is Convention IV



applicable to this situation? Even though Israel has declared that it only agreed to apply *de facto* the “humanitarian provisions” of Convention IV, which it has ratified?

2. Is the destruction of housing in conformity with IHL? If the houses were booby-trapped? If there were an element of doubt? If there were a high level of risk that the destructions would cause civilian casualties? As an act of reprisal against suicide attacks committed by Palestinians from Jenin? (HR, Arts 23(g) and 50; GC IV, Arts 33, 53 and 147; CIHL, Rules 50-51, 103 and 147)
3.
  - a. Which IHL provisions are concerned with the identification, repatriation and burial of the deceased? (GC I, Arts 15(1), 16 and 17; GC II, Arts 18(1) and 20; GC III, Art. 120; GC IV, Art. 130; P I, Arts 17(2), 32, 33(4) and 34; CIHL, Rules 114-116) Are some of these provisions applicable to the case in question? If not, why? If yes, which ones? In which capacity? Do some have a customary value?
  - b. If the said provisions are not applicable, why does the Court deem that “the responsibility for the location, identification, evacuation and burial of the bodies belongs to the Respondents”, and that these are obligations “according to the rules of international law” (*para. 7*)? To what provisions of international law could the Court be referring? Are the said provisions part of the “humanitarian provisions” that Israel agrees to apply? Are there “non-humanitarian” provisions in IHL? [See also **Case No. 132**, Israel, Cases Concerning Deportation Orders]
  - c. Is the involvement of civil society organizations and in particular of the Palestinian Red Crescent in these activities obligatory? Optional? Why is it necessary in this case?
  - d. Is the ICRC’s participation in these activities obligatory? Optional? What is the ICRC’s mandate? May it play a role with regard to people deceased during the conflict? Is this not mainly the task of the parties to the conflict? May the ICRC nevertheless offer its services? (GC IV, Arts 10, 140 and 143)
  - e. Was an agreement between the Israeli and Palestinian authorities vital? Advisable in these circumstances? Could the military authorities bring these agreements to an end for security reasons, as the Court seems to say? Could they for the same reasons cease to comply with their obligations “according to the rules of international law”?

**Case No. 135, Israel, The Rafah Case**

[Source: *Physicians for Human Rights v. Commander of the IDF Forces in the Gaza Strip*, HCJ 4764/04, The Supreme Court Sitting as the High Court of Justice, May 30, 2004]

**HCJ 4764/04**

**1. Physicians for Human Rights [*et al.*]**

**v.**

**1. Commander of the IDF Forces in the Gaza Strip**

**The Supreme Court Sitting as the High Court of Justice  
[May 30, 2004]**

**Before President A. Barak, Justice J. Türkkel and Justice D. Beinisch**

**Petition to the Supreme Court sitting as the High Court of Justice**

[...]

**Judgment**

**President A. Barak**

Is the State of Israel complying with various humanitarian obligations to which it is subject under international humanitarian law, during the military operations taking place in Rafah? This is the question before us.

**Background**

1. Since 18 May 2004, active combat has been taking place in the area of Rafah in the Gaza Strip. [...] According to the respondent's statement, the combat activities are on a large scale. They are intended to damage the terror infrastructure in that area. The main goal is to locate tunnels that are used for smuggling weapons from the Egyptian part of Rafah to the Palestinian part. The fighting also has the aim of arresting persons wanted for acts of terror and locating weapons in the Rafah area. The activity taking place there includes battles with armed opponents. Many explosive charges have been directed against the IDF forces, and various weapons are being fired at them.
2. The city of Rafah is divided into several neighbourhoods. Most of the military operations were in the neighbourhood of Tel A-Sultan. The IDF also entered the Brazil neighbourhood. During the night between the filing of the petition (20 May 2004) and the hearing the next morning (21 May 2004), the IDF left these two neighbourhoods, but the neighbourhoods are surrounded and controlled by the army.

3. Before the fighting – in the light of experience from similar operations carried out in the past – the army took three steps that were intended to facilitate the solution of humanitarian problems. *First*, a “humanitarian centre” was set up. This centre maintains contact with parties outside the area of operations. Thus, for example, various human rights organizations contact it. An attempt is made, on the spot, to resolve concrete problems arising in the course of the fighting. *Second*, a District Coordination Office (“DCO”) was established. This DCO is in constant communication, with regard to humanitarian matters arising as a result of the fighting, with personnel from the Palestinian Ministry of Health, the Palestinian Red Crescent and the International Red Cross. The person in charge of the DCO in the southern part of the Gaza Strip is in direct contact with personnel from the Palestinian Ministry of Health and with local hospitals. It is his job to find a solution to problems arising as a result of the fighting. The person in charge of the DCO in the area of the Gaza Strip is Colonel Y. Mordechai. *Third*, every battalion involved in the fighting has an officer from the DCO. His job is to deal with humanitarian issues arising from the fighting, such as the evacuation of the Palestinian dead and wounded.

### ***The petition***

4. The petitioners are four human rights organizations. They point to various instances of harm suffered by the local population in Rafah – which we will discuss below – as a result of the army’s military operations. They are petitioning that the army should allow medical teams and ambulances to reach the wounded in Rafah in order to evacuate them; that the evacuation should take place without prior coordination with the humanitarian centre; that the transport of medical equipment between Rafah and the hospitals outside it should be allowed; that medical teams or civilians involved in the evacuation of the dead or wounded should not be harmed or threatened; that the electricity and water supply to the neighbourhood of A-Sultan should be renewed and the supply of food and medicines for the residents of the neighbourhood should be allowed; that a team of physicians on behalf of the Physicians for Human Rights Organization (the first petitioner) should be allowed to enter hospitals in the Gaza Strip in order to assess the medical needs there. Finally, the petitioners ask that an incident (on 19 May 2004) in which a crowd of civilians was shelled and several residents were killed should be investigated. They also ask that an order should be made prohibiting the shooting or shelling of a crowd of civilians even if they contain armed persons who do not pose an immediate danger to life.

[...]

### ***Judicial Review***

7. “Israel is not an island. It is a member of an international community...” [...]. The military operations of the army are not conducted in a legal vacuum. There are legal norms – some from customary international law, some from international law enshrined in treaties to which Israel is a party, and some from the basic

principles of Israeli law – which provide rules as to how military operations should be conducted. I discussed this in one case, where I said:

‘Israel finds itself in a difficult war against rampant terror. It is acting on the basis of its right to self-defence (see art. 51 of the United Nations Charter). This fighting is not carried out in a normative vacuum. It is carried out according to the rules of international law, which set out the principles and rules for waging war. The statement that “when the cannons speak, the Muses are silent” is incorrect. Cicero’s aphorism that at a time of war the laws are silent does not reflect modern reality...

The reason underlying this approach is not merely pragmatic, the result of the political and normative reality. The reason underlying this approach is much deeper. It is an expression of the difference between a democratic state that is fighting for its survival and the fighting of terrorists who want to destroy it. The State is fighting for and on behalf of the law. The terrorists are fighting against and in defiance of the law. The war against terror is a war of the law against those who seek to destroy it [...]. But it is more than this: the State of Israel is a state whose values are Jewish and democratic. We have established here a state that respects law, that achieves its national goals and the vision of generations, and that does so while recognizing and realizing human rights in general and human dignity in particular; between these two there is harmony and agreement, not conflict and alienation” [...].

Indeed, all the military operations of every army are subject to the rules of international law governing these operations. I discussed this in one case where I said: “Even in a time of combat, the laws of war must be upheld. Even in a time of combat, everything must be done in order to protect the civilian population...” [...].

8. The judicial review of the Supreme Court is normally exercised *ex post facto*. The act which is the subject of the complaint has already been committed. Occasionally, a significant period of time elapses between the event and its review in the Supreme Court, which examines the legal consequences after the event. This is not the case here. We were not asked by the petitioners to examine the legal significance of military operations that have already been carried out and completed. The purpose of the petition is to direct the immediate conduct of the army. Our judicial review is prospective. It is exercised while the military activity is continuing. This imposes obvious constraints on the court. [...] [T]he case before us is special in that the judicial review is taking place before the military operations have ended, and while IDF soldiers are facing the dangers inherent in the combat. In this regard, it should be emphasized once again that:

“Certainly this court will not adopt any position regarding the manner in which the combat is being conducted. As long as soldiers’ lives are in danger, the decisions will be made by the commanders. In the case before us, no claim was brought before us that the arrangement that we reached endangers our soldiers” [...].

9. Judicial review does not examine the wisdom of the decision to carry out military operations. The issue addressed by judicial review is the legality of the military operations. Therefore we presume that the military operations carried out in Rafah are necessary from a military viewpoint. The question before us is whether these military operations satisfy the national and international criteria that determine the legality of these operations. The fact that operations are necessary from a military viewpoint does not mean that they are lawful from a legal viewpoint. Indeed, we do not replace the discretion of the military commander in so far as military considerations are concerned. That is his expertise. We examine their consequences from the viewpoint of humanitarian law. That is our expertise.

### ***The normative framework***

10. The military operations of the IDF in Rafah, in so far as the local inhabitants are concerned, are governed by the Hague Convention Respecting the Laws and Customs of War on Land, 1907 (hereafter – the Hague Convention) and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (hereafter – the Fourth Geneva Convention). In addition to this, there are the general principles of administrative law, which accompany every Israeli soldier [...]. According to these general principles of Israeli administrative law, the army must act in the occupied area, *inter alia*, with (substantive and procedural) fairness, reasonableness and proportionality, with a proper balance between individual liberty and the public interest [...].
11. The basic injunction of international humanitarian law applicable in times of combat is that the local inhabitants are "... entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof..." (art. 27 of the Fourth Geneva Convention; see also art. 46 of the Hague Convention). [...]

What underlies this basic provision is the recognition of the value of man, the sanctity of his life and the fact that he is entitled to liberty [...]. His life or his dignity as a human being may not be harmed, and his dignity as a human being must be protected. This basic duty is not absolute. It is subject to "... such measures of control and security in regard to protected persons as may be necessary as a result of the war" (last part of art. 27 of the Fourth Geneva Convention). These measures may not harm the essence of the rights [...]. They must be proportionate [...]. Indeed, the military operations are directed against terrorists and hostile acts of terror. They are not directed against the local inhabitants [...]. When these, as sometimes happens, enter a combat zone – and especially when terrorists turn the local inhabitants into "human shields" – everything must be done in order to protect the lives and dignity of the local inhabitants. The duty of the military commander, according to this basic rule, is twofold. *First*, he must refrain from operations that attack the local inhabitants. This duty is his "negative" obligation. *Second*, he must carry out acts required to ensure that the local inhabitants are

not harmed. This is his “positive” obligation [...]. Both these obligations – the dividing line between which is a fine one – should be implemented reasonably and proportionately in accordance with the needs of the time and place.

12. In addition to the basic injunction regarding the human dignity of the local inhabitants during military operations, international humanitarian law establishes several secondary obligations. These are not a full expression of the general principle. They are merely a specific expression of it. Of these secondary obligations, we shall mention two that are relevant to the petition before us:
  1. *The supply of food and medicines*: “...the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate” (art. 55 of the Fourth Geneva Convention [...]). In this context, humanitarian organizations and the Red Cross should be allowed to supply food and medicines (art. 59 of the Fourth Geneva Convention). Free passage of these consignments should be permitted (*ibid.*, and see also art. 23 of the Fourth Geneva Convention). Of course, the consignments may be searched in order to ascertain that they are intended for humanitarian purposes (art. 59 of the Fourth Geneva Convention).
  2. *Medical services*: The proper operation of medical establishments in the area under belligerent occupation should be ensured (art. 56 of the Fourth Geneva Convention). Persons engaged in searching for the wounded shall be protected. They shall be recognizable by means of an identity card certifying their status (art. 20 of the Fourth Geneva Convention). The Red Cross and the Red Crescent shall continue their activities in accordance with the principles of the Red Cross (art. 63 of the Fourth Geneva Convention).

### ***From the general to the specific***

[...]

### ***Water***

14. Counsel for the petitioners argued before us that the entrance of tanks into the neighbourhood of Tel A-Sultan has destroyed the water infrastructure and as a result the supply of water to the whole of Rafah has been disrupted. [...] The petitioners ask that we order the respondent to renew the water supply to the neighbourhood of Tel A-Sultan. In his oral response, Colonel Y. Mordechai said that the water wells in the neighbourhood of Tel A-Sultan were indeed damaged. As a result of this, there is a shortage of water in the southern part of the Gaza Strip. According to his report, as of the date when matters were presented before us, four out of five water wells had been repaired. The delay in the repairs was caused because the Palestinian repair team did not want to enter the neighbourhood of Tel A-Sultan, for fear of being injured. Later, on the initiative of Col. Mordechai, the Red Cross came in an international vehicle and most of the wells were repaired.

In areas where there is still no running water (like in the neighbourhood of Tel A-Sultan), the army allows water to be brought in tankers. As of now, there are five water tankers in the neighbourhood, to which the inhabitants have access without difficulty. [...] As a result of this, there is now running water in all the neighbourhoods of Rafah. [...]

15. It is the duty of the military commander to ensure the supply of water in the area subject to military activities. This duty is not merely the (negative) duty to prevent damage to water sources and to prevent a disruption of the water supply. The duty is also the (positive) duty to supply water if there is a shortage. Everything should be done in order to protect water sources and to repair them with due speed. Water tankers should be provided if the normal water supply is not functioning properly. Lessons will certainly have been learned in this regard for the future.

### ***Electricity***

16. The petitioners claim that the neighbourhoods in Rafah are without electricity. An attempt to connect the Tel A-Sultan neighbourhood to the electricity network failed, and the whole city is without electricity. They ask that we order the respondent to restore the supply of electricity. [...] Col. Mordechai said that electricity in the southern part of the Gaza Strip comes from Israel. During the military operations, the electricity infrastructure was damaged. The army – in coordination with the Rafah municipality – is working on repairing the damage. This takes time, as sometimes the workers have difficulty finding the source of the problem. In addition, the fighting taking place in the area makes it difficult to repair the electricity network properly. At the moment, there is electricity in the vast majority of Rafah, and everything will be done in order to complete the repairs so that electricity is restored for the whole area. Against this background, it seems to us that there is no need for any further action on our part. [...]

### ***Medical equipment and medicines***

17. Counsel for the petitioners said that there is a severe shortage of medicines, medical equipment and blood units in the A-Najar hospital, which, although it is located outside the area of combat, serves the area which is controlled by the IDF. Notice of this was given by the hospital to Professor Donchin, a member of the first petitioner (Physicians for Human Rights). The first petitioner prepared a vehicle containing medicines, bandages, and blood units. The vehicle is waiting by Erez Crossing, and it is not being allowed to enter the Gaza Strip. The petitioners request that we order the respondent to allow the supply of medicines to the inhabitants in the Tel A-Sultan neighbourhood. They also request that we order the respondent to allow the passage of vehicles carrying medical equipment between Rafah and the hospitals outside it, in Khan Younis and Gaza City. In his written response, Col. Mordechai said that the entry of medicines and medical equipment to the Rafah area is being allowed on a regular basis. There is nothing preventing the transfer of medical equipment from one area to another. The international border crossing at Rafah, which was closed during the fighting, was opened for this very purpose, in

order to allow trucks carrying medical equipment from Egypt to enter the Gaza Strip area. In his oral response Col. Mordechai added that the entrance to the combat zone is through Karni Crossing. Any medical equipment that is brought to that gate will be transferred immediately to its destination, provided that it is not accompanied by Israeli civilians, because of the fear that they may be taken hostage. [...]

18. It is the obligation of the military commander to ensure that there is sufficient medical equipment in the war zone. This is certainly his obligation to his own soldiers. But his obligation extends also to the civilian population under his control. Within the framework of the preparations for a military operation, this issue – which is always to be expected – must be taken into account. In this regard, both the local medical system and the ability of the local hospitals to give reasonable medical care during the fighting must be considered in advance. Medical equipment must be prepared in advance in case of a shortage; the entry of medical equipment from various sources must be allowed in order to alleviate the distress; contact must be maintained, in so far as possible, with the local medical services. The obligation is that of the military commander, and the receipt of assistance from external sources does not release him from that obligation (cf. art. 60 of the Fourth Geneva Convention). However, such external assistance may lead to the *de facto* fulfilment of the obligation. It seems to us that this issue has now been resolved and we do not think that there is a basis for any additional relief from the court.

### **Food**

19. According to the claim of counsel for the petitioners, when the military activity began, the army imposed a full curfew and sealed off some neighbourhoods in Rafah. These are lifted and imposed intermittently, depending upon the area where combat is taking place at any given time. In the neighbourhood of Tel A-Sultan, continuous combat has been taking place since the morning of 18 May 2004. Because of the curfew, the residents of the neighbourhood have been cut off from the outside world for three days. They suffer from a shortage of water (see para. 14 *supra*), medicine (see para. 17 *supra*), and food. In four neighbourhoods of Rafah, there is no milk nor any basic food products. Contact with other neighbourhoods – which would solve the problem – is prevented by the army. Moreover, no food is being brought in from outside the area. The petitioners request that we order the respondent to allow the supply of food to the residents of the neighbourhood of Tel A-Sultan. In his response, Col. Mordechai said that the usual procedure is that, when a curfew is imposed, a restocking of food should be allowed within 72 hours from the beginning of the curfew. In the case before us, the army allowed food trucks prepared by the Red Cross to be brought into the area within 48 hours. Food stations were designated in various parts of the neighbourhoods, and food was distributed to the residents. In this regard, the IDF is in contact with the mayor of Rafah and with the ministries of the Palestinian Authority. During the day, additional food trucks will be allowed to enter. Every request from an outside source to supply food will be approved and allowed. The same applies to milk. In Col. Mordechai's opinion, there is currently no shortage of



food. He emphasized in this regard that, even before the operation, UNRWA was allowed to fill its storage facilities with food.

20. On the normative level, the rule is that the military commander who is holding an area under belligerent occupation must provide the food requirements of the local inhabitants under his control. Carrying out this obligation in practice is naturally dependent on the conditions of the fighting. However, it is prohibited for the fighting to result in the starvation of local inhabitants under the control of the army [...]. On the practical level, it seems to us that the food problem has been resolved, but we should repeat that, like the problem of medicines, the question of food for the civilian population must be part of the advance planning for a military operation. The full responsibility for this issue lies with the IDF. The IDF may, of course, be assisted by international organizations, such as the Red Cross and UNRWA, but the actions of these do not discharge it, since it has effective control of the area, of its basic obligation to the civilian population under its control (cf. art. 60 of the Fourth Geneva Convention).

### ***Evacuation of the wounded***

21. The petitioners claim that, when the military operation began, the road from Rafah to Khan Younis was blocked in both directions. Ambulances that evacuated the wounded from Rafah to Khan Younis on that morning did not succeed in returning to Rafah. Therefore, wounded persons remained in the A-Najar hospital. That hospital is not equipped, nor is it sufficiently advanced, to treat the dozens of wounded coming to it. Because of the blocking of the road, the lives of many wounded are in danger. Moreover, when the army allows the evacuation of the wounded from A-Najar hospital in Rafah to hospitals outside Rafah, it allows the evacuation only on the condition that the name and identity number of the wounded person and the licence number of the ambulance which is supposed to evacuate him are provided. While the demand for giving the licence number of the ambulance can be satisfied, albeit with difficulty, the demand that the name and identity number of the wounded person are provided is an impossible demand. The reason for this is that many of the wounded are not conscious and their identity is not known. Because of this demand, ambulances are unable to come to evacuate wounded persons whose identities are not known. Moreover, the entry of additional ambulances into the A-Sultan neighbourhood is prevented because of digging that the IDF is carrying out in the area. In one case, shots were even fired on an ambulance of the "Red Crescent." The petitioners request that we order the IDF to refrain from harming or threatening the medical teams or civilians involved in the evacuation of the wounded or the dead. They also request that medical teams and Palestinian ambulances are allowed to reach the wounded in Rafah in order to evacuate them to hospitals. Finally, they request that we order the respondent to allow the transfer of the wounded in ambulances from the hospital in Rafah to other hospitals in the Gaza Strip without any need for prior arrangement, including giving details of the identity of the wounded.

22. [...] Col. Y. Mordechai said that the IDF allows the entry of ambulances and medical teams into Rafah in order to evacuate the dead and wounded. This is coordinated with Red Cross and Red Crescent officials, the Palestinian Civilian Liaison office, various UNRWA officials, various Palestinian officials, and Israeli human rights organizations that have contacted the humanitarian centre. [...] With regard to the demand for the licence plate number of the ambulances and the identity of the wounded, Col. Mordechai said [...] that these demands are based on a desire to ensure that it is indeed wounded persons that are being transferred by Palestinian medical teams, and that it is indeed an ambulance and not vehicles that are being used for another purpose. Experience has shown that Palestinian terrorists have used even ambulances for terrorist activities, including the transport of armed Palestinians and the smuggling of weapons from one area to another. [...] Col. Y. Mordechai added that a DCO officer is attached to each battalion. One of his main duties is to ensure the evacuation of the wounded in coordination with the ambulance team. During the operation, more than eighty ambulances passed from the northern part of the Gaza Strip to Rafah. The IDF allows the passage of every ambulance, provided that it is coordinated with the army. The search of the ambulance – in case it contains prohibited military equipment that is being transported from one place to another – is completed within minutes. With regard to the evacuation of the wounded, this is not made conditional on providing the names and identity numbers. Even someone whose name and identity is unknown is evacuated, but if it is possible to obtain the name and identity number, the information is requested and received. Without regard to the evacuation of the wounded to somewhere outside Rafah, Col. Mordechai says that more than 40 ambulances have left Rafah, heading north. Every ambulance requesting to leave is permitted to do so. All that is required is coordination with regard to the route. With regard to the shooting on an ambulance, it was stressed before us that the shooting was unintentional. There are clear orders that shooting at ambulances is prohibited. "Ambulances are out of bounds" – so Col. Mordechai told us. [...] It is to be regretted if even a single exception occurred. Wireless contact exists between ambulance drivers and officers of the DCO, by which proper coordination between the forces moving in the field and ambulances is maintained. When the passage of an ambulance is prevented by earth on the road, everything is done – after coordination – so that a tractor is brought to that place to remove the earth.
23. There is no dispute regarding the normative framework. The army must do everything possible, subject to the state of the fighting, to allow the evacuation of local inhabitants that were wounded in the fighting. In this respect, it was held by this court, *per* Justice Dorner, more than two years ago:
- "... our combat forces are required to abide by the rules of humanitarian law regarding the treatment of the wounded, the sick and dead bodies. The abuse committed by medical teams, hospitals and ambulances has made it necessary for the IDF to act in order to prevent such activities, but it does not, in itself, justify a sweeping violation of humanitarian rules. Indeed, this is the declared position of the State. This position is required not only by international law, on

which the petitioners are relying, but also by the values of the State of Israel as a Jewish and democratic state" [...].

It appears to us that the passage of ambulances to and from Rafah took place properly. This was made possible, *inter alia*, by the contact between the IDF – through the officers of the DCO – and the ambulance drivers. This contact is proper, and it worked properly. Also the movement of ambulances to and from the area was unrestricted. The demand of the IDF regarding the licence plate numbers of ambulances is reasonable. It is correct not to make the transfer of the wounded conditional upon giving their names and identity numbers, but we see nothing wrong in the attempt to receive this information when it is available, provided that obtaining this information is not made a condition for transporting them outside the combat area and does not cause an unreasonable delay in the transport. The single case of shooting on an ambulance was an exception. We are persuaded that in this respect the orders prohibiting such activity are clear and unequivocal. It seems to us, therefore, that in this regard the petition has been satisfied.

### ***Burying the dead***

24. Counsel for the petitioners said that the A-Najar Hospital in Rafah has 37 bodies of inhabitants who were killed in the course of the IDF's operations. Because of the restrictions imposed by the army, it is impossible to bury them. In his response before us, Col. Mordechai said that, in so far as the army is concerned, there is nothing to prevent the dead being buried in the cemeteries. These are located, to the best of his knowledge, outside the neighbourhood of Tel A-Sultan and therefore the funerals can be carried out today. In her response, counsel for the petitioners said that the funerals had not taken place because the army is surrounding the neighbourhood of Tel A-Sultan, and it is not possible for the relatives of the dead to participate in the funerals. Col. Mordechai admitted this to be true.
25. This response did not satisfy us. We said that a solution to this problem must be found quickly. Thus, for example, we asked why all or some of the relatives are not being allowed to participate in the funerals. Col. Mordechai promised us an answer to this question. In an updated statement we received on 23 May 2004, after the pleadings were concluded, we were notified by counsel for the respondent, on behalf of Col. Mordechai, that the respondent decided (on 21 May 2004) to allow several family members of each of the dead to leave the Tel A-Sultan neighbourhood in order to hold the funerals. The proposal was rejected by the Palestinian authorities. That statement also said that on that same day (21 May 2004) the respondent was prepared to allow, as a good will gesture, two vehicles from each family to leave the area of Tel A-Sultan in order to participate in their relatives' funerals. This proposal was also rejected by the Palestinians. On Saturday (22 May 2004) the respondent was prepared to allow, as a good will gesture and in response to a request by the Red Cross, the family members of each of the dead to leave the neighbourhood in order to take part in the funeral ceremonies, without any limit on the number, provided that the funerals should not be conducted at

the same time, but one after the other. The Palestinians rejected this proposal as well. On Sunday (23 May 2004) the respondent announced that he was prepared, as a good will gesture and in coordination with the Palestinian Authority, to allow several buses to leave the neighbourhood in order to allow family members to take part in their relatives' funerals. To the best of the respondent's knowledge, the Palestinians began organizing the buses needed to transport the family members from the neighbourhood of Tel A-Sultan for the funerals. A further statement from the respondent (on 24 May 2004) told us that the attempt (on 23 May 2004) to transport family members from the neighbourhood on organized buses for the funerals was unsuccessful because of the opposition of the Palestinians. The respondent added that on that day (24 May 2004), after IDF troops left the Tel A-Sultan neighbourhood, 22 funerals took place, and there was nothing to prevent the participation of family members living in the neighbourhood of Tel A-Sultan, as traffic between the neighbourhood and the area where the funerals took place was not held up by the IDF.

26. In their response (which was received on 24 May 2004), counsel for the petitioners said that, after making enquiries with the mayor of Rafah, it became clear that the residents in Rafah did indeed refuse the IDF's proposals, which significantly limited the participation of the families in the funerals of their relatives. The residents preferred holding the funerals after the siege on the neighbourhoods was lifted, in order to ensure that the prayer for the dead would be recited and that a mourners' tent would be erected for receiving condolences, as Islamic law mandates. We were further told that the mayor of Rafah announced that, in view of the end of the curfew on the neighbourhood of Tel A-Sultan, the inhabitants of Rafah are organizing a mass funeral for the 23 dead in Rafah. The funeral will take place in the afternoon and is expected to continue until the late afternoon because of the large number of the dead.
27. The problem of burying the dead has been resolved. Nevertheless, there are lessons to learn from the incident. The premise is that the basic principle enshrined in art. 27 of the Fourth Geneva Convention, according to which the dignity of the local inhabitants must be protected, applies not only to the local inhabitants who are alive, but also to the dead (cf. art. 130 of the Fourth Geneva Convention [...]). Human dignity is the dignity of the living and the dignity of the dead [...]. After bodies are found, he is obliged to ensure a dignified burial is held. In *Barakeh v. Minister of Defence* [...], which considered the duty of the military commander with regard to the bodies of persons killed in military operations, we said:

"The basic premise is that, in the circumstances of the case, the responsibility for locating, identifying, evacuating and burying the dead rests with the respondents. This is their obligation under international law. The respondents accept this position, and they act accordingly...

... The location, identification and burial of the dead are very important humanitarian acts. They derive from respect for the dead – respect for all dead. They are fundamental to our being a state whose values are Jewish and

democratic. The respondents declared that they are acting in accordance with this approach, and their approach seems correct to us...

... in the humanitarian sphere, it is usually possible to reach an understanding and an arrangement. Respect for the dead is important to us all, for man was created in the image of God. All the parties wish to finish the procedure of locating, identifying and burying the dead as soon as possible. The respondents are prepared to allow the participation of the Red Cross and, during the identification stage after the evacuation, also local authorities (subject to the specific decision of the military commander). In locating the bodies, everyone agrees that burials should be carried out with respect, in accordance with religious custom and as quickly as possible" [...].

The army tried to act in accordance with these principles in the case before us. The dead were identified and transferred to A-Najar Hospital. During all these stages, the Red Cross and the Red Crescent were involved. The problem that arose in the case before us is the problem of burial. The respondent was naturally prepared to bury the dead, but he thought that when he transferred the bodies to A-Najar Hospital he had discharged his duty. This was not the case. The duty of the respondent is to ensure a dignified burial for the bodies. In this regard, he must speak with the local authorities, to the extent that they are functioning, and find dignified ways to carry out this duty. As is clear from the information presented to us, the main difficulty that presented itself was with regard to the participation of the relatives of the dead. [...] A clear procedure should be adopted with regard to the various steps that should be followed in this matter. Naturally, if in the final analysis the bodies are in a hospital and their relatives refuse to bury them, they should not be forced to do so. Nonetheless, everything should be done in order to reach an agreement on this matter.

### ***Shelling on a procession***

28. The petitioners claim that on Wednesday, 19 May 2004, thousands of Palestinians from Rafah participated in a quiet and non-violent procession. They marched in the direction of the neighbourhood of Tel A-Sultan. None of the participants were armed or masked. The marchers included men and women, children and the elderly. [...] While they were marching, three or four tank shells and two helicopter missiles were fired at them. According to reports from the participants in the procession, shots were fired also from the direction of the Tel Al-Zuareb observation post, which is an observation post manned by the IDF. The shooting at the crowd resulted in the deaths of eight civilians. About half the dead were minors. The petitioners request that we order an investigation by the Military Police Investigations Department. They also request that we order the respondent to issue an unequivocal order absolutely forbidding the shooting or shelling of civilian gatherings, even if there are armed men among them, if they do not pose an immediate danger to life.
29. Counsel for the respondent told us that an initial investigation was conducted immediately. It found that because of a mishap, a shell was fired at an abandoned

building, and eight Palestinians were killed by shrapnel. One of these was an armed activist of the Islamic Jihad. The other seven victims were completely innocent. In this regard it was emphasized that there are considerable amounts of weapons in Rafah, including armour-piercing weapons. It was also emphasized that, in the past, terrorists have made many attempted to use civilians to attack the IDF. It was also feared that the protesters would climb onto the armoured vehicles with soldiers inside them. The procession took place in the middle of a war zone. There were armed elements among the marchers. In an initial attempt to speak with the marchers, an attempt was made to stop the procession. The attempt failed. Afterwards, deterrents were used. These also failed and the procession continued on its way. In these circumstances, it was then decided to fire a hollow shell at an abandoned building. [...] The respondent further said in his written response that the rules for opening fire in effect in the IDF, including with regard to dealing with civilian gatherings, were formulated on the basis of the ethical and legal outlook of preventing harm to the innocent, in so far as possible. Nevertheless, he reiterated that this was a situation of active warfare and danger to our forces in an area densely populated with civilians, where those persons fighting against the army do not separate themselves from the civilian population, but hide within it. They deliberately use the population as a human shield, contrary to the basic rules of war, which amounts to a war crime.

30. [...] At this stage, in the absence of a factual basis, we can only repeat the obvious, that the army must employ all possible caution in order to avoid harming the civilian population, including one that is protesting against it. The necessary precautions are naturally a function of the circumstances, including the dangers facing civilians on the one hand and the army on the other [...].

### ***What of the future?***

34. According to the humanitarian rules of international law, military activity has the following two requirements: *first*, that the rules of conduct should be taught to all combat soldiers and internalized by them, from the Chief of General Staff down to the private [...]; *second*, that institutional arrangements are created to allow the implementation of these rules and putting them into practice during combat. An examination of the conduct of the army while fighting in Rafah, as it appears from the petition before us – and we only have what has been presented before us – indicates significant progress as compared with the position two years ago [...]. This is the case regarding the internalization of the obligation to ensure water, medical equipment, medicines, food, evacuation of the wounded, and the burial of the dead. This is also the case regarding the preparedness of the army and the creation of arrangements for realizing the humanitarian obligations. The establishment of the humanitarian centre and the District Coordination Office, as well as the assignment of a liaison officer from the Coordination Office to each battalion have greatly facilitated the implementation of humanitarian principles.
35. Within the framework of the internalization of humanitarian laws, it should be emphasized that the duty of the military commander is not restricted merely to

preventing the army from harming the lives and dignity of the local residents (the “negative” duty: see para. 11 *supra*). He also has a “positive” duty (*ibid.*). He must protect the lives and dignity of the local residents [...]. The recognition that the basic obligation rests with the military commander must be internalized, and it is his job to carry out various measures from the outset so that he can fulfil his duty in times of war.

[...]

37. Against this background, when the arguments in the petition were completed, we wished to ensure that the various military frameworks in the area solve not only the problems raised by the petitioners, but also new problems that, in the nature of things, will arise tomorrow. In this respect, it was agreed that Col. Mordechai would appoint a senior officer who will be in direct contact with the organizations of the petitioners. This is the least that could have been done around the time of the events themselves. The main steps that should be taken will come after studying the lessons at the end of the events.

[...]

The result is that six of the seven reliefs that were requested by the petitioners have been satisfied. The petitioners are not entitled to the seventh relief – the entry of Israeli doctors on behalf of the first petitioner into the area in general and A-Najar Hospital in particular – because of the danger that the doctors will be taken hostage. In this regard, the respondent’s proposal that doctors who are not Israeli (whether from the Gaza Strip, from Judea and Samaria, from Israel, or from anywhere else in the world), will be allowed to enter the area – which was rejected by the petitioners – must suffice.

[...]

Petitions denied.

30 May 2004.

## DISCUSSION

1. How would you qualify the combat activities that took place in Rafah between 18th and 24th May 2004? What provisions of IHL cover this type of combat activity? Do you agree with the Court’s assessment of the applicable Conventions (*para. 10*)?
2. What do you think of the preventive measures that were taken before the start of the operation, such as the “Humanitarian Hotline”? To what extent do they fulfil Israel’s obligations as the occupying power?
3.
  - a. What are Israel’s obligations for the provision of water? Have these been respected? According to the petitioner? The respondent? The Court? What do you think? (GC IV, Arts 56 and 60; P I, Arts 14(1), 54 and 69; CIHL, Rule 55)
  - b. How about the provision of electricity?

4. Did the military commander fulfil his obligations to provide medical equipment and medicines? If not, should the Court have ordered additional remedies? Why did it not do so? (GC IV, Arts 55, 57 and 69; P I, Arts 14 and 69)
5. What do you think of the Court's decision pertaining to food distribution? Did the defendant fulfil his obligations under IHL? (GC IV, Arts 55, 56 and 60; P I, Art. 14)
6.
  - a. According to the petitioners' description of the facts, which provisions of the Geneva Conventions were being breached by the restrictions imposed on the evacuation of the wounded? (GC IV, Art. 17; P I, Arts 21-31; CIHL, Rules 109 and 110)
  - b. Do you think the restrictions described by the respondent are justifiable? In light of the past abusive use of medical facilities by the Palestinian forces?
7. According to IHL, what are the respondent's duties towards the dead? As by the end of the case the dead had been or were going to be buried according to their faith, even though no agreement had been reached between the parties, was the issue resolved? What more could the Court have done? (GC IV, Art. 130; P I, Art. 34; CIHL, Rule 115)
8. Does the IDF appear to have respected IHL during the shelling of the march (*para. 28*)? Is the shelling of an abandoned building in close proximity to a large number of civilians a violation of IHL? Was there a clear military objective in the attack? If yes, how would you assess the balance between the expected military advantage and the civilian deaths? Does the death of an armed activist change the balance?



**Case No. 136, Israel, The Targeted Killings Case**

[Source: Supreme Court of Israel, *Public Committee against Torture in Israel v. Government of Israel*, Case No. HCJ 769/02, 13 December 2006, available at [http://elyon1.court.gov.il/files\\_eng/02/690/007/A34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf), footnotes omitted]

**HCJ 769/02**

**1. The Public Committee against Torture in Israel**  
**2. Palestinian Society for the Protection of Human Rights and the Environment**  
**v.**  
**1. The Government of Israel [et al.]**

The Supreme Court Sitting as the High Court of Justice  
[...]

**JUDGMENT****President (Emeritus) A. Barak:**

The Government of Israel employs a policy of preventative strikes which cause the death of terrorists in Judea, Samaria, or the Gaza Strip. It fatally strikes these terrorists, who plan, launch, or commit terrorist attacks in Israel and in the area of Judea, Samaria, and the Gaza Strip, against both civilians and soldiers. These strikes at times also harm innocent civilians. Does the State thus act illegally? That is the question posed before us.

**1. Factual Background**

[...]

2. [...] As part of the security activity intended to confront the terrorist attacks, the State employs what it calls “the policy of targeted frustration” of terrorism. Under this policy, the security forces act in order to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel. During the second intifada, such preventative strikes have been performed across Judea, Samaria, and the Gaza Strip. According to the data relayed by petitioners, since the commencement of these acts, and up until the end of 2005, close to three hundred members of terrorist organizations have been killed by them. More than thirty targeted killing attempts have failed. Approximately one hundred and fifty civilians who were proximate to the location of the targeted persons have been killed during those acts. Hundreds of others have been wounded. The policy of targeted killings is the focus of this petition.

[...]

## 5. The General Normative Framework

### A. International Armed Conflict

16. The general, principled starting point is that between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip (hereinafter "the area") a continuous situation of armed conflict has existed since the first *intifada*. [...]

[...]

What is the normative system that applies in the case of an armed conflict between Israel and the terrorist organizations acting in the *area*?

18. The normative system which applies to the armed conflict between Israel and the terrorist organizations in the *area* is complex. In its center stands the international law regarding international armed conflict. Professor Cassese discussed the international character of an armed conflict between the occupying state in an area subject to belligerent occupation and the terrorists who come from the same area, including the armed conflict between Israel and the terrorist organizations in the *area*, stating:

"An armed conflict which takes place between an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character – in an occupied territory, amounts to an international armed conflict" [...]

This law includes the laws of belligerent occupation. However, it is not restricted only to them. This law applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation. This law constitutes a part of *iue [sic] in bello*. From the humanitarian perspective, it is part of international humanitarian law. That humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be supplemented by human rights law [...]. Alongside the international law dealing with armed conflicts, fundamental principles of Israeli public law, which every Israeli soldier "carries in his pack" and which go along with him wherever he may turn, may apply [...].

19. Substantial parts of international law dealing with armed conflicts are of customary character. That customary law is part of Israeli law, "by force of the State of Israel's existence as a sovereign and independent state" [...].

The international law entrenched in international conventions which is not part of customary international law (whether Israel is party to them or not), is not enacted in domestic law of the State of Israel [...]. In the petition before us, there is no question regarding contradictory Israeli law. [...]

20. International law dealing with the armed conflict between Israel and the terrorist organizations is entrenched in a number of sources [...]. The primary sources are as follows: the fourth Hague convention. The provisions of that convention, to which Israel is not a party, are of customary international law status [...]. Alongside

it stands *The Fourth Geneva Convention*. Israel is party to that convention. It has not been enacted through domestic Israeli legislation. However, its customary provisions constitute part of the law of the State of Israel [...]. As is well known, the position of the Government of Israel is that, in principle, the laws of belligerent occupation in *The Fourth Geneva Convention* do not apply regarding the area. However, Israel honors the humanitarian provisions of that convention [...]. That is sufficient for the purposes of the petition before us. In addition, the laws of armed conflict are entrenched in 1977 Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, hereinafter *The First Protocol*). Israel is not party to that protocol, and it was not enacted in domestic Israeli legislation. Of course, the customary provisions of *The First Protocol* are part of Israeli law.

21. Our starting point is that the law that applies to the armed conflict between Israel and the terrorist organizations in the area is the international law dealing with armed conflicts. [...] According to that view, the fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict [...]. Indeed, in today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character. [...]
22. The international law dealing with armed conflicts is based upon a delicate balance between two contradictory considerations [...]. One consists of the humanitarian considerations regarding those harmed as a result of an armed conflict. These considerations are based upon the rights of the individual, and his dignity. The other consists of military need and success [...]. The balance between these considerations is the basis of international law of armed conflict. [...]

[...]

The result of that balancing is that human rights are protected by the law of armed conflict, but not to their full scope. The same is so regarding the military needs. They are given an opportunity to be fulfilled, but not to their full scope. This balancing reflects the relativity of human rights, and the limits of military needs. The balancing point is not constant. "In certain issues the accent is upon the military need, and in others the accent is upon the needs of the civilian population" [...]. What are the factors affecting the balancing point?

23. A central consideration affecting the balancing point is the identity of the person harmed, or the objective compromised in armed conflict. That is the central principle of the distinction [...]. Customary international law regarding armed conflicts distinguishes between combatants and military targets, and non-combatants, in other words, civilians and civilian objectives [...]. According to the basic principle of the distinction, the balancing point between the State's military need and the other side's combatants and military objectives is not the

same as the balancing point between the state's military need and the other side's civilians and civilian objectives. In general, combatants and military objectives are legitimate targets for military attack. Their lives and bodies are endangered by the combat. They can be killed and wounded. [...] Opposite the combatants and military objectives stand the civilians and civilian objectives. Military attack directed at them is forbidden. Their lives and bodies are protected from the dangers of combat, provided that they themselves do not take a direct part in the combat. That customary principle is worded as follows:

"Rule 1: The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.

Rule 6: Civilians are protected against attack unless and for such time as they take a direct part in hostilities.

Rule 7: The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects" [...] [See

Case No. 43, ICRC, Customary International Humanitarian Law]

[...]

Are terrorist organizations and their members combatants, in regards to their rights in the armed conflict? Are they civilians taking an active part in the armed conflict? Are they possibly neither combatants nor civilians? What, then, is the status of those terrorists?

## **B. Combatants**

24. What makes a person a combatant? This category includes, of course, the armed forces. It also includes people who fulfill the following conditions [...]:

"The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

..."

Article 13 of The First and Second Geneva Conventions and article 4 of The Third Geneva Conventions repeat that wording (compare also article 43 of The First Protocol). [...] [T]he terrorist organizations from the area, and their members, do not fulfill the conditions for combatants [...]. It will suffice to say that they have no

fixed emblem recognizable at a distance, and they do not conduct their operations in accordance with the laws and customs of war. [...]

25. The terrorists and their organizations, with which the State of Israel has an armed conflict of international character, do not fall into the category of combatants. They do not belong to the armed forces, and they do not belong to units to which international law grants status similar to that of combatants. Indeed, the terrorists and the organizations which send them to carry out attacks are unlawful combatants. They do not enjoy the status of prisoners of war. They can be tried for their participation in hostilities, judged, and punished. [...]

The Imprisonment of Unlawful combatants Law, [...] authorizes the chief of the general staff of the IDF to issue an order for the administrative detention of an “unlawful combatant”. That term is defined in the statute as “a person who took part in hostilities against the State of Israel, whether directly or indirectly, or is part of a force which commits hostilities against the state of Israel, who does not fulfill the conditions granting prisoner of war status in international humanitarian law, as determined in article 4 of III Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949.” [See also Case No. 138, Israel, Detention of Unlawful Combatants] Needless to say, unlawful combatants are not beyond the law. They are not “outlaws”. [...] [T]heir human dignity as well is to be honored; they as well enjoy and are entitled to protection, even if most minimal, by customary international law [...]. Does it follow that in Israel’s conduct of combat against the terrorist organizations, Israel is not entitled to harm them, and Israel is not entitled to kill them even if they are planning, launching, or committing terrorist attacks? If they were seen as (legal) combatants, the answer would of course be that Israel is entitled to harm them. Just as it is permissible to harm a soldier of an enemy country, so can terrorists be harmed. Accordingly, they would also enjoy the status of prisoners of war, and the rest of the protections granted to legal combatants. However, as we have seen, the terrorists acting against Israel are not combatants according to the definition of that term in international law; they are not entitled to the status of prisoners of war; they can be put on trial for their membership in terrorist organizations and for their operations against the army. Are they seen as civilians under the law? It is to the examination of that question which we now turn.

### C. Civilians

26. Customary international law regarding armed conflicts protects “civilians” from harm as a result of the hostilities. The International Court of Justice discussed that in *The Legality of Nuclear Weapons*, stating:

“states must never make civilians the object of attack” [...].

That customary principle is expressed in article 51(2) of The First Protocol, according to which:

“The civilian population as such, as well as individual civilians, shall not be the object of attack”.

From that follows also the duty to do everything possible to minimize collateral damage to the civilian population during the attacks on “combatants” [...]. Against the background of that protection granted to “civilians”, the question what constitutes a “civilian” for the purposes of that law arises. The approach of customary international law is that “civilians” are those who are not “combatants” [...].

That definition is “negative” in nature. It defines the concept of “civilian” as the opposite of “combatant”. It thus views unlawful combatants – who, as we have seen, are not “combatants” – as civilians. Does that mean that the unlawful combatants are entitled to the same protection to which civilians who are not unlawful combatants are entitled? The answer is, no. Customary international law regarding armed conflicts determines that a civilian taking a direct part in the hostilities does not, at such time, enjoy the protection granted to a civilian who is not taking a direct part in the hostilities (see §51(3) of *The First Protocol*). The result is that an unlawful combatant is not a combatant, rather a “civilian”. However, he is a civilian who is not protected from attack as long as he is taking a direct part in the hostilities. Indeed, a person’s status as unlawful combatant is not merely an issue of the internal state penal law. It is an issue for international law dealing with armed conflicts [...]. It is manifest in the fact that civilians who are unlawful combatants are legitimate targets for attack, and thus surely do not enjoy the rights of civilians who are not unlawful combatants, provided that they are taking a direct part in the hostilities at such time. Nor, as we have seen, do they enjoy the rights granted to combatants. Thus, for example, the law of prisoners of war does not apply to them.

#### **D. A Third Category: Unlawful combatants?**

27. In the oral and written arguments before us, the State asked us to recognize a third category of persons, that of unlawful combatants. These are people who take active and continuous part in an armed conflict, and therefore should be treated as combatants, in the sense that they are legitimate targets of attack, and they do not enjoy the protections granted to civilians. However, they are not entitled to the rights and privileges of combatants, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war. Thus, for example, they are not entitled to the status of prisoners of war. The State’s position is that the terrorists who participate in the armed conflict between Israel and the terrorist organizations fall under this category of unlawful combatants.
28. [...] In our opinion, as far as existing law goes, the data before us are not sufficient to recognize this third category. That is the case according to the current state of international law, both international treaty law and customary international law [...]. It is difficult for us to see how a third category can be recognized in the framework of the *Hague* and *Geneva Conventions*. It does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a third category has been recognized in customary international law. However, new reality at times requires new interpretation. Rules developed against the

background of a reality which has changed must take on a dynamic interpretation which adapts them, in the framework of accepted interpretational rules, to the new reality [...]. In the spirit of such interpretation, we shall now proceed to the customary international law dealing with the status of civilians who constitute unlawful combatants.

## 6. Civilians who are Unlawful combatants

### A. The Basic Principle: Civilians Taking a Direct Part in Hostilities are not Protected at Such Time they are Doing So

29. Civilians enjoy comprehensive protection of their lives, liberty, and property. [...] As opposed to combatants, whom one can harm due to their status as combatants, civilians are not to be harmed, due to their status as civilians. A provision in this spirit is determined in article 51(2) of *The First Protocol*, which constitutes customary international law:

“The civilian population as such, as well as individual civilians, shall not be the object of attack. . .”

[...] That protection is granted to all civilians, excepting those civilians taking a direct part in hostilities. Indeed, the protection from attack is not granted to unlawful combatants who are taking a direct part in the hostilities. [...]

What is the source and the scope of that basic principle, according to which the protection of international humanitarian law is removed from those who take an active part in hostilities at such time that they are doing so?

### B. The Source of the Basic Principle and its Customary Character

30. The basic principle is that the civilians taking a direct part in hostilities are not protected from attack upon them at such time as they are doing so. This principle is manifest in §51(3) of *The First Protocol*, which determines:

“Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.”

As is well known, Israel is not party to *The First Protocol*. Thus, it clearly was not enacted in domestic Israeli legislation. Does the basic principle express customary international law? The position of The Red Cross is that it is a principle of customary international law [...]. That position is acceptable to us. It fits the provision Common Article 3 of *The Geneva Conventions*, to which Israel is party and which, according to all, reflects customary international law, pursuant to which protection is granted to persons “[T]aking no active part in the hostilities.” [...] According to the State’s position, “all that is determined in customary international law is that it is forbidden to harm civilians in general, and it expressly determines that it is permissible to harm a civilian who ‘takes a direct part in hostilities.’ Regarding the period of time during which such harm is permitted, there is no restriction” [...]. Therefore, according to the position of the State, the non-customary part

of article 51(3) of *The First Protocol* is the part which determines that civilians do not enjoy protection from attack “for such time” as they are taking a direct part in hostilities. As mentioned, our position is that all of the parts of article 51(3) of *The First Protocol* express customary international law. What is the scope of that provision? It is to that question that we now turn.

### C. The Essence of the Basic Principle

31. The basic approach is thus as follows: a civilian – that is, a person who does not fall into the category of combatant – must refrain from directly participating in hostilities [...]. A civilian who violates that law and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy – during that time – the protection granted to a civilian. He is subject to the risks of attack like those to which a combatant is subject, without enjoying the rights of a combatant, e.g. those granted to a prisoner of war. True, his status is that of a civilian, and he does not lose that status while he is directly participating in hostilities. However, he is a civilian performing the function of a combatant. As long as he performs that function, he is subject to the risks which that function entails and ceases to enjoy the protection granted to a civilian from attack [...].

That is the law regarding unlawful combatants. As long as he preserves his status as a civilian – that is, as long as he does not become part of the army – but takes part in combat, he ceases to enjoy the protection granted to the civilian, and is subject to the risks of attack just like a combatant, without enjoying the rights of a combatant as a prisoner of war. Indeed, terrorists who take part in hostilities are not entitled to the protection granted to civilians. True, terrorists participating in hostilities do not cease to be civilians, but by their acts they deny themselves the aspect of their civilian status which grants them protection from military attack. Nor do they enjoy the rights of combatants, e.g. the status of prisoners of war.

32. We have seen that the basic principle is that the civilian population, and single civilians, are protected from the dangers of military activity and are not targets for attack. That protection is granted to civilians “unless and for such time as they take a direct part in hostilities” [...]. That provision is composed of three main parts. The first part is the requirement that civilians take part in “hostilities”; the second part is the requirement that civilians take a “direct” part in hostilities; the third part is the provision by which civilians are not protected from attack “for such time” as they take a direct part in hostilities. We shall discuss each of those parts separately.

### D. The First Part: “Taking ... part in hostilities”

33. Civilians lose the protection of customary international law dealing with hostilities of international character if they “take ... part in hostilities.” What is the meaning of that provision? The accepted view is that “hostilities” are acts which by nature and objective are intended to cause damage to the army. Thus determines COMMENTARY ON THE ADDITIONAL PROTOCOLS, published by the Red Cross in 1987:



“Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces” [...].

[...] It seems that acts which by nature and objective are intended to cause damage to civilians should be added to that definition. According to the accepted definition, a civilian is taking part in hostilities when using weapons in an armed conflict, while gathering intelligence, or while preparing himself for the hostilities. Regarding taking part in hostilities, there is no condition that the civilian use his weapon, nor is there a condition that he bear arms (openly or concealed). It is possible to take part in hostilities without using weapons at all. COMMENTARY ON THE ADDITIONAL PROTOCOLS discussed that issue:

“It seems that the word ‘hostilities’ covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon” [...].

As we have seen, that approach is not limited merely to the issue of “hostilities” toward the army or the state. It applies also to hostilities against the civilian population of the state [...].

#### **E. Second Part: “Takes a Direct Part”**

34. Civilians lose the protection against military attack, granted to them by customary international law dealing with international armed conflict [...], if “they take a direct part in hostilities”. That provision differentiates between civilians taking a direct part in hostilities (from whom the protection from attack is removed) and civilians taking an indirect part in hostilities (who continue to enjoy protection from attack). What is that differentiation? A similar provision appears in Common Article 3 of *The Geneva Conventions*, which uses the wording “active part in hostilities”. The judgment of the International Criminal Tribunal for Rwanda determined that these two terms are of identical content [...]. What is that content? It seems accepted in the international literature that an agreed upon definition of the term “direct” in the context under discussion does not exist [...].

In that state of affairs, and without a comprehensive and agreed upon customary standard, there is no escaping going case by case, while narrowing the area of disagreement [...]. On this issue, the following passage from COMMENTARY ON THE ADDITIONAL PROTOCOLS is worth quoting:

“Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly” [...].

Indeed, a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back

from it, is a civilian taking “an active part” in the hostilities [...]. However, a civilian who generally supports the hostilities against the army is not taking a direct part in the hostilities [...]. Similarly, a civilian who sells food or medicine to unlawful combatants is also taking an indirect part in the hostilities. The third report of the Inter-American Commission on Human Rights states:

“Civilians whose activities merely support the adverse party’s war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party” [...].

And what is the law in the space between these two extremes? On the one hand, the desire to protect innocent civilians leads, in the hard cases, to a narrow interpretation of the term “direct” part in hostilities. [...]

On the other hand, it can be said that the desire to protect combatants and the desire to protect innocent civilians leads, in the hard cases, to a wide interpretation of the “direct” character of the hostilities, as thus civilians are encouraged to stay away from the hostilities to the extent possible. Schmitt writes:

“Gray areas should be interpreted liberally, i.e., in favor of finding direct participation. One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities. Moreover, a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible – in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted” [...]. [See Document No. 51, ICRC, Interpretive Guidance on the Notion

of Direct Participation in Hostilities]

35. Against the background of these considerations, the following cases should also be included in the definition of taking a “direct part” in hostilities: a person who collects intelligence on the army, whether on issues regarding the hostilities [...], or beyond those issues [...]; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may. All those persons are performing the function of combatants. The function determines the directness of the part taken in the hostilities [...]. However, a person who sells food or medicine to an unlawful combatant is not taking a direct part, rather an indirect part in the hostilities. The same is the case regarding a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid. The same is the case regarding a

person who distributes propaganda supporting those unlawful combatants. If such persons are injured, the State is likely not to be liable for it, if it falls into the framework of collateral or incidental damage. This was discussed by Gasser:

“Civilians who directly carry out a hostile act against the adversary may be resisted by force. A civilian who kills or takes prisoners, destroys military equipment, or gathers information in the area of operations may be made the object of attack. The same applies to civilians who operate a weapons system, supervise such operation, or service such equipment. The transmission of information concerning targets directly intended for the use of a weapon is also considered as taking part in hostilities. Furthermore, the logistics of military operations are among the activities prohibited to civilians . . . [N]ot only direct and personal involvement but also preparation for a military operation and intention to take part therein may suspend the immunity of a civilian. All these activities, however, must be proved to be directly related to hostilities or, in other words to represent a direct threat to the enemy . . . However, the term should not be understood too broadly. Not every activity carried out within a state at war is a hostile act. Employment in the armaments industry for example, does not mean, that civilian workers are necessarily participating in hostilities... Since, on the other hand, factories of this industry usually constitute lawful military objectives that may be attacked, the normal rules governing the assessment of possible collateral damage to civilians must be observed” [...].

In the international literature there is a debate surrounding the following case: a person driving a truck carrying ammunition [...]. Some are of the opinion that such a person is taking a direct part in the hostilities (and thus he can be attacked), and some are of the opinion that he is not taking a direct part (and thus he cannot be attacked). Both opinions are in agreement that the ammunition in the truck can be attacked. The disagreement regards the attack upon the civilian driver. Those who think that he is taking a direct part in the hostilities are of the opinion that he can be attacked. Those who think that he is not taking a direct part in the hostilities believe that he cannot be attacked, but that if he is wounded, that is collateral damage caused to civilians proximate to the attackable military objective. In our opinion, if the civilian is driving the ammunition to the place from which it will be used for the purposes of hostilities, he should be seen as taking a direct part in the hostilities [...].

36. What is the law regarding civilians serving as a “human shield” for terrorists taking a direct part in the hostilities? Certainly, if they are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. They themselves are victims of terrorism. However, if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities [...].
37. We have seen that a civilian causing harm to the army is taking “a direct part” in hostilities. What says the law about those who enlist him to take a direct part in the hostilities, and those who send him to commit hostilities? Is there a difference

between his direct commanders and those responsible for them? Is the “direct” part taken only by the last terrorist in the chain of command, or by the entire chain? In our opinion, the “direct” character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take “a direct part”. The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities. Their contribution is direct (and active) [...].

#### **F. The Third Part: “For Such Time”**

38. [...] A civilian taking a part in hostilities loses the protection from attack “for such time” as he is taking part in those hostilities. If “such time” has passed – the protection granted to the civilian returns. In respondents’ opinion, that part of article 51(3) of The First Protocol is not of customary character, and the State of Israel is not obligated to act according to it. We cannot accept that approach. As we have seen, all of the parts of article 51(3) of The First Protocol reflect customary international law, including the time requirement. The key question is: how is that provision to be interpreted, and what is its scope?
39. [...] With no consensus regarding the interpretation of the wording “for such time”, there is no choice but to proceed from case to case. Again, it is helpful to examine the extreme cases. On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his “home”, and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack “for such time” as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility [...].
40. These examples point out the dilemma which the “for such time” requirement presents before us. On the one hand, a civilian who took a direct part in hostilities once, or sporadically, but detached himself from them (entirely, or for a long period) is not to be harmed. On the other hand, the “revolving door” phenomenon, by which each terrorist has “horns of the alter” [...] to grasp or a “city of refuge” [...] to flee to, to which he turns in order to rest and prepare while they grant him immunity from attack, is to be avoided [...]. In the wide area between those two possibilities, one finds the “gray” cases, about which customary international law has not yet crystallized. There is thus no escaping examination of each and every case. In that context, the following four things should be said: first, well based information is needed before categorizing a civilian as falling into one of the discussed categories. Innocent civilians are not to be harmed [...]. Information which has been most thoroughly verified is needed regarding the identity and

activity of the civilian who is allegedly taking part in the hostilities [...]. CASSESE rightly stated that –

“[I]f a belligerent were allowed to fire at enemy civilians simply suspected of somehow planning or conspiring to plan military attacks, or of having planned or directed hostile actions, the basic foundations of international humanitarian law would be seriously undermined. The basic distinction between civilians and combatants would be called into question and the whole body of law relating to armed conflict would eventually be eroded” [...].

The burden of proof on the attacking army is heavy [...]. In the case of doubt, careful verification is needed before an attack is made. HENCKAERTS & DOSWALD-BECK made this point:

“[W]hen there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious” [...].

Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed [...]. Trial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force. [...]

Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required [...]. However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities [...]. Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used. Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent [...]. In appropriate cases it is appropriate to pay compensation as a result of harm caused to an innocent civilian [...]. Last, if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage. That damage must withstand the proportionality test. We shall now proceed to the examination of that question.

## 7. Proportionality

[See also **Case No. 123**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territories, Part B, HCJ, Beit Sourik Village Council v. The Government of Israel, paras 36-85]

[...]

### B. Proportionality in an International Armed Conflict

42. The principle of proportionality is a substantial part of international law regarding armed conflict [...]. That law is of customary character [...]. The principle of proportionality arises when the military operation is directed toward combatants and military objectives, or against civilians at such time as they are taking a direct part in hostilities, yet civilians are also harmed. The rule is that the harm to innocent civilians caused by collateral damage during combat operations must be proportionate [...]. Civilians might be harmed due to their presence inside of a military target, such as civilians working in an army base; civilians might be harmed when they live or work in, or pass by, military targets; at times, due to a mistake, civilians are harmed even if they are far from military targets; at times civilians are forced to serve as "human shields" from attack upon a military target, and they are harmed as a result. In all those situations, and in other similar ones, the rule is that the harm to the innocent civilians must fulfill, *inter alia*, the requirements of the principle of proportionality.
43. The principle of proportionality applies in every case in which civilians are harmed at such time as they are not taking a direct part in hostilities. [...]
44. The requirement of proportionality in the laws of armed conflict focuses primarily upon what our constitutional law calls proportionality "*stricto sensu*" [*sic*], that is, the requirement that there be a proper proportionate relationship between the military objective and the civilian damage. [...]

### **Proper Proportion between Benefit and Damage**

45. The proportionality test determines that attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to the military advantage (in protecting combatants and civilians). In other words, attack is proportionate if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it. That is a values based test. It is based upon a balancing between conflicting values and interests [...].

When the damage to innocent civilians is not proportionate to the benefit of the attacking army, the attack is disproportionate and forbidden.

46. That aspect of proportionality is not required regarding harm to a combatant, or to a civilian taking a direct part in the hostilities at such time as the harm is caused. Indeed, a civilian taking part in hostilities is endangering his life, and he might – like a combatant – be the objective of a fatal attack. That killing is permitted. However, that proportionality is required in any case in which an innocent civilian is harmed.

Thus, the requirements of proportionality *stricto sensu* [sic] must be fulfilled in a case in which the harm to the terrorist carries with it collateral damage caused to nearby innocent civilians. The proportionality rule applies in regards to harm to those innocent civilians [...]. The rule is that combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportionate to the military advantage in harming the combatants and terrorists [...]. Performing that balance is difficult. Here as well, one must proceed case by case, while narrowing the area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed [...]. The hard cases are those which are in the space between the extreme examples. There, a meticulous examination of every case is required; it is required that the military advantage be direct and anticipated [...].

[...]

### Implementation of the General Principles in This Case

60. [...] The examination of the “targeted killing” – and in our terms, the preventative strike causing the deaths of terrorists, and at times also of innocent civilians – has shown that the question of the legality of the preventative strike according to customary international law is complex [...]. The result of that examination is not that such strikes are always permissible or that they are always forbidden. The approach of customary international law applying to armed conflicts of an international nature is that civilians are protected from attacks by the army. However, that protection does not exist regarding those civilians “for such time as they take a direct part in hostilities” [...]. Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage. As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not.

[...]

### Vice President E. Rivlin

1. I concur in the important and comprehensive judgment of my colleague President A. Barak.

[...]

The issue of the correct, proper classification of terrorist organizations and their members raises difficult questions. Customary international humanitarian law obligates the parties to the conflict to differentiate between civilians and combatants and between military objectives and civilian objectives, and to refrain from causing extensive damage to enemy civilians. The question is whether *reality* hasn't created, *de facto*, an additional group, with a special legal status. Indeed, the scope of danger posed to the State of Israel and the security of her civilians by the terrorist organizations, and the fact that the means usually employed against lawbreaking citizens are not suitable to meet the threats posed by terrorist activity, make one uneasy when attempting to fit the traditional category of "civilians" to those taking an active part in acts of terrorism. They are not "combatants" as per the definition in international law. The way in which "combatants" were defined in the relevant conventions actually stemmed from the desire to deny "unlawful combatants" certain protections granted to legal combatants (especially protections regarding the issues of prisoner of war status and criminal prosecution). The latter are "unprivileged belligerents" [...]. However, the very characteristics of the terrorist organizations and their members that exclude them from the category of "combatants" – lack of fixed distinctive emblems recognizable at a distance and noncompliance with the laws and customs of war – create difficulty. Awarding a preferential status, even if only on certain issues, to those who choose to become "unlawful combatants" and do not act according to the rules of international law and the rules of morality and humanitarianism might be undesirable.

The classification of members of terrorist organizations under the category of "civilians" is not, therefore, an obvious one. DINSTEIN wrote, on this point, that:

"...a person is not allowed to wear simultaneously two caps: the hat of civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status: Article 5 (first Paragraph) of the 1949 Geneva Convention (IV) [...] specifically permits derogation from the rights of such a person (the derogation being less extensive in occupied territories, pursuant to the second Paragraph of Article 5)" [...].

Elsewhere it was written that "if it is not proper to see terrorists as combatants, and as a result to grant them the protections to which combatants are entitled, they should even less be seen as civilians who are not combatants, and thus granted many more rights" [...]. Those of the opinion that the third category of unlawful combatants exists emphasize that its members include those who wish to blur the boundaries between civilians and combatants [...]. The difficulty intensifies when we take into account that those who differentiate themselves from legal combatants on the one hand, and from innocent civilians on the other, are not homogenous. They include groups which are not necessarily identical to each



other in terms of the willingness to abide by fundamental legal and human norms. It is especially appropriate, in this context, to differentiate between unlawful combatants fighting against an army and those who purposely act against civilians.

It thus appears that international law must adapt itself to the era in which we are living. In light of the data presented before us, President Barak proposes to perform the adaptation within the framework of the existing law, which recognizes, in his opinion, two categories – combatants and civilians. [...]. As stated, other approaches are possible. I do not find a need to expand on them, since in light of the rules of interpretation proposed by President Barak, the theoretical distinction loses its sting.

The interpretation proposed by my colleague President Barak in fact creates a new group, and rightly so. It can be derived from the combatant group ("unlawful combatants") and it can be derived from the civilian group. My colleague President Barak takes the second path. If we go his way, we should derive a group of international-law-breaking civilians, whom I would call "uncivilized civilians". In any case, there is no difference between the two paths in terms of the result, since the interpretation of the provisions of international law proposed by my colleague President Barak adapts the rules to the new reality. That interpretation is acceptable to me. It is a dynamic interpretation which overcomes the limitations of a black letter reading of the laws of war.

3. Against the background of the differences between "legal" combatants and "international-law-breaking combatants", an analogy can be made between the means of combat permitted in a conflict between two armies, and "targeted killing" of terrorists [...]. The attitude behind the "targeted killing" policy is that the weapons should be directed exclusively toward those substantially involved in terrorist activity. Indeed, in conventional war combatants are marked and differentiated from the civilian population. Those combatants can be harmed (subject to the restrictions of international law). Civilians are not to be harmed. Similarly, in the context of the fight against terrorism, it is permissible to harm international-law-breaking combatants, but harm to civilians should be avoided to the extent possible. The difficulty stems, of course, from the fact that the unlawful combatants, by definition, do not act according to the laws of war, often disguising themselves within the civilian population, in contradiction to the express provisions of *The First Protocol of The Geneva Conventions*. [...]

However, even under the difficult conditions of combating terrorism, the differentiation between unlawful combatants and civilians must be ensured. That, regarding the issue at hand, is the meaning of the "targeting" in "targeted killing". That is the meaning of the proportionality requirement with which my colleague President Barak deals with extensively.

[...]

**President D. Beinisch:**

I concur in the judgment of President (emeritus) Barak [...].

[...]

Thus it is decided that it cannot be determined in advance that every targeted killing is prohibited according to customary international law, just as it cannot be determined in advance that every targeted killing is permissible according to customary international law. The law of targeted killing is determined in the customary international law, and the legality of each individual such act must be determined in light of it.

Given today, 23 Kislev 5767 (13 December 2006)

## DISCUSSION

**A. Qualification of the conflict and applicable law**

1. *Paras 16 onwards*

- a. How does the High Court of Justice (HCJ) qualify the conflict between the State of Israel and Palestinian armed groups? Do you agree? (GC I-IV, Art. 2) Does the fact that it is occurring, at least partly, in occupied territory suffice to qualify it as an international one?
- b. Does it make a difference that part of the territory where the conflict is taking place is occupied? In such parts of the territory, should the law of belligerent occupation apply instead of the rules on the conduct of hostilities? Should the law applicable vary according to the area where the conflict takes place and to the degree of control of the Israeli forces (*see* the difference of status between the Gaza Strip and the West Bank)? What would the implications of such a distinction be in terms of the legality of targeted killings?
- c. Do you agree with the HCJ that any conflict which crosses the border of a State automatically becomes an international armed conflict (*para. 18*)? (GC I-IV, Art. 2)
- d. Would it have been possible for the Court to qualify the conflict as being of a non-international character? What would have been different in the Court's conclusion if it had done so?
- e. Does international human rights law apply to targeted killings? In occupied territory? In territory which is not occupied by Israel? In your opinion? In the opinion of the Court?
- f. What if both IHL and human rights law apply?

**B. Qualification of the persons**

2. *Paras 24 onwards*

- a. According to the HCJ, what is the status of Palestinians involved in armed groups fighting against the State of Israel? To what protection are they entitled?
- b. Do you agree with President Barak's conclusion that there is currently no room for a third category of persons? Would the outcome of the decision have been the same if a category of "unlawful combatants" had been recognized?
- c. Do you think it is possible to have an international armed conflict with no combatants on one side? Is it possible for the enemy belligerents captured by one party to be granted prisoner-

of-war status, but for that party's belligerents, when captured by the other party, to be denied it? What is the protection granted to Palestinian fighters captured by the IDF? According to the Court (*para. 25*)? Conversely, what should be the status of Israeli soldiers captured by Palestinians? Should they have POW status? Would it be realistic to say that they should?

### C. Direct participation in hostilities

#### 3. *Paras 29 onwards*

- a. Does a civilian who directly participates in hostilities violate IHL?
- b. When may civilians be legitimate targets of attack? Where does the HCJ draw the line between taking part in hostilities and not taking part in hostilities? Is it a clear threshold?
- c. Which examples mentioned by the Court in paras 34-37 as cases of direct participation do you agree with, and which do you disagree with?
- d. (*Para. 35*) Where does the Court draw the line between taking a direct and an indirect part in hostilities? Is it a clear threshold? In your opinion, is the functional approach (i.e. based on the idea that a civilian becomes a legitimate target as soon as he performs a combatant function) the right criterion to apply in order to qualify a civilian as an unlawful combatant? Is there any possibility for another criterion to be used?
- e. Do you think that someone not carrying any weapon may still be considered as directly participating in hostilities? If so, in which circumstances?
- f. Do you think the person driving a truck carrying ammunition is directly participating in hostilities? In which circumstances (*para. 35*)?
- g. May any member of an armed group be targeted? Or is it necessary first and foremost to determine his role and status within the group? According to the Court? According to you?
- h. Up to which level of command and responsibility is someone taking direct part in hostilities (*para. 37*)? Do you agree with the Court's assertion that armed groups' leaders who order attacks are legitimate targets, just as much as the persons who actually carry out the attacks? May any leader be targeted, regardless of whether he is a military or a political leader?
- i. What is the conclusion of the HCJ regarding human shields (*para. 36*)? When may they be legitimate targets? Is it realistic to distinguish between voluntary and involuntary human shields? What is the legal basis for such a distinction? If voluntary human shields are legitimate targets, what is their contribution to hostilities that allows them to be considered as participating in such hostilities? To be a voluntary human shield, is the mere voluntary presence in a place that constitutes a military objective sufficient, or must the person have the intent to shield the objective against an attack? How can such intent be determined in the conduct of hostilities? (PI, Art. 51(7) and (8); CIHL, Rule 97)
- k. (*Paras 38-39*) When does a civilian directly participating in hostilities cease to do so? Do you agree with the Court's conclusion that once a person enters a "terrorist" organization, he/she becomes a full-time fighter who may therefore be attacked at any time, even when not engaged in hostilities? If not, when do they stop being legitimate targets? What does such a distinction between occasional fighters and full-time fighters imply in terms of knowledge about the person targeted?
- l. (*Paras 38-39*) Do you agree with the Court's assertion that a distinction should be made between the two types of civilians directly participating in hostilities, i.e. between occasional fighters and full-time fighters? What is the consequence for each group in terms of loss of

protection? Does this distinction have any basis in IHL? (P I, Arts 50(1) and 51(3)) Is Art. 5 of GC IV relevant for our discussion?

#### **D. Conduct of hostilities**

4. Is the deliberate killing of a protected person ever lawful? If that person is a civilian? If that person is a combatant? If that person was taking direct part in hostilities? Can a person taking direct part in hostilities be simultaneously in the power of the enemy and therefore a protected person? At least in an occupied territory? (GC IV, Arts 4 and 27)
5. *Para. 40*
  - a. What is the four-fold test set by the HCJ in order to determine whether an attack targeting civilians is lawful? Does it have a basis in IHL? When, according to the Court, should this test be applied?
  - b. What does the first condition of the test entail? Is it similar to the tests set in Arts 52(2) and 57 of P I? May Art. 52(2) be used to determine whether a person is a legitimate military target?
  - c. Under IHL, does the proportionality principle protect combatants? Civilians while directly participating in hostilities? Is there any obligation to use non-lethal means when possible? Is there any obligation to arrest rather than kill a combatant? A civilian directly participating in hostilities? Does the least harmful means requirement, as set by the Court, have any basis in IHL? (HR, Art. 22; P I, Arts 35(1), 51(5)(b))
  - d. Under IHL, is there any obligation to subsequently investigate attacks? If combatants are killed? If civilians directly participating in hostilities are killed? If other civilians are killed? Is there such an obligation under international human rights law? Is there an obligation under IHL to pay compensation to persons who have been affected by collateral damage caused by the attack? Under human rights law?
  - e. When is an attack proportionate? Which factors should be taken into account? Whose loss is to be weighed against whose military advantage? According to the HCJ? According to you? (P I, Art. 51(5)(b); CIHL, Rule 14)
6. (*Para. 42 onwards*) Is the Court's definition of the principle of proportionality the same as that in P I, Art. 51(5)(b)?
7. Does the decision clarify whether any of the targeted killings opposed by the petitioners were unlawful? Does it give clear instructions to the IDF as to when targeted killings will be lawful in the future? As to the persons who may be targeted? As to the other conditions and requirements?

**Case No. 137, Israel, Power Cuts in Gaza****A. Israeli Supreme Court, Judgment on Power Cuts in Gaza**

[Source: Israeli Supreme Court, *Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence*, 30 January 2008, available at [http://elyon1.court.gov.il/files\\_eng/07/320/091/n25/07091320.n25.pdf](http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf), footnotes omitted]

**H CJ 9132/07****Jaber Al-Bassiouni Ahmed  
and others****v.****1. Prime Minister  
2. Minister of Defence****The Supreme Court sitting as the High Court of Justice**

(30 January 2008)

[...]

**JUDGMENT****President D. Beinisch**

1. The petition before us is directed against the respondents' decision to reduce or limit the supply of fuel and electricity to the Gaza Strip. In their petition for relief from this court, the petitioners mainly addressed the need for various types of fuel (gasoline and diesel) for the proper running of hospitals and water and sewage pumps, as well as for the supply of electricity, whether via power lines from Israel or by supplying industrial diesel for operating the Gaza Strip power plant.
2. The circumstances surrounding the petition are the combat activities that have been taking place in the Gaza Strip for a long period, and the continuing campaign of terrorism directed against the citizens of Israel. The terrorist attacks have intensified and worsened since the Hamas organization took control of the Gaza Strip. These attacks include the continuous firing of rockets and mortar shells at civilian targets in the territory of the State of Israel, as well as terrorist attacks and attempted attacks that target civilians and IDF soldiers at the border crossings between the Gaza Strip and the State of Israel, along the border fence and in the territory of the State of Israel. The respondents' decision to limit the supply of fuel and electricity to the Gaza Strip was made as a part of the State of Israel's operations against the continuous terrorism. The following is the text of the decision that was adopted by the Ministerial Committee on National Security Affairs on 19 September 2007:

'The Hamas organization is a terrorist organization that has taken control of the Gaza Strip and turned it into a hostile territory. This organization carries out acts of hostility against the State of Israel and its citizens, and the responsibility for these acts lies with it. It has therefore been resolved to adopt the recommendations presented by the security establishment, including the continuation of the military and intelligence operations against the terrorist organizations. Additional restrictions will also be placed upon the Hamas regime, so that the passage of goods to the Gaza Strip will be limited, the supply of fuel and electricity will be reduced and restrictions will be imposed upon the movement of persons to and from the Strip. The restrictions will be implemented after considering the legal ramifications of the humanitarian situation in the Gaza Strip, in order to prevent a humanitarian crisis.'

The petition is directed against this decision.

3. [...] During the hearing, counsel for the respondents told the court that the state recognizes that it has a duty not to prevent the supply of basic humanitarian needs to the Gaza Strip, and therefore it announced that it would monitor the situation and ensure that the restrictions being made do not harm the supply of basic humanitarian needs. [...]

#### ***Reduction of the fuel supply to the Gaza Strip***

4. On 29 November 2007 we held, with regard to that part of the petition addressing the reduction of the fuel supply to the Gaza Strip, that the fuel that the Palestinian Energy Authority buys from the Israeli Dor Alon company, which is distributed by private suppliers to the highest bidder irrespective of any other concerns, can be distributed in another manner. We said that the various types of fuel supplied to the Gaza Strip can be distributed according to priorities that take into account the humanitarian needs of the civilian population, as well as the functioning of the generators that operate the water pumps and electricity plants in the Gaza Strip. In our decision we gave weight to the state's position that while combat operations and missile attacks are being carried out against Israeli towns, some of the fuel that enters the Gaza Strip is *de facto* used for various objectives of the terrorist organizations, and in such circumstances the reduction of the fuel supply, in the controlled manner in which it is made, may damage the terrorist infrastructures and their ability to operate against the citizens of the State of Israel, considering that the amount of fuel that enters the Gaza Strip is supposed to satisfy only the humanitarian purposes that require the use of fuel. We were therefore not persuaded at that stage, on the basis of the data presented to us, that the respondents' decision to reduce the amount of fuel allowed into the Gaza Strip through the border crossings with Israel currently violates the basic humanitarian needs of the Gaza Strip. We therefore held that there was no basis for any order *nisi* or interim order concerning the reduction of the fuel supply (gasoline and diesel). Our decision was mainly based on the state's undertaking, as required by Israeli and international law, to monitor the situation in the Gaza Strip and ensure that the aforesaid reduction does not prejudice the humanitarian needs of the

inhabitants of the Gaza Strip. In these circumstances we concluded the hearing of the issue of the restrictions on the fuel supply to the Gaza Strip, and proceeded to examine the arguments concerning the harm to the inhabitants of the Gaza Strip that could be anticipated as a result of the restrictions on the supply of electricity.

### ***Reduction of the supply of electricity to the Gaza Strip***

[...]

6. According to figures that are not disputed by either party, the amount of electricity needed for the Gaza Strip at peak times is slightly more than 200 megawatts. Approximately 120 megawatts are supplied by Israel, and approximately 17 megawatts are supplied by Egypt. The remainder is supplied by the Gaza Strip power plant. The electricity supplied to the Gaza Strip by the State of Israel is supplied via 10 power lines, on four of which load limiters have been installed. The respondents' intention was to reduce the supply of electricity through those four power lines gradually, by 5% of the amount of electricity transferred through each of the lines. The respondents' claim that this step would require the authority that controls the Gaza Strip to manage the load and reduce the actual consumption of electricity in the area to which the relevant line supplies electricity, to prevent the supply of electricity for terrorist purposes such as workshops where Qassam rockets are made. According to their approach, if the authorities in Gaza manage the consumption of electricity properly, the flow of electricity from Israel to the Gaza Strip will continue without interruption. But if consumption exceeds the permitted amount, the supply of electricity will cease automatically, due to the load limiters installed upon the four power lines described above. The respondents emphasized in their response that the aforesaid reduction of electricity does not affect the basic humanitarian needs of the residents of the Gaza Strip.
7. The petitioners argue that there is no physical way of reducing the supply of electricity to Gaza without causing power stoppages in hospitals and the pumping of clean water to the civilian population of Gaza, and therefore the implementation of this decision will cause certain, serious and irreversible harm to the necessary humanitarian needs of the Gaza Strip, its hospitals, the water and sewage system, and the entire civilian population. [...] [A]ccording to them even now, since the bombing of the local power plant by the Israeli Air Force in 2006, the Gaza Strip has suffered from a shortage of electricity that compels the Electricity Distribution Company in Gaza to make electricity stoppages for several hours each day. They argue that even now the frequent power stoppages affect the functioning of essential services in Gaza, such as hospitals, because the infrastructure in the Gaza Strip does not make it possible to disconnect the electrical supply to the civilian population without disconnecting essential services. Moreover, it was emphasized that stopping the supply of electricity to the homes of Gaza residents denies them the possibility of receiving clean drinking water in their homes and interrupts the functioning of the water and sewage pumps.

[...]

**Deliberations**

11. The question before us is whether the various restrictions upon the supply of fuel and electricity to the Gaza Strip harm the essential humanitarian needs of the residents of the Gaza Strip. [...] [T]he State of Israel has no duty to allow an unlimited amount of electricity and fuel to enter the Gaza Strip in circumstances where some of these products are in practice being used by the terrorist organizations in order to attack Israeli civilians. The duty of the State of Israel derives from the essential humanitarian needs of the inhabitants of the Gaza Strip. The respondents are required to discharge their duties under international humanitarian law, which requires them to allow the Gaza Strip to receive only what is needed in order to provide the essential humanitarian needs of the civilian population.
12. The State argued before us that it conducts itself in accordance with the rules of international law and respects its humanitarian obligations under the laws of war. Counsel for the state argues that these duties are limited and are derived from the state of armed conflict that exists between the State of Israel and the Hamas organization that controls the Gaza Strip, and from the need to avoid harm to the civilian population that finds itself in the combat zone. We should point out in this context that since September 2005 Israel no longer has effective control over what happens in the Gaza Strip. The military government that was in force in this territory in the past was ended by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip under all of the laws of a belligerent occupation under international law. Neither does Israel have any effective ability, in its present position, of enforcing order and managing civilian life in the Gaza Strip. In the prevailing circumstances, the main duties of the State of Israel relating to the residents of the Gaza Strip derive from the state of armed conflict that exists between it and the Hamas organization that controls the Gaza Strip; these duties also derive from the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip, as well as from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.
13. In this context, the respondents referred in their pleadings to various provisions of international humanitarian law that apply to this case. *Inter alia*, the respondents referred to art. 23 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: 'the Fourth Geneva Convention'), which requires a party to a conflict to allow the free passage of consignments intended for the civilians of the other party. They said, however, that this is a very limited obligation, since it only requires a party to a conflict to allow the unlimited passage of medical equipment, and to allow the passage of foodstuffs, clothing and medicine intended for children under the age of fifteen and expectant mothers. The respondents also referred to art. 70 of the Protocol Additional to the



Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1977 (hereinafter: 'the First Protocol'), which in their opinion constitutes customary international law, and which imposes a general and broader obligation according to which parties to a conflict are required to allow the rapid and unimpeded passage of essential goods for the civilian population. Finally, the respondents also referred in their pleadings to art. 54 of the First Protocol, which prohibits the starvation of civilians as a method of warfare, as well as any attack, destruction, removal or rendering useless of installations required by the civilian population, including foodstuffs, agricultural areas and drinking water installations.

14. The state's pleadings in this regard are based upon norms that are part of the customary international law, which set out basic obligations that govern combatant parties during an armed conflict, and require them to ensure the welfare of the civilian population and respect its dignity and basic rights. It should also be noted that under the rules of customary international humanitarian law, each party to a conflict is obliged to refrain from disrupting the passage of basic humanitarian relief to populations needing it in areas under its control (J. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law* (ICRC, vol. 1, 2005), at pp. 197, 199 [See Case No. 43, ICRC, Customary International Humanitarian Law, Rule 55]). It is also stated in the commentary on art. 70 of the First Protocol that arts. 54 and 70 of the First Protocol should be read together, so that a party to a conflict should not be permitted to refuse to allow the passage of foodstuffs and basic humanitarian equipment necessary for the survival of the civilian population [...].
15. It follows from the aforesaid that the respondents do not in any way deny the existence of their humanitarian duties, which require the State of Israel to allow the passage of essential humanitarian goods to the Gaza Strip, and to refrain from intentional harm to humanitarian facilities. According to the respondents' arguments, [...] not only are the respondents allowing the transfer essential goods to the civilian population in the Gaza Strip, but they also regard this as a humanitarian obligation for which they are liable pursuant to international law and the decision of the ministerial committee. Notwithstanding, the respondents emphasized that this does not require them to allow the passage of unessential goods or amounts of goods that exceed what is required for basic humanitarian needs, and this is the heart of the disagreement between them and the petitioners.
16. In this last respect, Colonel Nir Press, the commander of the Coordination and Liaison Authority,<sup>1</sup> appeared before us during the final hearing and gave details of the relevant data and information upon which respondents rely. Colonel Press clarified the statements made on behalf of the state, and insisted that the amount of fuel and electricity entering the Gaza Strip is sufficient for the proper functioning of all the humanitarian services in the territory; Colonel Press further told us of contacts that he held with Palestinian representatives for the routine

<sup>1</sup> The Coordination and Liaison Authority in Gaza is an organ of the Coordinator of Government Activities in the Territories (COGAT), created by the Israeli Ministry of Defence, and whose task is to coordinate civilian issues between Israel and the Occupied Territories. In Gaza, the Coordination and Liaison Authority deals with questions regarding access to and from Gaza, including the passage of humanitarian goods. (Note of the authors)

monitoring of the functioning of the humanitarian services in the Gaza Strip. *Inter alia*, he described how the State of Israel allows the safe conduct of the sick for treatment in the State of Israel, and allows the unlimited passage of food and medicine, in order to avoid harming the residents of the Gaza Strip beyond the extent necessitated by the state of armed conflict between the State of Israel and the Hamas organization. Colonel Press admitted to us that the situation of the civilian population in the Gaza Strip is indeed difficult, but he also gave examples of exaggerated descriptions published by the Hamas organization with regard to a humanitarian crisis in the territory.

17. The main issue remaining before us [...] is the amount of industrial diesel fuel required for the operation of the power plant in the Gaza Strip. As stated above, we were persuaded by the respondents' declarations that they intend to continue to allow the supply of industrial diesel fuel at the same level as prior to the implementation of the limitations, namely 2.2 million litres per week. Since it has been clarified that industrial diesel can be used, and is used *de facto*, solely for the power plant in the Gaza Strip, it can be assumed that the supply of industrial diesel will not fall short of this amount. Our examination of the matter revealed that the supply of industrial diesel to the Gaza Strip during the winter months last year was similar to the amount that the respondents now promise will be permitted to enter the Gaza Strip, and this fact also indicates that it is a reasonable amount that is sufficient for the basic humanitarian needs of the Gaza Strip. Admittedly, for several days the border crossings were closed and consequently the required amount of diesel was not delivered. But this, it was explained, was on account of a temporary security need that was caused by a very severe rocket attack launched against Israeli towns from within the Gaza Strip. It need not be said that even during this period, when there was a specific security need to close the border crossings, the State of Israel continued to supply the Gaza Strip with the same amount of electricity that it usually provides.
18. As for the revised plan presented to us, which concerns a five per cent reduction of the supply of electricity through three of the ten power lines supplying electricity to the Gaza Strip, to a level of 13.5 megawatts in two of the lines and 12.5 megawatts in the third, we have been persuaded that this reduction does not breach the State of Israel's humanitarian duties within the context of the armed conflict taking place between it and the Hamas organization that controls the Gaza Strip. This conclusion is based, *inter alia*, upon the fact that the respondents' affidavit shows that the relevant Palestinian authorities have said that they have the ability to carry out load reductions if limits are placed on the power lines, and they have made actual use of this ability in the past.
19. It should be emphasized that during the hearing of the petition the state reiterated its undertaking to monitor the humanitarian situation in the Gaza Strip, and in this context we were informed [...] that this commitment is being discharged very responsibly and seriously, and that the security establishment carries out a weekly assessment of the position in this regard, which is based, *inter alia*, upon contacts

with Palestinian authorities in the fields of electricity and health, and on contacts with international organizations. [...]

20. We have said, on more than one occasion, that we do not intervene in the question of the effectiveness or the wisdom of the security measures adopted by those responsible for security, but only in the question of their legality. Our role is limited to judicial review of compliance with the rules of Israeli and international law that bind the State of Israel, which the respondents declared before us are being scrupulously observed by the state. In this regard it has been said in the past that in times of war legal norms continue to apply, and the laws of war should be observed. [...]

[...]

22. In conclusion, we reiterate that the Gaza Strip is controlled by a murderous terrorist organization, which acts unceasingly to strike at the State of Israel and its inhabitants, violating every possible rule of international law in its violent acts, which are directed indiscriminately toward civilians – men, women and children. Notwithstanding, as we said above, the State of Israel is committed to acting against the terrorist organizations within the framework of the law and in accordance with the provisions of international law, and to refrain from intentional harm to the civilian population in the Gaza Strip. In view of all of the information presented to us with regard to the supply of electricity to the Gaza Strip, we are of the opinion that the amount of industrial diesel that the State said it intends to supply, as well as the electricity that is continually supplied through the power lines from Israel, are capable of satisfying the essential humanitarian needs of the Gaza Strip at the present.

Therefore, for the reasons set out above, the petition is denied.

**Justice E. Hayut**

I agree.

**Justice J. Elon**

I agree.

Petition denied. [...] 30 January 2008.

## **B. International Committee of the Red Cross, Report**

[Source: International Committee of the Red Cross, "Gaza is running out of fuel", 29 April 2008, available at <http://www.icrc.org/eng>]

### **Gaza is running out of fuel**

**The current fuel crisis is causing increasing hardship for the people of the Gaza Strip. The ICRC warns that the long-term consequences may be severe if sufficient supplies are not made available to ordinary people and for facilities like public transport, hospitals and water pumping stations.**

Ten per cent of nurses, doctors and other hospital staff are unable to get to work due to lack of transport. As a result, patients are having to wait for operations. Several have simply given up trying to reach hospital. Schools and universities are only functioning partially, with some 15-20 per cent of children, students and teachers absent. There are few cars on the usually crowded streets. Even in Gaza City, donkeys have become the usual means of transportation.

### **Daily life affected**

"This is affecting every aspect of daily life. Farmers cannot harvest their crops, fishermen cannot go to sea and workers have difficulties getting around," said Antoine Grand, head of the ICRC sub-delegation in Gaza.

If the fuel crisis is not resolved soon, it will have a serious effect on food, health and education in Gaza. Hospitals and sewage pumping stations are on the verge of running out of fuel for their backup generators. When the fuel is gone, these facilities will be totally dependent on mains electricity, making them highly vulnerable to power cuts.

### **Onions and garlic may rot in the fields**

"The lack of fuel will also severely damage the agricultural sector and the fishing industry. The sardine season is approaching, and the onion and garlic harvest is supposed to take place over the coming days and weeks. If there is no fuel available for the harvest and for irrigation, the crops will rot in the fields," adds Grand.

### **UN forced to abandon assistance**

Humanitarian organizations are also affected by the crisis. The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNWRA) ran out of fuel on 24 April, forcing it to stop distributing food. Médecins Sans Frontières has been forced to scale back its work and neither UNWRA nor the World Food Programme, who together feed over one million Gazans, will be able to start distributing food again until they receive diesel for their trucks.

As Grand points out, "Suspension of this assistance will have catastrophic consequences".

The ICRC has already called for political solutions to the ongoing conflict on a number of occasions, pointing out that solving the problems is far beyond the ability of humanitarian organizations. Currently, aid workers are finding it difficult to operate in Gaza at all.

### Fuel running out

The amount of fuel available to the people of Gaza has been falling since October 2007. By March 2008, the amount of petrol available had fallen by an estimated 80%, while quantities of diesel had fallen by half. On 7 April, fuel distributors in Gaza went on strike in protest against the lack of fuel. Following the killing of two Israeli workers by Palestinian militants at a fuel station in Nahal Oz near Gaza, Israel has further restricted the amount of fuel entering the Strip.

Antoine Grand: “We urge all parties to allow the civilian population of Gaza to live normal, decent lives.”

### DISCUSSION

1. a. (*High Court of Justice (HCJ)*, paras 12, 18) How would you qualify the situation prevailing in Gaza? How does the Court qualify it? Do you agree that this is a situation of armed conflict between the Hamas organization and the State of Israel? Is this conflict of an international character or not? Does it matter in this case? How could one argue that the IHL of international armed conflicts applies to the Israeli measures even if the conflict between Israel and Hamas is not of an international character?
- b. (*HCJ*, para. 12) Do you agree with the HCJ that the occupation in Gaza ended in September 2005 with the withdrawal of the Israeli troops? Even though “the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel”? Although Israel retains full control over who and what may enter Gaza? Did all the obligations of occupying powers cease to apply to Israel after September 2005?
2. a. Do you agree with the Court that the restrictions on fuel and electricity supplies were lawful? What are Israel’s obligations regarding the provision of fuel and electricity? Does it make a difference if one still considers Israel as the occupying power in Gaza? (HR, Art. 43; GC IV, Arts 23 and 59; P I, Arts 54(1), 69 and 70; CIHL, Rule 54)
- b. Are Israel’s obligations towards Gaza limited to meeting only the “basic humanitarian needs” of the inhabitants of the Gaza Strip (*HCJ*, paras 15, 17)? Even though Israeli officials themselves admit that the “situation of the civilian population in the Gaza Strip is indeed difficult” (*HCJ*, para. 16)? Considering the ICRC Report, can it be said that the basic humanitarian needs of the inhabitants of Gaza are being met? Does your answer depend on whether IHL on belligerent occupation still applies?
3. May Israel adopt measures in response to the attacks launched from Gaza? Even if they affect the entire population of Gaza? When do such measures amount to collective punishments? To reprisals? (GC IV, Art. 33; P I, Arts 20, 51(6), 52(1), 54(4), 75(2)(d); CIHL, Rule 103)
4. (*HCJ*, para. 17) Do you agree with the HCJ that security needs may allow for the restriction of relief consignments? Does IHL support this claim? Does it make a difference whether or not Gaza is still occupied? (GC IV, Arts 23 and 59; P I, Arts 54(1), 69 and 70; CIHL, Rule 54)

## Case No. 138, Israel, Detention of Unlawful Combatants

[See also Case No. 136, Israel, The Targeted Killings Case]

### A. Supreme Court, Criminal Appeals

[Source: Supreme Court of Israel, *Iyad v. State of Israel*,<sup>1</sup> CrimA 6659/06, 11 June 2008, available at [http://elyon1.court.gov.il/files\\_eng/06/590/066/n04/06066590.n04.pdf](http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf), footnotes omitted]

#### The Supreme Court of Israel sitting as the Court of Criminal Appeals

[...]

**The appellants:**

**1. A**

**2. B**

**v.**

**The respondent:**

**State of Israel**

[...]

#### JUDGMENT

#### President D. Beinisch:

We have before us appeals against the decisions of the Tel-Aviv-Jaffa District Court [...], in which the detention of the appellants under the Internment of Unlawful Combatants Law [...] (hereafter: ‘the Internment of Unlawful Combatants Law’ or ‘the law’) was upheld as lawful. Beyond the specific cases of the appellants, the appeals raise fundamental questions concerning the interpretation of the provisions of the Internment of Unlawful Combatants Law, [...] and to what extent the law is consistent with international humanitarian law.

#### *The main facts and sequence of events*

1. The first appellant is an inhabitant of the Gaza Strip, born in 1973, who was placed under administrative detention on 1 January 2002 pursuant to the Administrative Detentions [...] Order [...]. The detention of the first appellant was extended from time to time by the military commander and upheld on judicial review by the Gaza Military Court. The second appellant is also an inhabitant of Gaza, born in 1972, and he was placed under administrative detention on 24 January 2003 pursuant to the aforesaid order. The detention of the second appellant was also extended from time to time and reviewed by the Gaza Military Court.

On 12 September 2005 a statement was published by the Southern District Commander with regard to the end of military rule in the territory of the Gaza Strip. On the same day, in view of the change in circumstances and also the change in the relevant legal position, internment orders were issued against the appellants;

<sup>1</sup> The appellant in this case was initially referred to as Anonymous, but his name was subsequently released. [Note of the authors]

these were signed by the chief of staff under section 3 of the Internment of Unlawful Combatants Law, which is the law that is the focus of the case before us. [...] [O]n 20 September 2005 the chief of staff decided that the detention orders under the aforesaid law would remain valid.

2. On 22 September 2005 a judicial review proceeding began in the Tel-Aviv-Jaffa District Court [...] in the appellants' case. On 25 January 2006 the District Court held that there had been no impropriety in the procedure of issuing internment orders against the appellants and that all the conditions prescribed in the Internment of Unlawful Combatants Law were satisfied, including the fact that their release would harm state security. The appellants appealed this decision to the Supreme Court, and on 14 March 2006 their appeal was denied [...]. In the judgment it was held that from material that was presented to the court it could be seen that the appellants were clearly associated with the Hezbollah organization and that they participated in combat activities against the citizens of Israel before they were detained. The court emphasized in this context the individual threat presented by the two appellants and the risk that they would return to their activities if they were released, as could be seen from the material presented to the court.

[...]

***The Internment of Unlawful Combatants Law – the background to its legislation and its main purpose***

6. The Internment of Unlawful Combatants Law gives the state authorities power to detain 'unlawful combatants' as defined in section 2 of the law, i.e., persons who participate in hostilities or are members of forces that carry out hostilities against the State of Israel and who do not satisfy the conditions that grant a prisoner of war status under international humanitarian law. As we shall explain below, the law allows the internment of *foreign* persons who belong to a terrorist organization or who participate in hostilities against the security of the state, and it was intended to prevent these persons returning to the cycle of hostilities against Israel.

[...]

***Interpreting the provisions of the law***

7. [...]

[W]e should first consider the interpretation of the main arrangements prescribed in the Internment of Unlawful Combatants Law. [...]

[...]

9. With regard to the presumption of conformity to international humanitarian law, as we have said, section 1 of the law expressly declares that its purpose is to regulate the internment of unlawful combatants '... in a manner that is consistent with the commitments of the State of Israel under the provisions of international humanitarian law.' The premise in this context is that an international armed

conflict prevails between the State of Israel and the terrorist organizations that operate outside Israel [...] [See also Case No 136, Israel, The Targeted Killings Case, paras 18-21].

The international law that governs an international armed conflict is enshrined mainly in the Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) (hereafter: 'the Hague Convention') and the regulations appended to it, whose provisions have the status of customary international law [...]; the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949 (hereafter: 'the Fourth Geneva Convention'), whose customary provisions constitute a part of the law of the State of Israel and some of which have been considered in the past by this court [...]; and the Protocol Additional to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 (hereafter: 'the First Protocol'), to which Israel is not a party, but whose customary provisions also constitute a part of the law of the State of Israel [...]. In addition, where there is a lacuna in the laws of armed conflict set out above, it is possible to fill it by resorting to international human rights law [...].

[...]

[...] [I]t should be noted that when we approach the task of interpreting provisions of the statute in a manner consistent with the accepted norms of international law, we cannot ignore the fact that the provisions of international law that exist today have not been adapted to changing realities and the phenomenon of terrorism that is changing the form and characteristics of armed conflicts and those who participate in them [...]. In view of this, we should do our best in order to interpret the existing laws in a manner that is consistent with new realities and the principles of international humanitarian law.

10. In view of all of the aforesaid, let us now turn to the interpretation of the statutory definition of 'unlawful combatant' and the interpretation of the conditions required for proving the existence of a ground for detention under the law. [...]

### ***The definition of 'unlawful combatant' and its scope of application***

11. Section 2 of the law defines 'unlawful combatant' as follows:

'Definitions 2. In this law –

'Unlawful combatant' – a person who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a member of a force carrying out hostilities against the State of Israel, who does not satisfy the conditions granting a prisoner of war status under international humanitarian law, as set out in article 4 of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War;...'

This statutory definition of 'unlawful combatant' relates to those persons who take part in hostilities against the State of Israel or who are members of a force that carries out such hostilities, and who are not prisoners of war under



international humanitarian law. In this regard two points should be made: *first*, from the language of the aforesaid section 2 it can clearly be seen that it is not essential for someone to take part in hostilities against the State of Israel; his being a member of a 'force carrying out hostilities' – i.e., a terrorist organization – may include that person within the definition of 'unlawful combatant.' We will discuss the significance of these two alternatives in the definition of 'unlawful combatant' later (paragraph 21 below).

*Second*, as we said above, the purpose clause in the law refers expressly to the provisions of international humanitarian law. The definition of 'unlawful combatant' in the aforesaid section 2 also refers to international humanitarian law when it provides that the law applies to someone who does not enjoy a prisoner of war status under the Third Geneva Convention. As a rule, the rules of international humanitarian law were not intended to apply to the relationship between the state and its citizens (see, for example, the provisions of article 4 of the Fourth Geneva Convention, according to which a 'protected civilian' is someone who is not a citizen of the state that is holding him in circumstances of an international armed conflict). The express reference by the legislature to international humanitarian law, together with the requirement stipulated in the wording of the law that there is no prisoner of war status, show that the law was intended to apply only to *foreign* parties who belong to a terror organization that operates against the security of the state. We are not unaware that in the draft law of 14 June 2000 there was a provision that stated expressly that the law would not apply to Israeli inhabitants (and also to inhabitants of the territories), except in certain circumstances that were set out therein [...]. This provision of statute was omitted from the final wording of the law. Notwithstanding, in view of the express reference made by the law to international humanitarian law and the laws concerning prisoners of war as stated above, we are drawn to the conclusion that according to the wording and purpose of the law it was not intended to apply to *local* parties (citizens and residents of Israel) who endanger state security. For these there are other legal measures that are intended for a security purpose, which we shall address later.

It is therefore possible to summarize the matter by saying that an 'unlawful combatant' under section 2 of the law is a *foreign* party who belongs to a terrorist organization that operates against the security of the State of Israel. This definition may include residents of a foreign country that maintains a state of hostilities against the State of Israel, who belong to a terrorist organization that operates against the security of the state and who satisfy the other conditions of the statutory definition of 'unlawful combatant.' This definition may also include inhabitants of the Gaza Strip which today is no longer held under belligerent occupation. In this regard it should be noted that since the end of Israeli military rule in the Gaza Strip in September 2005, the State of Israel has no permanent physical presence in the Gaza Strip, and it also has no real possibility of carrying out the duties required of an occupying power under international law, including the main duty of maintaining public order and security. Any attempt to impose the authority of the State of Israel on the Gaza Strip is likely to involve complex and

prolonged military operations. In such circumstances, where the State of Israel has no real ability to control what happens in the Gaza Strip in an effective manner, the Gaza Strip should not be regarded as a territory that is subject to a belligerent occupation from the viewpoint of international law, even though because of the unique situation that prevails there, the State of Israel has certain duties to the inhabitants of the Gaza Strip [...] [See Case No. 137, Israel, Power Cuts in Gaza]. In our case, in view of the fact that the Gaza Strip is no longer under the effective control of the State of Israel, we are drawn to the conclusion that the inhabitants of the Gaza Strip constitute foreign parties who may be subject to the Internment of Unlawful Combatants Law in view of the nature and purpose of this law.

With regard to the inhabitants of the territory (Judeaea and Samaria) that is under the effective control of the State of Israel, [...] I tend to the opinion that in so far as this is required for security reasons, the administrative detention of these inhabitants should be carried out pursuant to the security legislation that applies in the territories and not by virtue of the Internment of Unlawful Combatants Law. [...]

***Conformity of the definition of ‘unlawful combatant’ to a category recognized by international law***

12. The appellants argued before us that the definition of ‘unlawful combatant’ in section 2 of the law is contrary to the provisions of international humanitarian law, since international law does not recognize the existence of an independent and separate category of ‘unlawful combatants.’ In their view there are only two categories in international law, ‘combatants’ and ‘civilians,’ who are subject to the provisions and protections enshrined in the Third and Fourth Geneva Conventions respectively. In their view international law does not have an intermediate category that includes persons who are not protected by either of these conventions.

With regard to the appellants’ aforesaid arguments we should point out that the question of the conformity of the term ‘unlawful combatant’ to the categories recognized by international law has already been addressed in our case law in *Public Committee against Torture in Israel v. Government of Israel*, in which it was held that the term ‘unlawful combatants’ does not constitute a separate category but is a sub-category of ‘civilians’ recognized by international law [See Case No 136, Israel, The Targeted Killings Case]. This conclusion is based on the approach of customary international law, according to which the category of ‘civilians’ includes everyone who is not a ‘combatant.’ We are therefore dealing with a negative definition. [...]

In this context, two additional points should be made: *first*, the finding that ‘unlawful combatants’ belong to the category of ‘civilians’ in international law is consistent with the official interpretation of the Geneva Conventions, according to which in an armed conflict or a state of occupation, every person who finds himself in the hands of the opposing party is entitled to a certain status under international humanitarian law – a prisoner of war status which is governed by the Third Geneva Convention or a protected civilian status which is governed by the Fourth Geneva Convention [...].

Second, it should be emphasized that *prima facie* the statutory definition of 'unlawful combatant' under section 2 of the law applies to a broader group of people than the group of 'unlawful combatants' discussed in *Public Committee against Torture in Israel v. Government of Israel*, in view of the difference in the measures under discussion: the judgment in *Public Committee against Torture in Israel v. Government of Israel* considered the legality of the measure of a military operation intended to cause the death of an 'unlawful combatant.' According to international law, it is permitted to attack an 'unlawful combatant' only during the period of time when he is taking a direct part in the hostilities. By contrast, the Internment of Unlawful Combatants Law addresses the measure of internment. For the purposes of detention under the law, it is not necessary that the 'unlawful combatant' will take a *direct* part in the hostilities, nor is it essential that his detention will take place during the period of time when he is taking part in hostilities; all that is required is that the conditions of the definition of 'unlawful combatant' in section 2 of the law are proved. This statutory definition does not conflict with the provisions of international humanitarian law since, as we shall clarify clear below [sic], the Fourth Geneva Convention also permits the detention of a protected 'civilian' who endangers the security of the detaining state. Thus we see that our reference to the judgment in *Public Committee against Torture in Israel v. Government of Israel* was not intended to indicate that an identical issue was considered in that case. Its purpose was to support the finding that the term 'unlawful combatants' in the law under discussion does not create a separate category of treatment from the viewpoint of international humanitarian law, but constitutes a sub-group of the category of 'civilians.'

13. Further to our finding that 'unlawful combatants' are members of the category of 'civilians' from the viewpoint of international law, it should be noted that this court has held in the past that international humanitarian law does not grant 'unlawful combatants' the same degree of protection to which innocent civilians are entitled, and that in this respect there is a difference from the viewpoint of the rules of international law between 'civilians' who are not 'unlawful combatants' and 'civilians' who are 'unlawful combatants.' [...]. As we shall explain below, in the present context the significance of this is that someone who is an 'unlawful combatant' is subject to the Fourth Geneva Convention, but according to the provisions of the aforesaid convention it is possible to apply various restrictions to them and *inter alia* to detain them when they represent a threat to the security of the state.

[...]

14. In summary, in view of the purpose clause of the Internment of Unlawful Combatants Law, according to which the law was intended to regulate the status of 'unlawful combatants' in a manner that is consistent with the rules of international humanitarian law, and in view of the finding of this court in *Public Committee against Torture in Israel v. Government of Israel* that 'unlawful combatants' constitute a subcategory of 'civilians' under international law, it is possible to determine that, contrary to the appellants' claim, the law does not create a new reference group from the viewpoint of international law, but it merely determines special

provisions for the detention of ‘civilians’ (according to the meaning of this term in international humanitarian law) who are ‘unlawful combatants.’

***The nature of detention of ‘unlawful combatants’ under the law – administrative detention***

15. Now that we have determined that the definition of ‘unlawful combatant’ in the law does not conflict with the two-category classification of ‘civilians’ and ‘combatants’ in international law and the case law of this court, let us turn to examine the provisions of the law that regulate the detention of unlawful combatants. Section 3(a) of the law provides the following:

‘Internment of unlawful combatant      3. (a) If the chief of staff has a reasonable basis for believing that a person who is held by state authorities is an unlawful combatant and that his release will harm state security, he may make an order with his signature requiring his internment in a place that he will determine (hereafter – an internment order); an internment order will include the reasons for internment without harming the security needs of the state. ...’

Section 7 of the law adds in this context a probative presumption, which provides the following:

‘Presumption      7. With regard to this law, a person who is a member of a force that carries out hostilities against the State of Israel or who took part in the hostilities of such a force, whether directly or indirectly, shall be regarded as someone whose release will harm state security as long as the hostilities of that force against the State of Israel have not ended, as long as the contrary has not been proved.’

The appellants argued before us that the detention provisions provided in the law *de facto* create a third category of detention, which is neither criminal arrest nor administrative detention, and which is not recognized at all by Israeli law or international law. We cannot accept this argument. The mechanism provided in the law is a mechanism of administrative detention in every respect, which is carried out in accordance with an order of the chief of staff, who is an officer of the highest security authority. As we shall explain below, we are dealing with an administrative detention whose purpose is to protect state security by removing from the cycle of hostilities anyone who is a member of a terrorist organization or who is taking part in the organization’s operations against the State of Israel, in view of the threat that he represents to the security of the state and the lives of its inhabitants.

16. It should be noted that the actual power provided in the law for the administrative detention of a ‘civilian’ who is an ‘unlawful combatant’ on account of the threat that he represents to the security of the state is not contrary to the provisions of international humanitarian law. Thus article 27 of the Fourth Geneva Convention, which lists a variety of rights to which protected civilians are entitled, recognizes the

possibility of a party to a dispute adopting 'control and security' measures that are justified on security grounds. The wording of the aforesaid article 27 is as follows:

'... the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.'

With regard to the types of control measures that are required for protecting state security, article 41 of the convention prohibits the adoption of control measures that are more severe than [sic] assigned residence or internment in accordance with the provisions of articles 42-43 of the convention. Article 42 enshrines the rule that a 'civilian' should not be interned unless it is 'absolutely necessary' for the security of the detaining power. Article 43 goes on to oblige the detaining power to approve the detention in a judicial or administrative review, and to hold periodic reviews of the continuing need for internment at least twice a year. Article 78 of the convention concerns the internment of protected civilians that are inhabitants of a territory that is held by an occupying power, and it provides that it is possible to employ various security measures against them for essential security reasons, including assigned residence and internment. Thus we see that the Fourth Geneva Convention allows the internment of protected 'civilians' in administrative detention, when this is necessary for reasons concerning the essential security needs of the detaining power.

17. In concluding these remarks we should point out that the appellants argued before us that the aforesaid provisions of the Fourth Geneva Convention are not appropriate in their case. According to them, articles 41-43 of the convention concern the detention of protected civilians who are present in the territory of a party to a dispute, whereas the appellants were taken into detention when they were in the Gaza Strip in the period prior to the implementation of the disengagement plan and the departure of IDF forces from the Gaza Strip. In view of this, the appellants argued that there is no provision of international humanitarian law that allows them to be placed in administrative detention, and therefore they argued that their detention under the Internment of Unlawful Combatants Law is contrary to the provisions of international law.

With regard to these arguments we shall reply that the detention provisions set out in the Fourth Geneva Convention were intended to apply and realize the basic rule provided in the last part of article 27 of the convention, which was cited above. As we have said, this article provides that the parties to a dispute may adopt security measures against protected civilians in so far as this is required as a result of the war. The principle underlying all the detention provisions provided in the Fourth Geneva Convention is that it is possible to detain [sic] 'civilians' for security reasons in accordance with the extent of the threat that they represent. According to the aforesaid convention, there is a power of detention for security reasons, whether we are concerned with the inhabitants of an occupied territory or we are concerned with foreigners who were found in the territory of one of the states involved in the dispute. In the appellants' case, although the Israeli military rule in the Gaza Strip has ended, the hostilities between the Hezbollah organization and the State of Israel have not ended, and therefore the detention of the appellants

in the territory of the State of Israel for security reasons is not inconsistent with the detention provisions in the Fourth Geneva Convention.

***The ground for detention under the law – the requirement of an individual threat to security and the effect of the interpretation of the statutory definition of ‘unlawful combatant’***

18. It is one of the first principles of our legal system that administrative detention is conditional upon the existence of a ground for detention that derives from the individual threat of the detainee to the security of the state. [...]
19. It should be noted that the individual threat to the security of the state represented by the detainee is also required by the principles of international humanitarian law. Thus, for example, in his interpretation of articles 42 and 78 of the Fourth Geneva Convention, Pictet emphasizes that the state should make use of the measure of detention only when it has serious and legitimate reasons to believe that the person concerned endangers its security. In his interpretation Pictet discusses the membership of organizations whose goal is to harm the security of the state as a ground for recognizing a threat, but he emphasizes the supreme principle that the threat is determined in accordance with the individual activity of that person. In Pictet's words:

‘To justify recourse to such measures, the state must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security’ [...].

20. No one before us disputes that the provisions of the Internment of Unlawful Combatants Law should be interpreted in accordance with the aforesaid principle, which make administrative detention conditional upon proving the existence of a ground that establishes an individual threat. Indeed, an examination of the provisions of the law in accordance with the aforesaid principles shows that the law does not allow anyone to be detained arbitrarily, and that the power of detention under the law is conditional upon the existence of a ground of detention that is based on the individual threat represented by the detainee: *first*, the definition of ‘unlawful combatant’ in section 2 of the law requires proof that the detainee himself took part or belonged to a force that is carrying out hostilities against the State of Israel, the significance of which we shall address below. *Second*, section 3(a) of the law expressly provides that the ground of detention under the law arises only with regard to someone for whom there is a reasonable basis to believe ‘that his release will harm state security.’ Section 5(c) of the law goes on to provide that the District Court shall set aside a detention order that was issued pursuant to the law only when the release of the detainee ‘will not harm state security’ (or when there are special reasons that justify the release). To this we should add that according to the purpose of the law, the administrative detention is intended to prevent the ‘unlawful combatant’ from returning to the cycle of hostilities, thus indicating that he was originally a part of that cycle.

The dispute between the parties before us in the context under discussion concerns the level of the individual threat that the state is liable to prove for the purpose of administrative detention under the law. This dispute arises because of the combination of two main provisions of the law: *one* is the provision of section 2 of the law that according to a simple reading states that an 'unlawful combatant' is not only someone who takes a direct or indirect part in hostilities against the State of Israel, but also someone who is a 'member of a force carrying out hostilities.' The *other* is the probative presumption provided in section 7 of the law, according to which a person who is a member of a force that carries out hostilities against the State of Israel shall be regarded as someone whose release will harm the security of the state unless the contrary is proved. Relying on the combination of these two provisions of the law taken together, the state argued that it is sufficient to prove that a person is a member of a terrorist organization in order to prove his individual threat to the security of the state in such a manner that gives rise to a ground for detention under the law. By contrast, the appellants' approach was that relying upon a vague 'membership' in an organization that carries out hostilities against the State of Israel as a basis for administrative detention under the law makes the requirement of proving an individual threat meaningless, which is contrary to constitutional principles and international humanitarian law.

21. Deciding the aforesaid dispute is affected to a large degree by the interpretation of the definition of 'unlawful combatant' in section 2 of the law. As we have said, the statutory definition of 'unlawful combatant' contains two limbs: one, 'a person who took part in hostilities against the State of Israel, whether directly or indirectly,' and the other, a person who is 'a member of a force carrying out hostilities against the State of Israel,' when the person concerned does not satisfy the conditions granting a prisoner of war status under international humanitarian law. These two limbs should be interpreted with reference to the security purpose of the law and in accordance with the [...] international humanitarian law that we discussed above, which require the proof of an individual threat as a ground for administrative detention.

With regard to the interpretation of the first limb that concerns 'a person who took part in hostilities against the State of Israel, whether directly or indirectly,' [...] we are drawn to the conclusion that in order to detain a person it is not sufficient for him to have made a remote, negligible or marginal contribution to the hostilities against the State of Israel. In order to prove that someone is an 'unlawful combatant,' the state needs to prove that the detainee made a contribution to the waging of hostilities against the state, whether directly or indirectly, in a manner that can indicate his individual threat. Naturally it is not possible to define the nature of such a contribution precisely and exhaustively, and the matter will be examined on a case by case basis according to the circumstances.

With regard to the second limb that concerns a person who is 'a member of a force carrying out hostilities against the State of Israel,' here too we require an interpretation that is consistent with the [...] international humanitarian law that we discussed above: on the one hand it is insufficient to show any tenuous



connection with a terrorist organization in order to be included within the cycle of hostilities in the broad meaning of this concept. On the other hand, in order to establish a ground for detention with regard to someone who is a member of an active terrorist organization whose self-declared goal is to fight unceasingly against the State of Israel, it is not necessary for that person to take a direct or indirect part in the hostilities themselves, and it is possible that his connection and contribution to the organization will be expressed in other ways that are sufficient to include him in the cycle of hostilities in its broad sense, in such a way that his detention will be justified under the law.

Thus we see that for the purpose of detention under the law at issue, the state is liable to prove with administrative proofs that the detainee is an 'unlawful combatant' with the meaning that we discussed, namely that the detainee took a direct or indirect part that involved a contribution to the fighting – a part that is not negligible or marginal – in the hostilities against the State of Israel, or that the detainee belongs to an organization that is carrying out hostilities, in which case we should consider the detainee's connection and the nature of his contribution to the cycle of hostilities of the organization in the broad sense of this concept.

It should be noted that providing the conditions of the definition of an 'unlawful combatant' in the aforesaid sense naturally includes proof of an individual threat that derives from the type of involvement in the organization. It should also be noted that only after the state has proved that the detainee satisfies the conditions of the statutory definition of 'unlawful combatant' can the state make use of the probative presumption set out in section 7 of the law, according to which the release of the detainee will harm state security as long as the contrary has not been proved. It is therefore clear that section 7 of the law does not negate the duty imposed on the state to prove the threat represented by the detainee, which derives from the type of involvement in the relevant organization that is required in order to prove him to be an 'unlawful combatant' under section 2 of the law. In view of this, we are drawn to the conclusion that the argument that the law includes no requirement of an individual threat goes too far and should be rejected.

***Proving someone to be an 'unlawful combatant' under the law – the need for clear and convincing administrative evidence***

22. In our remarks above, we discussed the interpretation of the definition of 'unlawful combatant.' According to the aforesaid interpretation, the state is required to prove that the detainee took a direct or indirect part, which was of significance, in the hostilities against the State of Israel, or that the detainee belonged to an organization that carries out hostilities, all of which while taking into account the connection and the extent of his contribution to the organization's cycle of hostilities. In these circumstances a person's detention may be required in order to remove him from the cycle of hostilities that harms the security of the citizens and residents of the State of Israel. The question that arises in this regard is: what evidence is required in order to persuade the court that the detainee satisfies the conditions of the definition of an 'unlawful combatant' with the aforesaid meaning.



[...] In view of the importance of the right to personal liberty and in view of the security purpose of the aforesaid law, the provisions of sections 2 and 3 of the law should be interpreted in such a way that the state is liable to prove, with clear and convincing administrative evidence, that even if the detainee did not take a direct or indirect part in the hostilities against the State of Israel, he belonged to a terrorist organization and made a significant contribution to the cycle of hostilities in its broad sense, in such a way that his administrative detention is justified in order to prevent his returning to the aforesaid cycle of hostilities.

The significance of the requirement that there is clear and convincing evidence is that importance should be attached to the quantity and quality of the evidence against the detainee and the degree to which the relevant intelligence information against him is up to date; this is necessary both for proving the detainee to be an 'unlawful combatant' under section 2 of the law and also for the purpose of the judicial review of the need to continue the detention, to which we shall return later. Indeed, the purpose of administrative detention is to prevent anticipated future threats to the security of the state, and naturally we can learn of these threats from tangible evidence concerning the detainee's acts in the past [...]. Notwithstanding, for the purposes of long-term detention under the Internment of Unlawful Combatants Law, adequate administrative evidence is required, and a single piece of evidence with regard to an isolated act carried out in the distant past is insufficient.

23. It follows that for the purposes of detention under the Internment of Unlawful Combatants Law the state is required to prove with clear and convincing evidence that, even if the detainee did not take a significant direct or indirect part in the hostilities against the State of Israel, he belonged to a terror organization and made a contribution to the cycle of hostilities in its broad sense. It should be noted that this requirement is not always easy to prove, since proving that someone is a member of a terrorist organization is not the same as proving that someone is a member of a regular army, because of the manner in which terrorist organizations work and the manner in which people join their ranks. The court held in *Public Committee against Torture in Israel v. Government of Israel* that unlike lawful combatants, unlawful combatants do not as a rule carry any clear and unambiguous indication that they belong to a terrorist organization [...] [See also Case No 136, Israel, The Targeted Killings Case, para. 24]. Therefore proving that someone belongs to an organization as aforesaid is not always an easy task. Notwithstanding, the state is required to prove with sufficient administrative evidence the nature of the detainee's connection to the terrorist organization, and the degree or manner of his contribution to the broad cycle of hostilities or operations carried out by the organization.

It should also be noted that in its pleadings before us, the state discussed how the power of detention provided in the Internment of Unlawful Combatants Law was intended to apply to members of terrorist organizations in a state of ongoing hostilities in an area that is not under the full control of the State of Israel, where in the course of the hostilities a relatively large number of unlawful combatants may fall into the hands of the security forces and where there is a need to prevent

them returning to the cycle of hostilities against Israel. The special circumstances that exist in situations of this kind require a different course of action from the one that is possible within the territory of the state or in an area subject to a belligerent occupation. In any case, it may be assumed that the reality under discussion may give rise to additional difficulties of assembling evidence with regard to whether those persons detained by the state during hostilities on the field of battle belong to a terrorist organization and how great a threat they are.

***The probative presumptions provided in sections 7 and 8 of the law***

24. As we have said, section 7 of the law provides a presumption according to which a person who satisfies the conditions of the definition of 'unlawful combatant' shall be regarded as someone whose release will harm the security of the state as long as the hostilities against the State of Israel have not come to an end. This is a rebuttable presumption, and the burden of rebutting it rests with the detainee. We should emphasize what we said above, that the presumption provided in the aforesaid section 7 may be relevant only after the state has proved that the detainee satisfies the conditions of the definition of 'unlawful combatant.' In such circumstances it is presumed that the release of the detainee will harm state security as required by section 3(a) of the law.

[...]

***(3) The judicial review of detention under the law***

40. Section 5 of the law, which is entitled 'Judicial review,' provides in subsections (a) to (d) the following arrangement:

- 'Judicial review' 5. (a) An internee shall be brought before a judge of the District Court no later than 14 days from the date of issuing the internment order; if a District Court judge finds that the conditions provided in section 3(a) are not satisfied, he shall cancel the internment order.
- (b) If the internee is not brought before the District Court and the hearing before it is not begun within 14 days of the date of issuing the internment order, the internee shall be released unless there is another ground for his detention under the law.
- (c) Once every six months from the date of issuing the order under section 3(a) the internee shall be brought before a judge of the District Court; if the court finds that his release will not harm state security or that there are special reasons that justify his release, it shall cancel the internment order.
- (d) A decision of the District Court under this section may be appealed within thirty days to the Supreme Court which

shall hear the appeal with one judge; the Supreme Court shall have all the powers given to the District Court under this law.

(e) ...

(f) ...'

42. [...]

The appellants' argument before us was that the frequency of once every six months is insufficient and disproportionately violates the right to personal liberty. With regard to this argument, we should point out that the holding of a periodic review of the necessity of continuing the administrative detention once every six months is consistent with the requirements of international humanitarian law. Thus article 43 of the Fourth Geneva Convention provides that:

'Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.'

From the aforesaid article 43 it can be seen that holding a periodic review of a detention order 'at least twice yearly' is consistent with the requirements of international humanitarian law, in a manner that supports the proportionality of the arrangement provided in section 5(c) of the law. Moreover, whereas section 43 of the Fourth Geneva Convention is satisfied with the holding of an administrative review that is carried out by an administrative body, the Internment of Unlawful Combatants provides that a District Court judge is the person who should carry out a judicial review of the detention orders under the aforesaid law, and his decision may be appealed to the Supreme Court which shall hear the appeal with one judge [...].

[...]

*(6) The length of the detention under the law*

46. From the provisions of sections 3, 7 and 8 of the Internment of Unlawful Combatants Law it can be seen that a detention order under the law need not include a defined date for the end of the detention. The law itself does not provide a maximum period of time for the detention imposed thereunder, apart from the determination that the detention should not continue after the hostilities of the force to which the detainee belongs against the State of Israel 'have ended' [...].

It should immediately be said that making a detention order that does not include a specific time limit for its termination does indeed raise a significant difficulty, especially in the circumstances that we are addressing, where the 'hostilities' of the various terrorist organizations, including the Hezbollah organization which is

relevant to the appellants' cases, have continued for many years, and naturally it is impossible to know when they will end. In this reality, detainees under the Internment of Unlawful Combatants Law may remain in detention for prolonged periods of time. [...]

As we have said, the purpose of the Internment of Unlawful Combatants Law is to prevent 'unlawful combatants' as defined in section 2 of the law from returning to the cycle of hostilities, as long as the hostilities are continuing and threatening the security of the citizens and residents of the State of Israel. For similar reasons the Third Geneva Convention allows prisoners of war to be interned until the hostilities have ended, in order to prevent them returning to the cycle of hostilities as long as the fighting continues. Even where we are concerned with civilians who are detained during an armed conflict, international humanitarian law provides that the rule is that they should be released from detention immediately after the specific ground for the detention has elapsed and no later than the date when the hostilities end [...].

[...]

### ***From general principles to the specific case***

50. As we said at the outset, the appellants, who are inhabitants of the Gaza Strip, were originally detained in the years 2002-2003, when the Gaza Strip was subject to a belligerent occupation. At that time, the administrative detention of the appellants was effected by virtue of the security legislation that was in force in the Gaza Strip. Following the end of military rule in the Gaza Strip in September 2005 and the cancellation of the security legislation in force there, on 20 September 2005 the chief of staff issued detention orders for the appellants under the Internment of Unlawful Combatants Law.

On 22 September 2005 the Tel-Aviv-Jaffa District Court began the initial judicial review of the appellants' case. From then until now the District Court has held four periodic judicial reviews of the appellants' continuing detention. The appeal against the decision of the District Court not to order the release of the appellants within the framework of the initial judicial review was denied by this court on 14 March 2006 [...].

51. In their pleadings before us, the appellants raised two main arguments with regard to their specific cases: *first*, it was argued that according to the provisions of the Fourth Geneva Convention, Israel should have released the appellants when the military rule in the Gaza Strip ended, since they were inhabitants of an occupied territory that was liberated. *Second*, it was argued that even if the Internment of Unlawful Combatants Law is constitutional, no ground of detention thereunder has been proved with regard to the appellants. According to this argument, it was not proved that the appellants are members of the Hezbollah organization nor has it been proved that their release would harm state security.

52. We cannot accept the appellants' first argument. The end of military rule in the Gaza Strip did not oblige Israel to release automatically all the detainees held by it who are inhabitants of the Gaza Strip, as long as the personal threat that the detainees represented continued against the background of the continued hostilities against the State of Israel. This conclusion is clearly implied by the arrangements set out in articles 132-133 of the Fourth Geneva Convention. Section 132 of the aforesaid convention provides the general principle that the date for the release of detainees is when the grounds of detention that originally led to their detention no longer exist. The first part of article 133 of the convention, which relates to a specific case that is included within the scope of the aforesaid general principle, goes on to provide that the detention will end as soon as possible after the hostilities have ended. Article 134 of the convention, which concerns the question of the place where the detainees should be released, also relates to the date on which hostilities end as the date on which detainees should be released from detention. Unfortunately, the hostilities of the terrorist organizations against the State of Israel have not yet ended, and they lead almost on a daily basis to physical injuries and mortalities. In such circumstances, the laws of armed conflict continue to apply. Consequently it cannot be said that international law requires Israel to release the detainees that were held by it when the military rule in the Gaza Strip came to an end, when it is possible to prove the continued individual threat presented by the detainees against the background of the continued hostilities against the security of the state.
53. [...] The material shows clearly the close links of the appellants to the Hezbollah organization and their role in the organization's ranks, including involvement in hostilities against Israeli civilian targets. In view of this, we have been persuaded that the individual threat of the appellants to state security has been proved, even without resorting to the probative presumption provided in section 7 of the law [...]. In view of the aforesaid, we cannot accept the appellants' claim that the change in the form of their detention – from detention by virtue of an order of the IDF Commander in the Gaza Strip to internment orders under the law – was done arbitrarily and without any real basis in evidence. As we have said, the change in the form of detention was required by the end of the military rule in the Gaza Strip, and that was why it was done when it was done. The choice of internment under the Internment of Unlawful Combatants Law as opposed to detention under the Emergency Powers (Detentions) Law was made, as we explained above, because of the purpose of the law under discussion and because it is appropriate to the circumstances of the appellants' cases.

The appellants further argued that their release does not represent any threat to state security since their family members who were involved in terrorist activities have been arrested or killed by the security forces in such a way that the terrorist infrastructure that existed before they were detained no longer exists. They also argued that the passage of time since the appellants were arrested reduces the risk that they represent. With regard to these arguments it should be said that after we inspected the material brought before us, we have been persuaded that the arrest or death of some of the appellants' family members in itself does not remove the security threat that would be represented by the appellants, were

they released from detention. We were also persuaded that, in the circumstances of the case, the time that has passed since the appellants were first detained has not reduced the threat that they present. [...]

In view of all of the aforesaid reasons, and after we have studied the material that was brought before us and have been persuaded that there is sufficient evidence to show the individual security threat represented by the appellants, we have reached the conclusion that the trial court was justified when it refused to cancel the internment orders in their cases. It should be pointed out that there is naturally increasing significance to the passage of time when we are dealing with administrative detention. Notwithstanding, at the present time we have found no reason to intervene in the decision of the trial court.

[...]

Therefore, for all of the reasons set out above, we have reached the conclusion that the appeals should be denied.

[...]

**Justice E.E. Levy:**

I agree with the comprehensive opinion of my colleague, the president.

[...]

**Justice A. Procaccia:**

I agree with the profound opinion of my colleague, President Beinisch.

[...]

Case decided as stated in the opinion of President D. Beinisch.

Given today, [...] 11 June 2008 [...].

## **B. Supreme Court, Administration Detention Appeals**

**[N.B.:** Following the judgement in *Iyad v. State of Israel*, the Supreme Court rendered other decisions concerning the application of the Internment of Unlawful Combatants Law, including the one discussed below]

**[Source:** Supreme Court of Israel, *A. v. State of Israel*, Adm. Det. App. 7750/08, 23 November 2008, unofficial translation]

### **In the Supreme Court**

[...]

**The Appellant:**

**A.**

**v.**

**The Respondent:**

**State of Israel**

[...]

## JUDGMENT

Before me is an appeal of a decision of the Tel Aviv-Jaffa District Court [...] of 16 July 2008 [...], in the framework of the periodic examination of the internment of the appellant, in accordance with section 5(c) of the Unlawful Combatants Law [...].

1. On 8 November 2007, the appellant was detained by IDF forces in the framework of their activity in the area where he lived in the Gaza Strip. On 19 December 2007, the head of the Operations Branch in the IDF ordered, pursuant to the authority delegated to him by the Chief of Staff in accordance with section 3 of the Unlawful Combatants Law, his internment as an unlawful combatant.
2. [...] [T]he District Court [...] approved, on 2 June 2008, continuation of the appellant's internment. [...] The court held that the appellant proved by his acts that he acquired – by himself and together with his father and brothers – expertise in the strategic smuggling of weapons into the Gaza Strip in large and significant quantities. The court pointed out that, after being detained by security forces, the area “responded” in a way that indicated his part in the hostilities against the State of Israel. The court further held that release of the appellant would prejudice state security and that the danger he posed had not faded during the time that had passed since his internment.
3. On 16 July 2008, the appellant's matter was again brought before the Tel Aviv-Jaffa District Court for periodic review [...]. In its decision, the court held that the appellant is connected to a “family cell” operating in the Gaza Strip, a family cell that acquired, *inter alia*, expertise of the highest level in the sphere of weapons smuggling, and that the family cell is to be viewed as a hostile force, which carried out and is carrying out hostilities against the state. The court stressed the appellant's dominant position in this family cell and the independent danger that he posed to state security.

[...]

5. [...] [T]he internment of the appellant was made pursuant to his being declared an unlawful combatant. [...]
6. [...] [T]he Law specifies two alternatives (which may, of course, overlap) as an initial condition for internment, which form the basis for declaring a person an unlawful combatant. One, the person *himself* took part in hostilities against the State of Israel, and two, the person is a member of the *force* carrying out hostilities. As section 3(b)(1) of the Unlawful Combatants Law states, from the moment that a particular person is an unlawful combatant, the chief of staff may, if he finds an additional condition is satisfied – that is, that his release will prejudice state security – order his internment. [...]
7. In our case, after studying the privileged information presented before me, I was convinced that, in the case of the appellant, the second conditions is indeed satisfied; that is, his release, under the currently existing circumstances in the Gaza Strip, will harm state security to an extent justifying use of the harsh tool of denying his liberty by means of detention. Without going into detail, it is sufficient

to say that the evidence presented before me indicates that the danger posed by the appellant does not result solely from his family connections, and is evident from his individual acts. [...]

8. Notwithstanding the above, I did not find that the first condition was satisfied in the appellant's case, that is, that he is an "unlawful combatant" within the meaning of the term in section 2 of the Unlawful Combatants Law. As stated, this section specifies two possibilities for inclusion in this definition – "group" (being a member of a force carrying out hostilities) or "personal" (taking part in hostilities, directly or indirectly). Even though the respondent does not contend this explicitly, it appears from its contentions that the circumstances of the appellant combine the two possibilities. Whether one or the other, in light of the cautious interpretation that must be given to the definitions in this law, I do not find that the appellant comes within the boundaries of these definitions.

[...]

10. In our case, [...] I did not find it could be said that the appellant is a member of a force carrying out hostilities against the State of Israel. [...] [T]he information against the appellant relates to his engaging in weapons smuggling. In the framework of the evidence presented before me, I did not find evidence related to any real organizational *belonging* of the appellant, or to his activity *in the framework* of one terrorist organization or another. Therefore, I did not find that the appellant comes within the "group" alternative.
11. In this regard, I cannot accept the holding of the District Court, whereby the family cell to which the appellant belongs can be deemed a hostile force, so as to satisfy the requirements of section 2 of the Unlawful Combatants Law.

[...]

[I]t is not sufficient that the person be in the ranks of some entity that is hostile to the state and whose existence endangers its security, but it must be an entity that carries out, in an active and organized manner, hostile terrorist activity against the State of Israel. [...]

12. In the "personal" alternative also, I did not find that the appellant comes within the definition of "unlawful combatant" under section 2 of the Law. This possibility involves, as stated, a person taking part in hostilities, directly or indirectly. In the appellant's case, I did not find any evidence indicating that he took a real part in hostilities directed against Israel. As stated, the evidence against him related primarily, but not only, to his engaging in weapons smuggling. Indeed, it is possible to argue that this information [...] indicates that the appellant took an indirect part in hostilities. [...] However, in applying the cautious principles of interpretation that are required as stated in implementing the Unlawful Combatants Law, I did not find that, in this context, the contribution of the appellant to these acts can be deemed a contribution that constitutes *taking part* in the hostilities, as the Law requires. [...]
13. I also reached this conclusion following a fundamental constitutional examination of the appellant's internment. As is the case with every administrative act, this



act, too, must satisfy, *inter alia*, the principle of proportionality, for it not to deviate from the boundaries of the law authorizing it. In our case, the appellant's internment under the Unlawful Combatants Law raises the question of whether there is a means that causes lesser harm and achieves the same objective. In this case, I find that, in his case, administrative detention under the Emergency Powers (Detentions) Law [...] (hereafter: the Administrative Detention Law), is sufficient.<sup>2</sup>

14. The Administrative Detention Law empowers the Minister of Defense to order the detention of a person for a period not to exceed six months, if he finds "a reasonable basis to assume that reasons of state security or public security" require his detention (section 2(a) of the law). [...]
15. [...] [A]s was held in *Iyad*, the principal purpose of the Unlawful Combatants Law relates to aiding and advancing the state's battle against terrorist bodies that have declared total war against it. As such, it is itself intended to prevent the return of activists in these organizations, and of those who take part in terrorist attacks against the state, to the cycle of hostilities. Conversely, the purpose of the Administrative Detention Law is to prevent danger to state security by individual persons and for specific reasons. [...]
16. Therefore, it cannot be said that the extent of the appellant's contribution to hostilities carried out by terrorist organizations justifies using the means of internment under the Unlawful Combatants Law, and it is sufficient to hold him in administrative detention under the Administrative Detention Law. As stated, the evidence presented before me clearly indicates he poses a danger to state security. However, prevention of this specific dangerousness comports more with the arrangements set out in the Administrative Detention Law – which despite their severe harm, are far less extreme than the harm of the arrangements specified in the Unlawful Combatants Law.
17. Therefore, the appeal is accepted [...].

Given today, [...] 23 November 2008 [...].

[...]

## DISCUSSION

### A. Qualifications of the conflict and of the persons under discussion

1. (*Part A, para. 9*) Do you agree with the Court that there is an international armed conflict between the State of Israel and "terrorist organizations"? How are international armed conflicts defined? What is the law applicable to the situation? According to the Court? According to you? (GC I-IV, Art. 2)
2. (*Part A, para. 11*) Do you agree with the Court that the occupation of Gaza ended in September 2005 when Israeli troops withdrew? Could Israel still be regarded as an occupying power even though its troops are no longer present on the territory? Which duties does Israel still recognize itself as having

<sup>2</sup> Detention under the "Administrative Detention Law" differs from detention under the "Unlawful Combatants Law"; in that in the former, the detainee is kept in detention for security reasons, and only for a limited period of time, while in the latter, the detention is to lead to criminal proceedings.

towards the inhabitants of the Gaza Strip? What legal basis do they arise from? (GC IV, Art. 6(1); P I, 3(b))

3. (*Part A, paras 11 and 12*) Does the definition of unlawful combatant as given in Section 3 of the Unlawful Combatants Law have any basis under IHL (*para. 12*)? Is the interpretation of the concept of unlawful combatants given here by the Court the same as the one it gave in the Targeted Killings case? Why does the Court say that the two definitions are necessarily different? Do you agree? [See **Case No. 136**, Israel, The Targeted Killings Case, para. 31]
4. (*Part A, para. 14*) Do you agree with the Court that there is no intermediate status between the categories of combatants and civilians? What is the status of the Palestinians detained by Israel? According to the Court? According to you? Are they protected persons? Why? What protection are they afforded? (GC IV, Art. 4)

## B. Legal basis for detention

5.
  - a. (*Part A*) What was the legal basis, under IHL, for the appellants' detention before September 2005? According to the Court? (GC IV, Arts 27, 78)
  - b. (*Part A*) What was the legal basis, under IHL, for the appellants' detention after September 2005? According to the Court? Do Arts 41 and 42 apply here even though the appellants were first arrested outside Israel's own territory? (GC IV, Arts 27, 41-42)
  - c. (*Part A, para. 17*) Do you agree with the appellants that their detention is unlawful under IHL because none of the provisions contained in GC IV apply? What was the status of the Gaza Strip during the Disengagement Plan? What are the consequences of your answer for the legality of the appellants' detention?
  - d. (*Part A, para. 17*) According to the Court, in GC IV "there is a power of detention for security reasons, whether we are concerned with the inhabitants of an occupied territory or we are concerned with foreigners who were found in the territory of one of the states involved in the dispute". Does this mean that protected persons may be arrested in the territory of a party to a conflict by the enemy forces, without it being occupied by the latter? Would this be in accordance with GC IV's definition of occupation? Is there a basis in IHL for the detention of civilians arrested neither in an occupied territory nor in the Detaining Power's own territory?
6. (*Part A*) Was Israel allowed to transfer the detainees to its own territory at the end of occupation? May civilian internees arrested in occupied territories be transferred to the Detaining Power's own territory? Does Art. 49 of GC IV prohibiting "[i]ndividual (...) forcible transfers, as well as deportations of protected persons", apply to civilian internees? In a situation where internees are transferred to the territory of the Detaining Power, which set of rules should apply to them after their transfer?
7.
  - a. (*Part A, para. 52*) Should the detainees have been released at the end of occupation, in September 2005? Do you agree with the Court that the obligation to release them at the end of occupation is not an obligation under IHL? (GC IV, Arts 49 and 132-134)
  - b. (*Part A, paras 46 and 52*) How should the requirement of release "as soon as possible after the close of hostilities" be interpreted (GC IV, Art. 133)? What does the close of hostilities mean in a situation such as the present one, where sporadic fighting carries on for years?
8.
  - a. (*Part A, paras 20-23*) How does the Court interpret the "individual threat" requirement? Does IHL require an individual assessment of the threat posed by a person before deciding upon that person's detention? (GC IV, Arts 27(4), 41-43 and 78) According to the Court, when may a person be detained as an "unlawful combatant"? What elements are required to authorize

detention? Does the Court say whether the same elements are required for the continuation of detention? Should they be required?

- b. (*Part A, paras 15 and 24*) Is the presumption of constituting a security threat provided for in Section 7 of the Unlawful Combatants Law in accordance with IHL? May a person be interned for the mere fact that he or she belongs to a hostile armed group, independently of that person's individual conduct? Is this in compliance with the requirement for an individual assessment? (GC IV, Arts 42 and 78)
  - c. (*Part A, para. 23*) When can a person be considered to belong to a hostile, illegal organization? How can such a connection be proved?
9. (*Part A, para. 40*) Are the provisions of the said Law relating to the judicial review of detention in accordance with IHL? What are the requirements set by IHL with regard to the judicial review of detention? Must the review be judicial or may it also be administrative? What is the utility of a judicial review if the detainees concerned have no access to the evidence against them? Must they have access to such evidence under GC IV? (GC IV, Arts 43 and 78)

### C. Participation in hostilities

[See also **Case No. 136** Israel, The Targeted Killings Case]

10. (*Part A, para. 13*) Do you agree with the Court that IHL “does not grant ‘unlawful combatants’ the same degree of protection to which innocent civilians are entitled”? Does this assertion have a legal basis in IHL? What restrictions may apply to them? Does it make a difference whether they are themselves in an occupied territory or in the territory of the party in whose hands they are? What restrictions, if any, may be applied to the detainees in the present case? May the same restrictions be applied to them before and after September 2005? Were they deprived of any protection under GC IV? (GC IV, Art. 5)
11. a. (*Part A, para. 21*) When does someone become an “unlawful combatant”? What does the requirement of having made a significant contribution to the hostilities mean? Are the nature and degree of the contribution similar to the definition of participation in hostilities given by the HCJ in the Targeted Killings case? [See **Case No. 136**, Israel, The Targeted Killings Case, para. 33]
- b. (*Part B*) Could weapon smuggling be considered to constitute a direct participation in hostilities? A security threat justifying internment under GC IV? According to the Court? According to you? If the appellant had been a member of an organization conducting hostilities against Israel, could he have been considered an “unlawful combatant” for the purpose of the Unlawful Combatants Law? Even if he were only smuggling weapons?
- c. (*Part B, para. 13*) Why should the appellant be detained under the Administrative Detention Law rather than under the Unlawful Combatants Law? What is the difference between the two forms of detention? As far as the legal basis in IHL is concerned? Under Israeli law? Does the requirement that less harmful measures must be used when available have any basis under IHL?

**Case No. 139, UN, Resolutions and Conference on Respect  
for the Fourth Convention****A. UN Security Council Resolution 681 (1990)**

[Source: United Nations, S/RES/681, 20 December 1990; available on <http://www.un.org/documents/scres.htm>]

*The Security Council, [...]*

*Having received* the report of the Secretary-General submitted in accordance with Security Council resolution 672 (1990) of 12 October 1990 on ways and means for ensuring the safety and protection of the Palestinian civilians under Israeli occupation and taking note in particular of paragraphs 20 to 26 thereof, [...]

*Gravely concerned* at the dangerous deterioration of the situation in all the Palestinian territories occupied by Israel since 1967, including Jerusalem, and at the violence and rising tension in Israel, [...]

2. *Expresses its grave concern* over the rejection by Israel of Security Council resolutions 672 (1990) of 12 October 1990 and 673 (1990) of 24 October 1990;
3. *Deplores* the decision by the Government of Israel, the occupying Power, to resume deportations of Palestinian civilians in the occupied territories;
4. *Urges* the Government of Israel to accept the *de jure* applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to all the territories occupied by Israel since 1967, and to abide scrupulously by the provisions of the Convention;
5. *Calls upon* the High Contracting Parties to the said Convention to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof;
6. *Requests* the Secretary-General, in co-operation with the International Committee of the Red Cross, to develop further the idea, expressed in his report, of convening a meeting of the High Contracting Parties to the said Convention to discuss possible measures that might be taken by them under the Convention and, for this purpose, to invite the Parties to submit their views on how the idea could contribute to the goals of the Convention, as well as on other relevant matters, and to report thereon to the Council; [...]

## B. UN General Assembly Resolution ES-10/2

[Source: UN Doc. A/RES/ES-10/2 (May 5, 1997); footnotes omitted; available on [www.un.org](http://www.un.org)]

### **RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY [without reference to a Main Committee (A/ES-10/L.1 and Add.1)]**

#### ***Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory***

*The General Assembly,*

*Aware* of the commencement, after the adoption of General Assembly resolution 51/223 of 13 March 1997, of construction by Israel, the occupying Power, of a new settlement in Jebel Abu Ghneim to the south of East Jerusalem on 18 March 1997, and of other illegal Israeli actions in Jerusalem and the rest of the Occupied Palestinian Territory, [...]

*Reaffirming also* the applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, [...] and the Regulations annexed to the Hague Convention IV of 1907 to the Occupied Palestinian Territory, including Jerusalem, and all other Arab territories occupied by Israel since 1967,

*Recalling* the obligation of the High Contracting Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War to respect and ensure respect for the Convention in all circumstances, in accordance with article 1 of the Convention,

*Conscious* of the serious dangers arising from persistent violation and grave breaches of the Convention and the responsibilities arising therefrom,

*Convinced that* ensuring respect for treaties and other sources of international law is essential for the maintenance of international peace and security, and determined, in accordance with the preamble to the Charter of the United Nations, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,

*Also convinced,* in this context, that the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security,

*Increasingly concerned* about the actions of armed Israeli settlers in the Occupied Palestinian Territory, including Jerusalem,

*Aware* that, in the circumstances, it should consider the situation with a view to making appropriate recommendations to the States Members of the United Nations, in accordance with General Assembly resolution 377 A (V) of 3 November 1950, [...]

5. *Demands also* that Israel accept the *de jure* applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to all the territories occupied since 1967, and that it comply with relevant Security Council resolutions, in accordance with the Charter of the United Nations; [...]
7. *Calls* for the cessation of all forms of assistance and support for illegal Israeli activities in the Occupied Palestinian Territory, including Jerusalem, in particular settlement activities;
8. *Recommends* to the States that are High Contracting Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War to take measures, on a national or regional level, in fulfilment of their obligations under article 1 of the Convention, to ensure respect by Israel, the occupying Power, of the Convention; [...]

### C. UN General Assembly Resolution ES-10/3

[Source: United Nations, A/RES/ES-10/3, July 15 1997; available on [www.un.org](http://www.un.org)]

#### **RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY [without reference to a Main Committee (A/ES-10/L.2/Rev.1)]**

##### ***Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory***

*The General Assembly,*

*Having received with appreciation* the report of the Secretary-General, [A/ES-10/6; S/1997/494 and Add.1 [available on <http://www.un.org>]], [...]

*Reaffirming* its resolution ES-10/2 of 25 April 1997, [available on <http://www.un.org>],

*Having been informed* in the report of the Secretary-General that, *inter alia*, the Government of Israel, as of 20 June 1997, has not abandoned its construction of the new Israeli settlement at Jebel Abu Ghneim and that settlement activity, including the expansion of existing settlements, the construction of bypass roads, the confiscation of lands adjacent to settlements and related activities, in violation of Security Council resolutions on the matter, continues unabated throughout the Occupied Palestinian Territory, and also that the Israeli Prime Minister and other representatives of the Government continue to reject the terms of resolution ES-10/2 requiring the cessation of those activities,

*Aware* that, in the light of the position of the Government of Israel, as indicated in the report of the Secretary-General, the General Assembly should once more consider the situation with a view to making additional appropriate recommendations to States Members of the United Nations, in accordance with General Assembly resolution 377 A (V) of 3 November 1950, [available on <http://www.un.org>],

1. *Condemns* the failure of the Government of Israel to comply with the demands made by the General Assembly at its tenth emergency special session in resolution ES-10/2; [...]
6. *Recommends* to Member States that they actively discourage activities which directly contribute to any construction or development of Israeli settlements in the Occupied Palestinian Territory, including Jerusalem, as these activities contravene international law;
7. *Demands* that Israel, the occupying Power, make available to Member States the necessary information about goods produced or manufactured in the illegal settlements in the Occupied Palestinian Territory, including Jerusalem;
8. *Stresses* that all Member States, in order to ensure their rights and benefits resulting from membership, should fulfil in good faith the obligations assumed by them in accordance with the provisions of the Charter of the United Nations;
9. *Emphasizes* the responsibilities, including personal ones, arising from persistent violations and grave breaches of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949;
10. *Recommends* that the High Contracting Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War convene a conference on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, and to ensure its respect, in accordance with common article 1, and requests the Secretary-General to present a report on the matter within three months; [...]

## D. UN Secretary-General's Report

[Source: United Nations, A/ES-10/16 and S/1997/798, 14 October 1997; available on [www.un.org](http://www.un.org)]

### **ILLEGAL ISRAELI ACTIONS IN OCCUPIED EAST JERUSALEM AND THE REST OF THE OCCUPIED PALESTINIAN TERRITORY**

**Report of the Secretary-General submitted in accordance  
with General Assembly resolution ES-10/3**

#### I. INTRODUCTION

1. The present report is submitted pursuant to resolution ES-10/3 adopted on 15 July 1997 by the General Assembly at its tenth emergency special session. [...]
2. In order to fulfil my reporting responsibilities, on 31 July 1997, I addressed a *note verbale* to the Permanent Observer of Switzerland to the United Nations requesting the Government of Switzerland, in its capacity as depositary of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, to provide me, in due course, with the necessary information.

## II. INFORMATION PROVIDED BY THE GOVERNMENT OF SWITZERLAND

3. On 7 October 1997, the Government of Switzerland conveyed to me the following information:

“In response to the note of the Secretary-General, the Government of Switzerland sought the views of the 188 States parties to the Fourth Geneva Convention. The notes addressed to the States parties stated, *inter alia*, the following:

‘It is the responsibility of the States parties to the Fourth Convention, after considering the recommendation addressed to them, to determine how they wish to follow it up. As depositary, the Swiss Government is interested in knowing their views. Therefore, the Embassy has the honour to consult the Ministry and to invite it to submit its comments on possible measures to follow up paragraph 10 of resolution ES-10/3, including comments on the convening of a conference, as recommended, and on the results that might thereby be achieved.’

“To date, 53 States parties to the Convention have sent written replies to the note requesting their views. These views are as follows:

[follows a list of opinions expressed by States, including:]

- One State said that it had ‘no objection to the proposal to convene a conference of experts from the interested parties, with a view to discussing the existing humanitarian problems in the Palestinian territory’. That State also felt that ‘another possible measure ... would be for the interested parties to appeal to the International Fact-Finding Commission (article 90 of Additional Protocol I of 1977). The Commission is competent to facilitate, through its good offices, the restoration of an attitude of respect for the 1949 Conventions’. That State believes, in that regard, ‘that the fact that Israel has not acceded to Additional Protocol I of 1977 should not prevent the Commission from resolving the issue on an *ad hoc* basis’. In the view of this State, ‘the implementation of either of these two measures would be a positive step and would encourage a normalization of the humanitarian situation in the Palestinian territory’. [...]
- One State thought it would be preferable, ‘given the delicate situation in the Middle East, to await progress on the efforts being made to bring about the resumption of the peace process, particularly at a time when meetings are planned in the near future between the parties directly involved’.
- One State wrote that it wished ‘to try to exchange views with other Governments in order to ensure that the convening of the conference at the current stage will not provoke further tensions in Israeli-Palestinian relations and will not endanger the fragile peace which has already been threatened by the outbreak of violence’. [...]

“Similarly, the Secretary-General of the League of Arab States sent a letter expressing ‘the approval of all the Arab countries of the contents of the letter from the Swiss



Government concerning the holding of such a conference', adding, in a subsequent letter, that 'the Arab countries would hope that this conference will be held as soon as possible in order to safeguard the interests of the Palestinian people'.

"Lastly, the Presidency of the Council of the European Union stated that it had been 'authorized by the 15 States members of the European Union, High Contracting Parties to the Geneva Conventions, to transmit a joint reply from the 15 member States concerning the follow-up to resolution ES-10/3, paragraph 10 of which provides for the convening of a conference'. In this joint reply, the member States said that they 'believe that the convening of a conference in the immediate future would, in the present circumstances, risk giving rise to additional complications unless it was carefully prepared'. The member States therefore suggested that 'the possibilities should be explored of convening a meeting of experts which would be charged with examining the political and legal context before a conference of the High Contracting Parties was convened. The meeting of experts could also examine the broader implications of such a conference'.

"Upon receipt of these collective replies, the depositary indicated that, out of a concern for clarity and precision, it would, as far as possible, like to be able to obtain individual replies from the States concerned. A number of those States acceded to the depositary's request and sent individual replies, included in the 53 mentioned above, along the lines of the reply sent by the body of which those States were members."

## **E. UN General Assembly Resolution ES-10/4**

[Source: UN Doc. A/RES/ES-10/4 (November 19, 1997); footnotes omitted; available on [www.un.org](http://www.un.org)]

### **RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY [without reference to a Main Committee (A/ES-10/L.3 and Add.1)]**

#### ***Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory***

*The General Assembly,*

*Having received* the report of the Secretary-General submitted in accordance with paragraph 10 of its resolution ES-10/3 of 15 July 1997, [...]

*Reiterating* the demands made in resolutions ES-10/2 and ES-10/3, [...]

*Having been informed* in the report of the Secretary-General of the responses of the High Contracting Parties to the Geneva Convention and of the collective responses transmitted through letters from the President of the Coordinating Bureau of the Movement of Non-Aligned Countries, the Secretary-General of the League of Arab States and the Presidency of the Council of the European Union, to the note sent by the Government of Switzerland in its capacity as the depositary of the Convention, [...]

*Gravely concerned* at the continuing deterioration of the Middle East peace process and the lack of implementation of the agreements reached,

*Reaffirming* that all illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, especially settlement activities, and the practical results thereof, cannot be recognized irrespective of the passage of time,

*Recalling* its rejection of terrorism in all its forms and manifestations in accordance with all relevant resolutions and declarations of the United Nations [...]

3. *Reiterates its recommendation* to the High Contracting Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War, to take measures on a national or regional level, in fulfilment of their obligations under article 1 of the Convention, to ensure respect by Israel, the occupying Power, of the Convention, as well as its recommendation to Member States to actively discourage activities that directly contribute to any construction or development of Israeli settlements in the Occupied Palestinian Territory, including Jerusalem, as these activities contravene international law;
4. *Reiterates also its recommendation* that the High Contracting Parties to the Geneva Convention convene a conference on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, and to ensure its respect in accordance with common article 1;
5. *Recommends* to the Government of Switzerland, in its capacity as the depository of the Geneva Convention, to undertake the necessary steps, including the convening of a meeting of experts in order to follow up on the above-mentioned recommendation, as soon as possible and with a target date not later than the end of February 1998;
6. *Requests* the Government of Switzerland to invite the Palestine Liberation Organization to participate in the above-mentioned conference and any preparatory steps for that conference; [...]

## **F. Press Release, Experts' Meeting, June 1998**

[Source: Federal Department of Foreign Affairs, Switzerland, Geneva, 11 June 1998; available on [www.dfae.admin.ch](http://www.dfae.admin.ch)]

### **Experts' meeting on the application of the Fourth Geneva Convention**

An experts' meeting on the application of the Fourth Geneva Convention was held at Sarasin Villa, near Geneva, from 9 to 11 June 1998. The meeting chaired by Switzerland brought together Israeli and Palestinian representatives in the presence of the International Committee of the Red Cross. The President of the Swiss Confederation, Flavio Cotti, took the opportunity to meet the delegations and express the support of the Swiss government for the ongoing efforts with regard to this important issue.

Bearing in mind several Emergency Session Resolutions of the General Assembly of the United Nations, Switzerland, depository of the Geneva Conventions, convened this meeting after having conducted extensive consultations with the High Contracting Parties and in particular with states and organisations concerned.

This meeting was the first part of a package of two measures proposed by Switzerland. The second measure, an experts' meeting of the High Contracting Parties of the Geneva Conventions on problems of the Fourth Geneva Convention (in general, and in particular in occupied territories), will be proposed in the early days of July. It is expected to take place in early autumn 1998.

Parties participating at the meeting held at Sarasin Villa agreed to hold their discussions in camera and to commonly issue the present press release.

Main issues regarding the application of the Fourth Geneva Convention have been raised. Significant conceptual differences have emerged concerning the implementation of the Fourth Geneva Convention, its relation with the peace process in the Middle East and the security environment.

The discussions have been frank and constructive and have been held in a spirit of respect and understanding. Israeli and Palestinian representatives have agreed to follow the three principles proposed by Switzerland for meetings on this issue:

- contribute to real improvements in the respect for the international humanitarian law on the ground;
- avoid any politicisation of international humanitarian law, and
- support the peace process in the Middle East.

The parties exchanged views on the feasibility of establishing mechanisms and taking concrete measures to implement the Fourth Geneva Convention. All delegations have reaffirmed that the Geneva Conventions are a core value of international law and have to be respected.

With a view to continuing the dialogue, the parties agreed to meet again to take into consideration ideas and suggestions that can foster respect of the Fourth Geneva Convention.

## **G. Chairman's Report, Experts' Meeting, October 1998**

[Source: Conference of States Parties to the Fourth Geneva Convention, experts' meeting on the Fourth Geneva Convention, Geneva, 27-29 October, 1998; available on [www.eda.admin.ch](http://www.eda.admin.ch)]

### **Experts' Meeting on the Fourth Geneva Convention**

**Geneva, 27-29 October 1998**

#### **Chairman's Report**

## **I. Introduction**

An experts' meeting on the Fourth 1949 Geneva Convention, Relative to the Protection of Civilian Persons in Time of War (the Fourth Convention), took place in Geneva from 27 to 29 October 1998. It was held in order to analyse general problems regarding the application of the Fourth Convention – in general and, in particular, in occupied territories –, to consider measures aimed at overcoming those problems and to examine the necessary means to implement such measures.

Representatives of 118 States Parties to the Fourth Convention and 15 delegations of observers took part in the Meeting. Participants were provided with a report for the Meeting prepared by the International Committee of the Red Cross.

The Meeting was convened by the Swiss authorities as part of a package of measures that emerged from a long consultation process with the States Parties to the Fourth Convention and the organisations most closely concerned, bearing in mind the message conveyed to the States Parties by an emergency special session of the United Nations General Assembly.

In his opening statement, which is attached to the present report, the Chairman pointed out that several delegations had expressed diverging views as to whether the Meeting constituted a preliminary step to the conference recommended in Paragraph 3 of resolution ES-10/5 of the General Assembly of the United Nations. He emphasised that the Swiss authorities deemed that the holding of this Meeting, which would not be devoted to any specific situation, should not in one way or another prejudice the positions of the States Parties with regard to the implementation of resolution ES-10/5 or possible recommendations that the General Assembly of the United Nations might make on these questions in the future. Indeed, it would be up to the States Parties to evaluate the results of the Meeting and to consider the advisability and modalities of possible subsequent action. [...]

At the end of the Meeting, the Chairman presented his summary of the discussions. This summary identifies general problems regarding the application of the Fourth Geneva Convention – in general and, in particular, in occupied territories –, considers a number of possible measures aimed at overcoming these problems and examines the means required to implement such measures. The summary is the Chairman's personal account of the Meeting, and is not binding on the delegations which participated at it.

\* \* \* \* \*

## **II. Chairman's summary**

### **1. General problems identified**

It emerged from the exchange of views and from the discussions that it is not technical problems that are hindering the application of the Fourth Geneva Convention but essentially political and legal disputes over its applicability:

- In today's armed conflicts the great suffering of the civilian population is most often not only the result of ignorance of the obligations contained

in the Fourth Geneva Convention, but of political and legal disputes over its applicability or the duration of its applicability. Such problems arise as a result of States Parties concerned denying the existence of an international armed conflict (or any armed conflict beyond that of a police operation or the struggle against terrorism), or contesting the legal status of certain territories, or claiming that the Convention lacks clarity on various issues, and so forth;

- The obligation of the States Parties to ensure respect for the Convention's rules in accordance with its Article 1, is frequently subordinated to considerations of political expediency;
- Parties to an armed conflict often fail to agree on the establishment of protected zones.

## **2. Identified violations of the Fourth Convention**

In the light of the general problems listed above, the following violations of the Fourth Convention were identified by the participants in particular. It emerges in particular that in many recent armed conflicts and in situations in occupied territories, civilians are no longer merely victims of hostilities but have become the actual target of them:

In armed conflicts in general:

- Killing, torture, rape, pillage, hostage-taking;
- Displacement of civilians not justified by security reasons;
- Repatriation of foreign nationals in violation of the principle of non-refoulement, or their detention under inhuman conditions;
- Violation of family rights;
- Refusal to grant providers of humanitarian assistance or religious personnel access to civilian victims, particularly children, women, the elderly, and the medically dependent;
- Deportation or expulsion of civilians, as in the practice of ethnic cleansing;
- Use of anti-personnel mines to terrorise civilians or to prevent their safe return;
- Destruction of hospitals and places of worship;
- Destruction of property without military justification;
- Destruction of the environment.

In occupied territories:

- Destruction of the economic and social structures of the occupied territory, failure to respect local customs, substitution of the occupying power's laws for those previously in force;

- Restrictions on the local population communication with the outside world, thus impeding the intellectual, economic and structural development of the occupied territory;
- Destruction of the cultural heritage;
- Deportation and displacement of civilians not justified by the safety of the civilians themselves or by imperative military considerations;
- Arbitrary detention;
- Confiscation and destruction of property not rendered absolutely necessary by military operations;
- Transfer by the occupying power of a part of its own population to the occupied territory, which could amount to the territory's gradual annexation;
- Ill-treatment of and violence against civilian populations, such as rape, torture, summary execution and measures of collective punishment – sometimes continuing.

### **3. Principal measures proposed by the States Parties to solve the problems and to prevent future violations**

On the basis of the identified violations of the Fourth Convention, the participants at the Experts' Meeting examined aspects of possible solutions and reviewed appropriate measures to implement such solutions. The participants proposed a series of concrete measures aimed at overcoming the problems encountered and to prevent future violations. Some of these measures explicitly require the States Parties to do everything to ensure full respect for the Fourth Convention in armed conflicts, in general and in occupied territories in particular. The participants were unanimous in underscoring the need for better implementation. Nevertheless, diverging views were expressed concerning some of the envisaged measures, in particular, those which were proposed in relation to specific situations. The measures which were discussed are the following:

- Ensure observance, in all circumstances and by all parties to an armed conflict, including the occupiers and the inhabitants of occupied territory, of the principles of humanity and of the dignity to which all human beings are entitled;
- Recognise that the humanitarian objective of the Fourth Convention, i.e. the protection of the civilian population during armed conflicts and in situations of occupation, must not be jeopardised by unduly narrow interpretations of the provisions defining the Convention's applicability;
- Ensure, both in international and non-international armed conflicts, full and non-selective respect for the Convention in accordance with Article 1 common to the 1949 Geneva Conventions;

- Accede to other instruments of international humanitarian law (IHL) protecting the civilian population in armed conflicts, such as the two Additional Protocols to the 1949 Geneva Conventions, Protocol II to the 1980 UN Convention on Certain Conventional Weapons as amended on 3 May 1996, and the 1997 Convention on the prohibition of anti-personnel mines;
- Encourage, through diplomatic dialogue, parties to an armed conflict to ensure respect for the Fourth Convention;
- Organise regular meetings of States Parties to examine, in the tradition of the humanitarian dialogue – for example, within the framework of Periodical Meetings as decided at the 26<sup>th</sup> International Conference of the Red Cross and the Red Crescent –, general problems regarding the application of the Fourth Convention;
- Organise meetings which would be attended by States or by entities particularly concerned as well as, when appropriate, by a certain number of States Parties to examine specific situations;
- Examine, both in general and in particular cases, the advisability of convening meetings of States Parties on specific situations for the purpose of determining *i.a.* if and to what extent such meetings can contribute to making concrete improvements to the fate of victims; and examine the modalities for convening and holding such meetings;
- Co-operate in taking sanctions and other coercive measures which would be decided by the Security Council in accordance with the UN Charter against States Parties which seriously and systematically violate the Convention, and in allocating just compensation to the victims;
- Prosecute on a national level individual violators, and support international efforts to try alleged perpetrators of war crimes, including through ratification of the Statute of the International Criminal Court;
- Recognise, where appropriate, the competence of the International Humanitarian Fact-Finding Commission pursuant to Article 90 of Additional Protocol I to the 1949 Geneva Conventions, or make use of the procedure which allows the Commission to open an inquiry with the consent of the parties to a conflict;
- Enact appropriate national legislation to prevent and repress violations of IHL, bearing in mind the availability of the ICRC advisory services;
- Establish programmes to disseminate IHL in armed forces and in civilian society, and support the activities of the ICRC and of the National Red Cross and Red Crescent Societies in this regard;
- Establish a mechanism allowing States Parties to exchange views and experiences in the field of dissemination;

- Encourage the United Nations to establish a programme for teaching IHL to peacekeeping forces that may also serve as a model for the dissemination of IHL in national armed forces;
- Establish national committees to assist different branches of government in the implementation of IHL;
- Support the activities of the ICRC and the National Red Cross and Red Crescent Societies, as well as those of the non-governmental organisations that provide humanitarian assistance.

Geneva, 11 December 1998

The Chairman of the Experts' Meeting on the Fourth Geneva Convention

Walter B. Gyger

## H. UN General Assembly Resolution ES-10/6

[Source: United Nations, A/RES/ES-10/6, 24 February 1999, footnotes omitted; available on [www.un.org](http://www.un.org)]

### **RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY [without reference to a Main Committee (A/ES-10/L.5/Rev.1)]**

#### ***Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory***

*The General Assembly, [...]*

3. *Reiterates* in the strongest terms all the demands made of Israel, the occupying Power, in the [...] resolutions of the tenth emergency special session, including the immediate and full cessation of the construction at Jebel Abu Ghneim and of all other Israeli settlement activities, as well as of all illegal measures and actions in Occupied East Jerusalem, the acceptance of the *de jure* applicability of the Fourth Geneva Convention and compliance with relevant Security Council resolutions, the cessation and reversal of all actions taken illegally against Palestinian Jerusalemites and the provision of information about goods produced or manufactured in the settlements; [...]



## **I. Declaration adopted by the Conference of High Contracting Parties to the Fourth Geneva Convention, 5 December 2001**

[Source: Declaration adopted at the Conference of High Contracting Parties to the Fourth Geneva Convention, 5 December 2001, published in *IRRC*, No. 847 (2002); available on [www.icrc.org](http://www.icrc.org)]

### **CONFERENCE OF HIGH CONTRACTING PARTIES TO THE FOURTH GENEVA CONVENTION**

**Geneva, 5 December 2001**

#### **DECLARATION**

1. This Declaration reflects the common understanding reached by the participating High Contracting Parties to the reconvened Conference of High Contracting Parties to the Fourth Geneva Convention. The Conference of 15 July 1999, recommended by United Nations' General Assembly Resolution ES-10/6 in an Emergency Special Session, issued a statement as follows: "The participating High Contracting Parties reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem. Furthermore, they reiterated the need for full respect for the provisions of the said Convention in that Territory. Taking into consideration the improved atmosphere in the Middle East as a whole, the Conference was adjourned on the understanding that it will convene again in the light of consultations on the development of the humanitarian situation in the field."
2. The participating High Contracting Parties express deep concern about the deterioration of the humanitarian situation in the field. They deplore the great number of civilian victims, in particular children and other vulnerable groups, due to indiscriminate or disproportionate use of force and due to lack of respect for international humanitarian law.
3. Taking into account art. 1 of the Fourth Geneva Convention of 1949 and bearing in mind the United Nations' General Assembly Resolution ES-10/7, the participating High Contracting Parties reaffirm the applicability of the Convention to the Occupied Palestinian Territory, including East Jerusalem and reiterate the need for full respect for the provisions of the said Convention in that Territory. Through the present Declaration, they recall in particular the respective obligations under the Convention of all High Contracting Parties (para 4-7), of the parties to the conflict (para 8-11) and of the State of Israel as the Occupying Power (para 12-15).
4. The participating High Contracting Parties call upon all parties, directly involved in the conflict or not, to respect and to ensure respect for the Geneva Conventions in all circumstances, to disseminate and take measures necessary for the prevention and suppression of breaches of the Conventions. They reaffirm the obligations of the High Contracting Parties under articles 146, 147 and 148 of the Fourth Geneva Convention with regard to penal sanctions, grave breaches and responsibilities of the High Contracting Parties.

5. The participating High Contracting Parties stress that the Fourth Geneva Convention, which takes fully into account imperative military necessity, has to be respected in all circumstances.
6. The participating High Contracting Parties see the need to recall basic humanitarian rules with regard to persons taking no active part in the hostilities, which shall be treated humanely without any discrimination, and to recall the prohibition at any time and in any place whatsoever of acts of violence to life and person, torture, outrages upon personal dignity and of arbitrary or extra-judiciary executions.
7. The participating High Contracting Parties express their support for the endeavours of the humanitarian relief societies in the field in ensuring that the wounded and sick receive assistance, and for the activities of the International Committee of the Red Cross (ICRC), the United Nations Relief and Works Agency in the Near East (UNRWA) and of other impartial humanitarian organisations. They also express their support for the efforts of the United Nations High Commissioner for Human Rights and of UN Special Rapporteurs in order to assess the situation in the field and they take note of the reports and recommendations [*sic*] of the High Commissioner for Human Rights (E/CN/4/2001/114) and of the Commission of Inquiry (E/CN/4/2001/121). [available on <http://www.ohchr.org>]
8. The participating High Contracting Parties call upon the parties to the conflict to ensure respect for and protection of the civilian population and civilian objects and to distinguish at all times between the civilian population and combatants and between civilian objects and military objectives. They also call upon the parties to abstain from any measures of brutality and violence against the civilian population whether applied by civilian or military agents and to abstain from exposing the civilian population to military operations.
9. The participating High Contracting Parties call upon the parties to the conflict to respect and to protect at all times the fixed establishments and mobile medical units of the Medical Services and to facilitate the operations of the humanitarian relief societies in the field, including the free passage of their ambulances and medical personnel, and to guarantee their protection.
10. The participating High Contracting Parties call upon the parties to the conflict to facilitate the activities of the ICRC, within its particular role conferred upon it by the Geneva Conventions, the UNRWA and of other impartial humanitarian organisations. They recognise and support their efforts to assess and to improve the humanitarian situation in the field. They invite the parties to the conflict to co-operate with independent and impartial observers such as the Temporary International Presence in the City of Hebron (TIPH).
11. The participating High Contracting Parties call upon the parties to the conflict to consider anew suggestions made at the meeting of experts of High Contracting Parties in 1998 to resolve problems of implementation of the Fourth Geneva Convention and to respect and to ensure respect in all circumstances for the rules of international humanitarian law and to co-operate within the framework of direct contacts, including procedures of inquiry and of conciliation. They encourage

any arrangements and agreements supported by the parties to the conflict on the deployment of independent and impartial observers to monitor, *inter alia*, breaches of the Fourth Geneva Convention as a protection and confidence building measure, with the aim to ensure effectiveness of humanitarian rules.

12. The participating High Contracting Parties call upon the Occupying Power to fully and effectively respect the Fourth Geneva Convention in the Occupied Palestinian Territory, including East Jerusalem, and to refrain from perpetrating any violation of the Convention. They reaffirm the illegality of the settlements in the said territories and of the extension thereof. They recall the need to safeguard and guarantee the rights and access of all inhabitants to the Holy Places.
13. The participating High Contracting Parties call upon the Occupying Power to immediately refrain from committing grave breaches involving any of the acts mentioned in art. 147 of the Fourth Geneva Convention, such as wilful killing, torture, unlawful deportation, wilful depriving of the rights of fair and regular trial, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly. The participating High Contracting Parties recall that according to art. 148 no High Contracting Party shall be allowed to absolve itself of any liability incurred by itself in respect to grave breaches. The participating High Contracting Parties also recall the responsibilities of the Occupying Power according to art. 29 of the Fourth Geneva Convention for the treatment of protected persons.
14. The participating High Contracting Parties also call upon the Occupying Power to refrain from perpetrating any other violation of the Convention, in particular reprisals against protected persons and their property, collective penalties, unjustified restrictions of free movement, and to treat the protected persons humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
15. The participating High Contracting Parties call upon the Occupying Power to facilitate the relief operations and free passage of the ICRC, UNRWA, as well as any other impartial humanitarian organisation, to guarantee their protection and, where applicable, to refrain from levying taxes and imposing undue financial burdens on these organisations.
16. The participating High Contracting Parties stress that respect for the Fourth Geneva Convention and international humanitarian law in general is essential to improve the humanitarian situation in the field and to achieve a just and lasting peace. The participating High Contracting Parties invite the parties concerned to bring the conflict to an end by means of negotiation and to settle their disputes in accordance with applicable international law.
17. The participating High Contracting Parties welcome and encourage the initiatives by States Parties, both individually and collectively, according to art. 1 of the Convention and aimed at ensuring the respect of the Convention, and they underline the need for the Parties, to follow up on the implementation of the present Declaration.

18. The participating High Contracting Parties express their gratitude to the Depositary of the Fourth Geneva Convention for its good services and offices.

## J. UN General Assembly Resolution ES-10/10

[Source: United Nations, A/RES/ES-10/10, 7 May 2002, available on [www.un.org](http://www.un.org)]

### **RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY [without reference to a Main Committee (A/ES-10/L.9/Rev.1)]**

#### ***Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory***

*The General Assembly, [...]*

5. *Calls* for the implementation of the declaration adopted by the Conference of High Contracting Parties to the Fourth Geneva Convention, reconvened in Geneva on 5 December 2001, through concrete action on the national, regional and international levels to ensure respect by Israel, the occupying Power, of the provisions of the Convention; [...]

## K. UN General Assembly Resolution ES-10/15

[Source: United Nations, A/RES/ES-10/15, 2 August 2004, available on [www.un.org](http://www.un.org)]

### **Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem**

[See **Case No. 123**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A]]

*The General Assembly [...],*

*Having received with respect* the advisory opinion of the Court on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, rendered on 9 July 2004 [See **Case No. 123**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory],

[...]

3. *Calls upon* all States Members of the United Nations to comply with their legal obligations as mentioned in the advisory opinion;
4. *Requests* the Secretary-General to establish a register of damage caused to all natural or legal persons concerned in connection with paragraphs 152 and 153 of the advisory opinion;

[...]

7. *Calls upon* all States parties to the Fourth Geneva Convention to ensure respect by Israel for the Convention, and invites Switzerland, in its capacity as the depositary of the Geneva Conventions, to conduct consultations and to report to the General Assembly on the matter, including with regard to the possibility of resuming the Conference of High Contracting Parties to the Fourth Geneva Convention;

[...]

## **L. UN General Assembly Resolution 64/10**

[Source: United Nations, A/RES/64/10, 1 December 2009, available on [www.un.org](http://www.un.org). Footnotes omitted.]

### **Resolution adopted by the General Assembly**

[...]

**64/10**

#### **Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict**

[See Case No. 124, Israel, Operation Cast Lead [Part II]]

*The General Assembly,*

*Guided by* the purposes and principles of the Charter of the United Nations,

*Recalling* the relevant rules and principles of international law, including international humanitarian and human rights law, in particular the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, which is applicable to the Occupied Palestinian Territory, including East Jerusalem,

[...]

*Recalling further* its relevant resolutions, including resolution ES-10/18 of 16 January 2009 of its tenth emergency special session,

*Recalling* the relevant Security Council resolutions, including resolution 1860 (2009) of 8 January 2009,

[...]

*Expressing its appreciation* to the United Nations Fact-Finding Mission on the Gaza Conflict, led by Justice Richard Goldstone, for its comprehensive report,

*Affirming* the obligation of all parties to respect international humanitarian law and international human rights law,

*Emphasizing* the importance of the safety and well-being of all civilians, and *reaffirming* the obligation to ensure the protection of civilians in armed conflict,

*Gravely concerned* by reports regarding serious human rights violations and grave breaches of international humanitarian law committed during the Israeli military

operations in the Gaza Strip that were launched on 27 December 2008, including the findings of the Fact-Finding Mission and of the Board of Inquiry convened by the Secretary-General,

*Condemning* all targeting of civilians and civilian infrastructure and institutions, including United Nations facilities,

*Stressing* the need to ensure accountability for all violations of international humanitarian law and international human rights law in order to prevent impunity, ensure justice, deter further violations and promote peace,

*Convinced* that achieving a just, lasting and comprehensive settlement of the question of Palestine, the core of the Arab-Israeli conflict, is imperative for the attainment of a comprehensive, just and lasting peace and stability in the Middle East,

1. *Endorses* the report of the Human Rights Council on its twelfth special session, held on 15 and 16 October 2009;
2. *Requests* the Secretary-General to transmit the report of the United Nations Fact-Finding Mission on the Gaza Conflict to the Security Council;
3. *Calls upon* the Government of Israel to take all appropriate steps, within a period of three months, to undertake investigations that are independent, credible and in conformity with international standards into the serious violations of international humanitarian and international human rights law reported by the Fact-Finding Mission, towards ensuring accountability and justice;
4. *Urges*, in line with the recommendation of the Fact-Finding Mission, the undertaking by the Palestinian side, within a period of three months, of investigations that are independent, credible and in conformity with international standards into the serious violations of international humanitarian and international human rights law reported by the Fact-Finding Mission, towards ensuring accountability and justice;
5. *Recommends* that the Government of Switzerland, in its capacity as depositary of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, undertake as soon as possible the steps necessary to reconvene a Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including East Jerusalem, and to ensure its respect in accordance with common article 1;
6. *Requests* the Secretary-General to report to the General Assembly, within a period of three months, on the implementation of the present resolution, with a view to the consideration of further action, if necessary, by the relevant United Nations organs and bodies, including the Security Council;

[...]

## M. UN General Assembly Resolution 64/92

[Source: United Nations, A/RES/64/92, 19 January 2010, available on [www.un.org](http://www.un.org). Footnotes omitted.]

### Resolution adopted by the General Assembly

*[on the report of the Special Political and Decolonization Committee (Fourth Committee)  
(A/64/406)]*

**64/92**

### **Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories**

*The General Assembly,*

[...]

*Recalling* the Regulations annexed to The Hague Convention IV of 1907, the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and relevant provisions of customary law, including those codified in Additional Protocol I to the four Geneva Conventions,

[...]

*Recalling* the advisory opinion rendered on 9 July 2004 by the International Court of Justice, and also recalling General Assembly resolution ES-10/15 of 20 July 2004,

*Noting* in particular the Court's reply, including that the Fourth Geneva Convention is applicable in the Occupied Palestinian Territory, including East Jerusalem, and that Israel is in breach of several of the provisions of the Convention,

*Recalling* the Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including East Jerusalem, held on 15 July 1999, as well as the Declaration adopted by the reconvened Conference on 5 December 2001 and the need for the parties to follow up the implementation of the Declaration,

*Welcoming* and encouraging the initiatives by States parties to the Convention, both individually and collectively, according to article 1 common to the four Geneva Conventions, aimed at ensuring respect for the Convention, as well as the efforts of the depositary State of the Geneva Conventions in this regard,

*Stressing* that Israel, the occupying Power, should comply strictly with its obligations under international law, including international humanitarian law,

1. *Reaffirms* that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967;

2. *Demands* that Israel accept the *de jure* applicability of the Convention in the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967, and that it comply scrupulously with the provisions of the Convention;
3. *Calls upon* all High Contracting Parties to the Convention, in accordance with article 1 common to the four Geneva Conventions and as mentioned in the advisory opinion of the International Court of Justice of 9 July 2004, to continue to exert all efforts to ensure respect for its provisions by Israel, the occupying Power, in the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967;
4. *Reiterates* the need for speedy implementation of the relevant recommendations contained in the resolutions adopted by the General Assembly at its tenth emergency special session, including resolution ES-10/15, with regard to ensuring respect by Israel, the occupying Power, for the provisions of the Convention;

[...]

## DISCUSSION

### I. Common Article 1

1. a. What does Art. 1 common to the Geneva Conventions require States Parties to do to “ensure respect” for international humanitarian law (IHL)? Does the UN General Assembly resolution demanding that Israel accept the *de jure* applicability of GC IV and respect its provisions constitute an implementation by the States Parties of their obligations under common Art. 1? For compliance with Art. 1, is it enough that they made such a demand even if Israel does not respect the above resolutions?
- b. How should States Parties implement Art. 1? How can they “ensure respect” for the Conventions? To act in conformity with Art. 1, what means must they use? What means may they use? What means may they not use?
- c. What do you think of the use of public opinion to exert pressure on States that are not fulfilling their obligations? Of confidential or public approaches by inter-governmental or non-governmental organizations? What if these methods fail?
- d. Do States violate Art. 1 if they uphold or authorize, on their territory, acts by people advocating violations of IHL?
- e. Under Art. 1, must or may States ban the import of goods produced by Israel in the settlements established in violation of GC IV, Art. 49(6) (as suggested in Part H, para. 3)?
- f. Does this obligation to “respect and ensure respect” for the Conventions derive only from the Conventions? Or is it also a general principle of IHL? Of treaty-based law? Does this principle apply to all multilateral treaties? [See **Case No. 153**, ICJ, *Nicaragua v. United States* [Para. 220]]

### II. UN General Assembly resolutions

2. a. What is the legal value of General Assembly resolutions? Does the reference to the resolution “Uniting for peace” (Resolution 377 (V) of 3 November 1950, available at [www.un.org](http://www.un.org)), in which the General Assembly states that it will take over the functions of the Security Council if the



latter is paralysed by the veto of a permanent member, reinforce this value? Does this mean that the States party to the Conventions do not need to respect the recommendations made in para. 10 of Part C? Does not each State have an individual obligation to ensure respect for the Conventions?

- b. Should the General Assembly have reminded the States Parties of their treaty obligations? Is it appropriate for the UN, which is neither a State party to the Geneva Conventions nor an implementing mechanism foreseen by them, to call for the application of common Art. 1? (P I, Art. 89)

### III. Conferences of States Parties

3. Why did Switzerland twice make preliminary inquiries about the idea of a Conference of all States Parties? What is the depositary State's role in the implementation of the Conventions? Does the depositary have a specific role in the event of violations? May the depositary convene a conference of the States Parties? In regard to the Conventions? In regard to Protocol I? (P I, Arts 7, 97 and 98) Under which conditions and for what purpose?
4.
  - a. Do not the States Parties have a legal interest in the treaties being respected? Is taking no action to "ensure respect" for IHL a violation of common Art. 1?
  - b. Are the legal arguments of the State that wishes to call on the International Fact-Finding Commission sound (*Part D*)? (P I, Art. 90) Does each State Party have an obligation to ask the Commission to hold an inquiry into ongoing violations? At least in cases where the Commission has jurisdiction? Is such a request by a State Party a means of fulfilling its obligation under common Art. 1? What could the Commission do in the present case? Are there facts that need to be established? Which?
  - c. What do you think of the replies by States that fear a negative impact on the peace process? Do they fear such an impact because the Conference may consider questions that are important for the peace process (*Part D*)? Or do they fear that a discussion on respect for IHL will cause the international community to lose sight of the main aim, which is the peace process? Can respect for IHL be an alternative to peace? Is lasting peace a realistic option before the violations of IHL have been redressed?
5.
  - a. Was it the aim of the meetings of June and October 1998 to implement the requests formulated by the General Assembly resolutions? Were there violations of these resolutions? Were they useful (*Parts F and G*)?
  - b. Did the meeting of October 1998 result in new conclusions or recommendations that go further than existing IHL (*Part G*)?
6.
  - a. Must common Art. 1 be implemented separately by each State Party? Which measures can be implemented separately? Which measures require collective action? Is a coordination of the measures taken by virtue of Article 1 necessary? Useful? How can this coordination be most effectively organized?
  - b. Is a conference of all States Parties a useful means of coordinating the measures taken by virtue of Art. 1? What are the opportunities and dangers of such a conference?
  - c. Do the Conventions provide for the organization of a conference of all States Parties? What about Protocol I? (P I, Art. 7) May such a conference deal with a specific context? Does treaty law provide for the organization of a conference of all States Parties? Are States obliged to participate? During these Conferences, may they make binding decisions?

- d. Could or must the conference mentioned in Part I and envisaged in Part K take place if Israel were not taking part? Is the objective of these conferences to discuss the violations committed by Israel or the obligations of third States?
- e. Did the Conference of States Parties of December 2001 result in new conclusions or recommendations that went beyond the scope of existing IHL? Did it have the expected impact on the situation in the Middle East? Would it have had a greater impact if all States Parties had participated (*Part I*)?
- f. Does the General Assembly resolution adopted after that Conference and requesting the application of the Declaration have a greater legal value? Does it have a greater impact (*Part J*)?
- g. What is the purpose of the conference envisaged in Part K? What is the purpose of the conference envisaged in Part L? Considering the situation in the Middle East, do you think that the organization of another Conference of States Parties is the best way of ensuring respect for IHL by Israel?
- h. What decisions could a Conference of States Parties make following the Goldstone Report? Could it enforce the report's recommendations? Could it impose any sanctions on Israel in response to the violations mentioned in the report (*Part L*)? [See **Case No. 124**, Israel, Operation Cast Lead [Part II.]]

**Case No. 140, Israel, Human Rights Committee's Report on Beit Hanoun**

[Source: Human Rights Council, Report of the high-level fact-finding mission to Beit Hanoun established under Council resolution S-3/1, A/HRC/9/26, 1 September 2008, footnotes omitted]

[...]

**HUMAN RIGHTS SITUATION IN PALESTINE AND OTHER  
OCCUPIED ARAB TERRITORIES****Report of the high-level fact-finding mission to Beit Hanoun  
established under Council resolution S-3/1****I. INTRODUCTION**

1. At its third special session, held on 15 November 2006, the Human Rights Council adopted resolution S-3/1, in which the Council among other things, called for a high-level fact-finding mission to be established and for the mission to travel to the town of Beit Hanoun in the occupied Palestinian territory of Gaza, following Israeli military operations carried out there around 8 November 2006. [...]
2. [...] The present report is the final report of the mission, following its trip to Beit Hanoun in May 2008.

**II. BACKGROUND**

[...]

**D. Applicable law**

10. In construing its mandate and the facts presented to it, the mission applied an international law framework, in particular international human rights law and international humanitarian law [...].
11. Gaza is under the effective control of Israel and is thus occupied by it. This control, including in the period since the disengagement of Israel in September 2005, has been described in a number of reports to the Council and to the General Assembly [...]. The mission was able to witness this control first-hand, not least in its own protracted difficulties in gaining access to the territory without Israeli cooperation. The mission also witnessed the constant surveillance of Gaza by Israeli forces, most strikingly from unmanned aerial drones. It was also able to see how Israel effectively controls basic aspects of the daily life of Gazans, notably through the fuel blockade in force when the mission visited the territory. [...]
12. As the occupying force, Israel has obligations towards the population in Gaza under both international human rights law and international humanitarian law, both of which are relevant to the shelling of Beit Hanoun. Israel is a party to six of the nine core international human rights instruments. The long-standing

position of United Nations human rights treaty bodies is that, as a State party to international human rights instruments, Israel continues to bear responsibility for implementing its human rights conventional obligations in the occupied Palestinian territory, to the extent that it is in effective control. This position is supported by the jurisprudence of the International Court of Justice which, in its advisory opinions on the South West Africa case and the legal consequences of the Construction of a Wall in the Occupied Palestinian Territory case, held that an occupying power remains responsible for fulfilling its obligations under the relevant human rights conventions in occupied territory.

13. In terms of international humanitarian law, Israel, as the occupying power, has responsibilities under, *inter alia*, the Hague Regulations (accepted as customary international law) and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.
14. The mission's mandate also encompasses the humanitarian law obligations of other parties to the conflict, the most relevant being militants launching rockets from Gaza into Israel (Council resolution S-3/1, para. 6). Under accepted customary international humanitarian law obligations, armed groups are bound by the obligations of common article 3 of the Geneva Conventions. They must respect and ensure respect of the principles of distinction, proportionality and the obligation to take the necessary precautions to avoid or minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. Aiming rockets at civilian targets is a violation of this obligation, as would be endangering Palestinian civilians by launching rockets from or near civilians (for example in residential areas).

### **III. THE SHELLING OF BEIT HANOUN ON 8 NOVEMBER 2006 AND ITS CONTEXT**

#### **A. Context**

15. Beit Hanoun is situated near the north-eastern border of the Gaza Strip, with more than 35,000 inhabitants, of which 70 per cent are registered refugees. As in the case of other Gazan towns and cities, the population density in the town is very high, with houses and apartment buildings of three to five stories predominating and a high number of inhabitants in each building. [...] The mission witnessed the widespread destruction of houses and property and the devastation of agricultural land in the border area as a result of Israeli incursions.

[...]

18. [...] [I]ncreased military activity added a climate of fear for an already fragile population. According to the Office for the Coordination of Humanitarian Affairs, from the disengagement until 9 November 2006, the Israeli military fired approximately 15,000 artillery shells and conducted more than 550 air strikes into the Gaza Strip. Israeli military attacks killed approximately 525 Gazans and injured 1,527. According to Israel, the majority of its military operations in Gaza are aimed

at stopping rocket-launching activity. Over the same period, at least 1,700 Kassam rockets were fired into Israel by Palestinian militants, injuring 41 Israelis.

19. Conflict reached a peak in the summer and autumn of 2006 with Israeli military incursions into Gaza, code-named “Summer Rains” and “Autumn Clouds” respectively, the latter focusing on Beit Hanoun in the week immediately prior to 8 November. [...] During the incursion, the Israeli military fired 239 artillery shells and launched 66 air-to-ground missiles into Gaza. Israel enforced a curfew confining residents to their homes that was lifted only every second day for three to four hours. Hundreds of male residents aged between 16 and 40 were ordered from their homes and taken to an Israeli holding centre to the north of the town for questioning. [...]
20. [...] The hospital in Beit Hanoun was inaugurated barely five weeks before the incursion. According to the World Health Organization, it was not fully operational at the time of the incursion and was designed as a centre for primary care and triage. The mission heard testimony from the hospital Director, a surgeon, a nurse and an ambulance driver. They told of the 24-hour work of the hospital during the incursion in conditions without water, telephone and grid electricity. The already grave situation was compounded as up to 1,500 people sought refuge in the hospital on 3 November, putting excessive demands on hospital staff to provide food and sleeping facilities. Access to and from the hospital was restricted by the Israeli military, hampering ambulances from fetching and transferring the injured. Two paramedics were killed during the military operation.

[...]

22. Accounts by United Nations relief agencies, international and Palestinian human rights groups put the number of Palestinians killed during the incursion (together with the victims of the 8 November attack) at between 77 and 82, including at least 39 civilians. Around 250 others were reportedly wounded, including at least 67 children and 58 women. One Israeli soldier died during the operation.

[...]

## **B. The events of 8 November 2006 and immediate aftermath**

24. [...] [T]he physical evidence of the attack appeared largely intact, as a consequence of both the enormous impact of a 155 mm shell in an urban area and the lack of significant repairs to damaged property. [...]
25. The shelling took place early on the morning of Wednesday, 8 November 2006, some 24 hours after the Israeli military withdrew from the town and concluded operation Autumn Clouds. Residents of Beit Hanoun, including the Al-Athamna family, were returning to normal life after the trauma of the incursion. Those interviewed by the mission spoke of the night of 7 November as being the first time they and their children could again “get a proper night’s sleep”. Another survivor noted that it was the first night she could bake bread. Another noted that it was the first time he could rise and pray at the mosque rather than at home.

26. At approximately 5.35 a.m., the first 155 mm shell from Israeli artillery hit a house in the heavily populated neighbourhood of al-Madakkha in northern Beit Hanoun. Over the following 30 minutes or so, a total of 12 shells struck an area of approximately 1.5 hectares along the western side of Hamad Street, which lies around 800 metres from the armistice line. The shells struck six houses as well as surrounding areas in Hamad Street and lanes between houses. Six shells fell on an area of 50 metres in diameter. The mission saw the extensive damage caused by the shells, including holes blasted through reinforced concrete walls and floors, and blast damage to surrounding buildings. Amateur video footage obtained by the mission shows the last three shells landing with intervals of around one minute and 15 seconds.
27. The victims of the shelling were either asleep in their homes or, as was the case with a number of the men, returning from morning prayer. Following the first shell, which hit a house killing and injuring people inside, most residents fled to the street. Once in the street, people congregated to assist those who had been injured. More shells then landed in the street and surrounding lanes, killing and injuring dozens more. A number of survivors ran into surrounding fields. Others indicated running towards the nearby Erez crossing, believing that the Israeli installation there would offer safety.
28. [...] Woken by the first shell, families fled their homes and assembled in the street outside, where dead and injured persons already lay. One mother described being faced with one of her children with an open skull wound while trying to help another son as he scooped his intestines back into his abdomen. Another spoke of helping his injured father to the door of the house, only for him to be killed by a direct shell at the door. As people gathered and attempted to provide assistance to the injured, more shells landed in the street. [...]
29. Some time after the first shell landed, the injured started to arrive by private vehicle at the Beit Hanoun hospital, most having lost limbs or requiring amputation. Within a short amount of time, 30 to 40 injured people arrived at the hospital. The director of the hospital declared an emergency and called for ambulances from across Gaza to assist. The first ambulance to reach the scene of the shelling itself came under fire, the driver and assistant being forced to abandon the vehicle. [...]
30. The shelling resulted in the immediate death or mortal wounding of 19 civilians, including seven children and six women. All but one of the victims were from a single family group, the Al-Athamna. Over 50 others were wounded during the attack.
31. A number of the more seriously injured required treatment that could not be provided in Gaza. Families of the injured ran directly to the Erez crossing to plead for Israeli approval to transport injured people to Israeli hospitals. According to survivors, approval to move some injured to Israeli hospitals was received only some 12 hours after the shelling. [...]

[...]

**C. The Israeli response and explanations for the shelling**

34. Following the shelling, the Prime Minister and Minister for Defense of Israel “expressed their regret over the deaths of Palestinian civilians in Beit Hanoun” and offered “urgent humanitarian assistance and immediate medical care for the wounded”. The Israeli military similarly expressed regret but stressed that “the responsibility for this rests with the terror organizations, which use the Palestinian civilian population as a ‘human shield’, carrying out terror attacks and firing Kassam rockets at Israeli population centres from the shelter of populated areas”. The Minister for Foreign Affairs said that “unfortunately, in the course of battle, regrettable incidents such as that which occurred this morning do happen”.
35. On 8 November 2006, Israel announced an inquiry into the shelling of Beit Hanoun earlier that day, intimating that the shells were not fired on civilian areas of Beit Hanoun intentionally but rather as a result of some technical error. Use of artillery in Gaza was halted pending the outcome of an investigation. It has been reported to the Mission that artillery has not been used in Gaza since 8 November 2006.
36. The Israeli military appointed an internal investigation committee of military staff headed by a senior officer. Some 15 months after the shelling, the committee presented its findings to the Military Advocate General, who then decided that “no legal action is to be taken against any military official regarding this incident”. According to a press communiqué issued by the Israeli Ministry of Foreign Affairs, the reasons for this decision were that:
  - (a) The shelling of civilians was not intentional;
  - (b) The error was “directly due to a rare and severe failure in the artillery fire-control system operated at the time of the incident” causing “incorrect range findings that lead, unknowingly, to fire at a different target than planned initially”;
  - (c) The malfunction was so rare that “it is not possible to point to a legal circumstantial connection, between the behaviours of the people involved in the incident and the result of the incident”.
37. Neither the report of the committee nor that of the Advocate General has been made public. [...]
38. The Israeli military appears to be of the view that, if an error is caused by malfunctioning technology, there can be no causal link (and thus no responsibility) on the part of individuals, be they designing, building or operating the technology. The Mission also notes that press reports of the investigation quote military sources as suggesting that “it would be worthwhile to look into whether the artillery battery team could have nonetheless avoided the incident through more proper performance, and careful monitoring of the equipment”. [...]
39. According to a number of sources, the Israeli military version of events on 8 November 2006 is as follows. On or at some time prior to 8 November, the military received information that rocket launching would take place from a field

near Beit Hanoun. "In an effort to disrupt and thwart the launching of rockets at Israeli population centers", Israeli artillery directed twenty-four 155 mm shells at two targets near Beit Hanoun. In the military's view, artillery shelling of a site of potential rocket launching is an effective deterrent. The first 12 shells landed in the correct location, however 6 of the second round landed 450 metres away from their intended target and resulted in the civilian casualties.

40. This view is in conflict with the information received by the mission. [...]
41. [...] Many expressed doubts as to claims that they had been shelled in error. More than one remarked that they "could believe one shell fired in error but not 12". Others indicated that the level of Israeli monitoring of Beit Hanoun (including by unmanned aerial drones as witnessed by the mission) is such that an error of this magnitude is highly unlikely. [...]
42. The mission strongly endorses the position put forward by others, particularly human rights organizations, that the use of artillery in urban areas, especially in densely populated urban settings such as Gaza, is wholly inappropriate and likely contrary to international humanitarian and human rights law. The risks of this practice were compounded by the reported reduction by the Israeli military of the "safety zone" for artillery shelling from 300 to 100 metres earlier in 2006. The 155 mm artillery shells fired on Beit Hanoun have an expected lethal radius of 50 to 150 metres and a casualty radius of up to 300 metres. Firing such a shell within 100 metres of civilians appears to the mission almost certain to cause casualties at one time or another. In litigation by human rights groups against the safety-zone reduction, it was reported that Israeli military officers "admitted that the new regulations put Palestinian lives at risk but insisted it would help strike back at Palestinian militants launching rockets at Israeli civilians".

#### IV. VICTIMS AND SURVIVORS

[...]

44. [...] The extremely difficult conditions of life facing all Gazans in many instances constitute gross violations of human rights and international humanitarian law. The mission agrees with the Secretary-General (SG/SM/11429), the previous Special Rapporteur (A/HRC/7/17) and the High Commissioner for Human Rights (A/HRC/7/76) that the blockade amounts to collective punishment contrary to international humanitarian law.

##### A. The protection of civilians in conflict and the right to life

45. [...] As noted by the Israeli Foreign Minister above, "regrettable incidents" do occur in battle; however, such incidents must be assessed in accordance with both the rules regulating recourse to force and international humanitarian law, the applicable *lex specialis*.

[...]



47. The primary rule of international humanitarian law is the protection of civilians. Article 43 of the Hague Regulations require the occupier to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety” in the occupied territory. According to Judge Higgins, President of the International Court of Justice, “the protection of civilians remains an intransgressible obligation of humanitarian law, not only for the occupiers but equally for those seeking to liberate themselves from occupation”. Nevertheless, the use of force with an impact on civilians is permissible if it is directed at a legitimate military target and is proportionate to the overall threat faced. The mission received no evidence that the shelled area of Beit Hanoun was a legitimate military target and notes that it had been occupied by Israeli military earlier in the week.
48. Israel has not claimed that the houses around Hamad Street were a military target but that the shelling was caused by technical error. The International Law Commission articles on the responsibility of states for internationally wrongful acts are silent on whether such a mistake relieves a State of its international responsibility for the commission of an internationally wrongful act and the requirement of fault in international law is controversial. [...]
49. The firing of artillery towards Beit Hanoun on the morning of 8 November 2006 was a deliberate act in the context of the long-term occupation of Gaza and of the deaths of civilians and destruction of property in Autumn Clouds. Taken together with further facts (such as the reduction of the safety zone for artillery use referred to above) and the nature of the “intransgressible obligation” to protect civilian life, the mission considers that there is evidence of a disproportionate and reckless disregard for Palestinian civilian life, contrary to the requirements of international humanitarian law and raising legitimate concerns about the possibility of a war crime having been committed.
50. Human rights law is also applicable in armed conflict and occupation. The mission considers that this reckless disregard for civilian life also constitutes a violation of the right to life as set out in article 6 of the International Covenant on Civil and Political Rights to which Israel is a party. The right to life includes the negative obligation to respect life and the positive obligation to protect life. The Human Rights Committee has stated that States parties should take measures not only to prevent and punish deprivation by criminal acts, but also to prevent arbitrary killing by their own security forces. No exception is made for acts during war.
51. The right to life also includes a procedural component that requires adequate investigation of any alleged violation “promptly, thoroughly and effectively through independent and impartial bodies” for “failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant”. The investigation of the Israeli military referred to above was not independent (it was carried out by a committee comprised of Israeli military personnel) and the lack of transparency makes it impossible to determine whether or not it was rigorous or effective. [...]

## **B. The situation of victims and the needs of survivors**

52. The needs of victims and survivors of the shelling include compliance by Israel with other human rights obligations, especially where failure to do so has an adverse impact on their recovery from the events of 8 November 2006. [...]

### **1. The right to physical and mental health**

53. Testimony demonstrated a number of violations of the obligation to respect and protect the right to the enjoyment of the highest attainable standard of physical and mental health. The Special Rapporteur has described the many ways in which the primary obligation to protect the right to physical and mental health has been severely undermined by the economic situation and the blockade of Gaza [...].
54. The situation in Beit Hanoun before and after the shelling has had a significant detrimental impact on the access of victims and survivors to adequate health care. [...]

[...]

56. [...] The obligation under the Covenant to respect the right to physical and mental health requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. Survivors told of the various ways in which Israeli authorities had failed to comply with this obligation, for example by refusing permission to return to hospitals in Israel and Egypt for follow-up treatment that had been prescribed by doctors. Testimonies included the following: "Once a month, I have to go to Israel to follow treatment. I spend a month getting my permit. Since the siege I can't go for follow-up." Another survivor could not return to Egypt to have shrapnel removed from wounds, nor could a woman whose foot had been blown off during the shelling return to Egypt to receive a prosthetic foot. [...]

[...]

### **3. Freedom of movement**

62. Freedom of movement is provided for in article 12 of the International Covenant on Civil and Political Rights, including individuals' freedom to leave any country, including their own. Together with other persons living in Gaza, survivors of the Beit Hanoun shelling have had their movements severely restricted by the occupation and the blockade. More directly, during the Autumn Clouds operation, a curfew was imposed on Beit Hanoun, which was thus isolated. The impact of these restrictions on access to health-care services has been discussed above. Being unable to move freely also contributes to feelings of isolation and can undermine mental health.

### **4. The situation of women**

63. The particular position of women and gender-specific harm may be invisible where a whole society is facing gross violations of human rights and of international

humanitarian law, as there is a sense of unity that prevents identification of and focus on women's situations. [...]

64. The mission heard testimony from both women survivors of the shelling and women's groups active in Gaza. Many spoke of the intrusions of the Autumn Clouds incursions on women's sense of privacy within the home. Where women have a more vulnerable social position and only limited freedom of movement in public, the private space of the home is especially important as a "women's space". Intrusion into the home by Israeli military personnel, sometimes for several hours, caused humiliation, loss of dignity, denied privacy and undermined women's sense of belonging and ownership. [...]
65. Autumn Clouds and the shelling on 8 November led to the destruction of a number of houses. Female victims told the mission that they destroyed "the only thing in the world" and that "life itself was destroyed" with the house. [...]
66. One woman told the mission that the sufferings of women "could not be divided" but noted that the particular effects and vulnerable social position of women had been worsened by the blockade and effects of the incursion and shelling; women are "the poorest of the poor" and unemployment is especially high among women, including women graduates. The burden of childcare falls on women, which is made more difficult when children are traumatized. Lack of specialized medical services and limited facilities for counselling mean that women receive little expert assistance. [...]

## **5. Access to justice and right to an effective remedy**

67. One of the major needs of survivors is to secure access to justice and redress. [...] In the Basic Principles and Guidelines on the Right to a Remedy, the General Assembly recognized that it is through honouring the victims' right to benefit from remedies and reparation that the international community keeps faith with the plight of victims and survivors. The survivors of the Beit Hanoun shelling have not been able to have access to justice. Victims have made recourse to the assistance of an Israeli lawyer for compensation from Israel, at this stage through court proceedings; however, they face many obstacles, including restrictions on their travel to Israel and legal costs. A number of people also spoke of their concerns about measures introduced recently into Israeli law that had the effect of limiting the ability of Palestinians harmed by Israeli military action to seek redress in Israeli courts.
68. The Israeli military internal investigation referred to above concluded that there would be no prosecutions of individuals or other disciplinary action arising from the shelling; therefore, no one has been held to account for the injuries suffered. [...]
69. Article 2 (3) of the International Covenant on Civil and Political Rights guarantees the right to an effective remedy for violations of the Covenant. The Basic Principles state that reparation for harm suffered should be "adequate, effective and prompt", and that victims seeking access to justice should receive proper assistance. These

standards were not observed. The mission was told of how the lack of financial resources prevented survivors from seeking further health care and from finding adequate housing where homes had been made uninhabitable. Some family members are living in rented accommodation and others have taken out loans, creating further financial strains. This also means that family members have been separated when they need mutual support.

70. There has been limited monetary assistance offered to some survivors of the Beit Hanoun shelling and immediate humanitarian assistance from UNRWA. The United Arab Emirates and the United Nations have assisted in the rebuilding of houses. To the best of the mission's knowledge, Israel has not paid compensation for the damage and harm caused by its internationally wrongful act. The requirements for reparations for victims of human rights abuses have not been satisfied. Other forms of monetary compensation (for example, for moral damage or lost opportunities) have not been offered.

[...]

## V. CONCLUSIONS AND RECOMMENDATIONS

[...]

75. **The violence in Gaza and southern Israel has led to countless violations of international human rights and international humanitarian law. [...] The people of Gaza must be afforded protection in compliance with international law and, above all, the Fourth Geneva Convention. [...] In the absence of a well-founded explanation from the Israeli military (who is in sole possession of the relevant facts), the mission must conclude that there is a possibility that the shelling of Beit Hanoun constituted a war crime as defined in the Rome Statute of the International Criminal Court. Similarly, as the mission made clear to Hamas at the highest level, the firing of rockets on the civilian population in Israel must stop. Those in positions of authority in Gaza have not only an international humanitarian law obligation to respect international humanitarian law norms relating to the protection of civilians, but also a responsibility to ensure that these norms are respected by others.**
76. [...] There has been no accountability for an act that killed 19 people and injured many more. [...] The mission repeats its position that, regardless of whether the casualties at Beit Hanoun were caused by a mistake, recklessness, criminal negligence or wilful conduct, those responsible must be held accountable. It is not too late for an independent, impartial and transparent investigation of the shelling to be held; indeed, the mission notes other instances in which the courts have ordered the Israeli military to open investigations into the killings of civilians by the military. [...]
77. **As the mission has repeatedly stressed (including to representatives of Hamas), those firing rockets on Israeli civilians are no less accountable than the Israeli military for their actions [...].**

78. **Accountability involves providing a remedy and redress for victims. To date, neither has been forthcoming from Israel, despite its admission of responsibility for the attack. [...] While the mission calls on Israel to remove these obstacles, it is of the view that victims should not be forced to fight for compensation through Israeli courts when all accept that damage was inflicted on individuals by the State. The mission recommends that the State of Israel pay victims adequate compensation without delay. In the light of the magnitude of the attack on a small community, and in addition to compensation to individuals, the mission also recommends that Israel make reparation to the community of Beit Hanoun in the form of a memorial to the victims that constitutes a response to the needs of survivors. [...]**
79. **[...] Israel, Hamas and the Palestinian Authority have human rights obligations towards the victims. [...] A major barrier to the enjoyment of human rights is the ongoing blockade that limits individuals' ability to provide an adequate standard of living for themselves and their families and the capacity of local authorities to provide essential services for the population. A central need of victims is access to health services. Israel must desist from obstructing victims' access to health-care services, be it through restricting the flow of medical goods and personnel into Gaza, or through restricting victims' ability to leave Gaza to seek health care elsewhere.**
80. **[...] [O]ne of the most effective and immediate means of protecting Palestinian civilians against any further Israeli assaults is to insist on respect for the rule of law and accountability. We have seen that even the flawed Israeli investigation into the Beit Hanoun shelling resulted in a decision to discontinue use of artillery in Gaza, one of the main causes of civilian death and injury in the territory. The knowledge that their actions will be scrutinized by an independent authority would be a powerful deterrent to members of the Israeli military against taking risks with civilian lives.**

[...]

## DISCUSSION

### I. Qualification of the conflict and applicable law

1.
  - a. How would you qualify the situation prevailing in Gaza in November 2006? How does the fact-finding mission qualify it (*para. 11*)? Do you agree? (GC I-IV, Art. 2; HR, Art. 42)
  - b. What are the arguments in favour of the existence of a *de facto* occupation of Gaza by Israel?
  - c. Are the same rules applicable to the killing of civilians during the Israeli incursion into Beit Hanoun and one day after the Israeli withdrawal from Beit Hanoun? According to the mission? In your opinion?
2. (*Paras 13-14*)
  - a. What is the law applicable to the shelling? According to the mission? According to you? Does it make a difference whether the territory is occupied or not?

- b. The mission's report makes no mention of Protocol I; does this mean that the rules on the conduct of hostilities contained in that Protocol do not apply to the situation under consideration here? Which provisions contained in Protocol I can be said to be customary?
- c. Why are Palestinian militants bound by common Art. 3? Why does common Art. 3 prescribe respect for the principles of distinction and proportionality and for the obligation to take the necessary precautions to avoid or minimize incidental loss of civilian life, injury to civilians and damage to civilian objects? Why does it prohibit launching rockets from or near civilians?
- d. Is it conceivable that the Israeli shelling of Gaza is governed by the IHL of international armed conflicts, but the shelling of Israeli towns and villages from Gaza by the IHL of non-international armed conflicts?

## II. Conduct of hostilities

- 3. Does the mission consider that the shelling violated IHL? On what basis?
- 4.
  - a. (*Para. 47*) Does the mission consider that the town of Beit Hanoun was a legitimate military target? What is your opinion? How do you define a legitimate military target? (P I, Art. 51(2))
  - b. Does the fact that Palestinian attacks were allegedly launched from the town render it a legitimate military target? What if a member of the armed group had been present in the town that night? (P I, Arts 48 and 51(2))
  - c. (*Para. 34*) Would the use of the town of Beit Hanoun as a shield for the launching of rockets entitle the Israeli armed forces to deliberately target it? Would it have been different if the residents were voluntarily protecting the Palestinian militants launching rockets? (P I, Arts 51(7) and (8) and 58)
- 5.
  - a. Did the shelling comply with the proportionality principle? According to the mission? In your opinion? What if the town actually was shelled in error? Must the proportionality assessment be based on the actual or the expected result of the attack? (P I, Arts 51(5)(b) and 57(2)(a)(iii))
  - b. Taking into account the likelihood that civilians would be affected by the shelling, even if the shells were in fact aimed at the field, do you think that the number of casualties could be argued not to be excessive compared with the direct military advantage? Would it have made a difference to the proportionality assessment if the Israeli armed forces had also killed Palestinian militants launching rockets during the shelling?
- 6.
  - a. (*Para. 38 onwards*) Which precautionary measures must a party take before launching an attack? Were they taken here? Do you think enough precautions were taken? How could the error have been avoided? Do you agree with the mission that the shelling should be investigated in order to check whether it could have been avoided "through more [...] careful monitoring of the equipment" (*para. 38*)? (P I, Art. 57)
  - b. Are artillery attacks on densely populated urban areas prohibited by IHL? At least in occupied territories? How should Israel react when it is shelled from a place near a populated urban area?
  - c. What should the reaction of the armed forces have been when they realized that they were hitting the town and not the field (*para. 26*)? (P I, Art. 57(2)(b))

## III. Occupation

- 7. Does Art. 43 of the Hague Regulations protect civilians against attacks?
- 8. If Beit Hanoun was occupied when the shelling took place, should not Israel have tried to arrest the persons launching the rockets rather than to shell them?

9. a. What are the obligations of an occupying power regarding public health in the occupied territories? Was Israel in conformity with its obligations under IHL when it restricted access to and from the Beit Hanoun hospital during the incursions which took place before the shelling (*para. 20*)? (GC IV, Arts 55-57)
- b. Has Israel violated its obligations in refusing injured civilians access to its own hospitals, in view of the fact that the local health facilities could not meet the demand (*para. 31*)? If Beit Hanoun is in occupied territory? If it is not?
10. Do inhabitants of an occupied territory have a right to leave that territory? Under IHL? Under international human rights law?

#### IV. IHL and Human Rights Law

11. a. (*Para. 50 onwards*) Is international human rights law applicable in armed conflicts? In occupied territories? To the shelling on foreign territory of a town that is not occupied?
- b. Is the Human Rights Council applying IHL in the present case? Would it be entitled to do so? What could the consequences be if the Council was pointing at precise violations of IHL?
12. a. Which specific human rights are mentioned in the mission's report? Are they also protected by IHL? What are the obligations of an occupying power regarding those rights? Would it make a difference if the territory was not occupied? From an IHL point of view? From a human rights law point of view?
- b. Do human rights, if applicable, add anything to IHL in terms of the rules applicable to the shelling of Beit Hanoun?

#### V. Responsibility for Violations

13. (*Para. 36*) Do you agree with the Israeli authorities that no one can be held accountable for the shelling of civilians, as it was not intentional but was the result of a malfunction? (P I, Art. 57)
14. Must a belligerent conduct an enquiry every time its armed forces have killed civilians? Under IHL? Under international human rights law? Which of the two branches of law prevails in such a case, and why? May such an enquiry be conducted by members of the belligerent's own armed forces? Must the result be made public? What legitimate reasons could there be for not making the result public?
15. a. Does IHL require reparation/compensation for violations committed by the parties in the course of an armed conflict? What are the provisions applicable in the present case? To whom must this compensation be paid? (Hague Convention IV, Art. 3; P I, Art. 91)
- b. Must a belligerent pay compensation for the deaths of civilians killed by mistake? For civilians killed as incidental casualties in an attack complying with the proportionality principle? Even if all precautionary measures prescribed by IHL were taken?
- c. May a State responsible for IHL violations leave the determination of reparations to its own courts? Even if the victims are on enemy territory?
16. (*Para. 68*) According to IHL, is Israel under the obligation to search for and prosecute the members of its armed forces who allegedly committed violations of IHL?
17. (*Paras 49 and 75*) Do you agree with the mission's conclusion that the shelling may have amounted to a war crime as defined in Art. 8 of the ICC Statute?

**Case No. 141, United Kingdom, Position on Applicability of Fourth Convention**

[Source: Extract from "United Kingdom Materials on International Law," *The British Yearbook of International Law* LXIX (1998), pp. 598-600]

The following observations were made by Mr M. Eaton, Deputy Legal Advisor, FCO, at an Experts' Meeting on the Fourth Geneva Convention on Humanitarian Law, held in Geneva on 27-29 October 1998:

Greatest problem in relation to implementation of the GCIV is that of refusal to recognise its applicability. As ICRC says "when confronted with situations in which the Convention should be applied, the States party to it almost invariably cite some grounds or other on which in their view it is not applicable".

Has also been rightly said "The law of belligerent occupation has had a poor record of compliance for most of the twentieth century. The principal problem has been the reluctance of States to admit that the law applies at all." This is not a problem of a single situation of occupation – it is a widespread and long observed phenomenon. But, since a particular current occupation situation has frequently been mentioned here, I wish to state that the British position on the *de jure* application of the Convention to the territories occupied by Israel after 1967 is well-known, and does not need to be rehearsed.

Unfortunately the question of applicability of GCIV is very frequently bedevilled and confused by that of title to the territory in question. If applicability of the law were dependent on the resolution of underlying questions of title it would almost never be applied.

In fact the law does not make it a precondition that the territory occupied must have belonged to the displaced sovereign prior to occupation. It might appear so from GCIV Article 2 (2): "The Convention shall apply in all cases of partial or total occupation of the territory of an HCP, even if the occupation meets with no armed resistance."

But this is not the primary criterion for application. It is, rather, a residual role. The *primary* rule is in Article 2 (1): "The Convention shall apply to all cases of declared war or other armed conflict."

So if, during an armed conflict, a state takes military control of a territory it did not control before the conflict the Convention is applicable, whatever the underlying disputes about title.

To restate a very well-known, yet often not-respected, principle of IHL [International Humanitarian Law], the application of IHL is not concerned with the rights and wrongs and origins of the conflict. The sole question is, is there an armed conflict, international or internal? If so, the relevant rules of IHL apply. Of course, that question itself is not always easy to answer, but my point is that the application of IHL depends upon a factual situation of occupation. For the sake of the civilians caught up in the situation it needs to be applied notwithstanding legal arguments over status, whether of territory or of parties to the conflict. The drafters of the Convention did their best to exclude such arguments. It is sad that they are still used to justify its non-application.



If I may be permitted a personal reminiscence of the Protocol I negotiations in the Third Committee of the Diplomatic Conference of 1974-77 [...]: there was a proposal to characterise occupation as inherently wrong.

It was resisted by the Rapporteur, Ambassador George Aldrich of the USA, who recalled that his country, with France, the Soviet Union and the UK was an occupying power in Berlin and he saw nothing wrong in that. The proposal was promptly dropped.

So it is not occupation *per se* that offends against IHL (I leave aside other legal questions of use of force etc). It is refusal of occupants fully to apply the rules of IHL to the occupied territory as a matter of law. There is no particular weakness in the law, save that it is not applied.

To state this is easy. To put it into practice very hard, because neither the Fourth Convention nor Additional Protocol I sets up an independent arbiter to determine when they apply. It is not the job of the ICRC. The international community and HCPs individually or collectively, indeed, should say what they think. But ultimately it depends on the political will of the HCP concerned in any given situation of occupation.

Of course it is welcome when the Convention is applied voluntarily and *de facto* in situations where there is dispute as to its application *de jure*, even if such application is only partial. If civilians *in practice* are protected that is the most important thing. But it can never be a completely satisfactory substitute for *de jure* application, being both partial and dependent upon a consent which can always be withdrawn.

Finally, it has been suggested that the law of belligerent occupation is ill-suited to long-running occupations of the kind we have seen relatively often since 1945, being essentially designed for temporary situations. There is some force in that. It is possible to pick out particular GCIV provisions which are hard to apply in a long-running occupation. But what do you put in its place? Any change which recognises a permanency to the situation, or gives occupying power greater power to make changes there, would tend to legitimize the substitution of the occupant for the former sovereign power.

So, once again it does not seem to my delegation that there is any need to embark on the difficult exercise of trying to agree new provisions to apply in long-running occupations. Better to apply the existing law, which is in our view elastic enough. None of the difficulties of application is insuperable.

(Text provided by the FCO)

## DISCUSSION

1. a. How does the Occupying Power justify the non-applicability of Convention IV? Is the dispute over title to the territory in question a defensible justification of the non-application of Convention IV? (GC I-IV, common Art. 2)
2. Would characterizing occupation as inherently wrong be a realistic solution?
3. Would third party determination on when Convention IV applies resolve the problem of classification? Has the determination been left to the political will of the occupying power concerned?

4. a. Should Convention IV be amended in order to adapt it to long-term occupation? Why or why not?
- b. Do you agree that the existing law is “elastic enough” to cover both short and long-term occupation?

**Document No. 142, Switzerland, Prohibition of Deportation  
from Israeli Occupied Territories**

[Source: "Le droit de la guerre" in *Annuaire Suisse de Droit International*, 1989, p. 248; original in French, unofficial translation.]

**10.2 Prohibition on expelling and deporting the population of an occupied territory.  
Applicability to the territories occupied by Israel of the Geneva Convention  
relative to the Protection of Civilian Persons in Time of War.**

The following note was drawn up by the Directorate for Public International Law. It relates to the lawfulness of the expulsion and deportation to Lebanon of four Palestinian activists from the West Bank of the Jordan.

1. Notwithstanding Resolution 607 (1988) adopted unanimously by the Security Council on 5 January, which obliges Israel to refrain from deporting Palestinian civilians from the occupied territories and calls upon it to meet the obligations imposed upon it by the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter referred to as the Fourth Convention), the Israeli authorities expelled four Palestinian activists from the West Bank and deported them to Lebanon.

The question arises as to the lawfulness of such a measure with regard to international law and the Fourth Convention in particular. To resolve that matter, consideration should first be given to the question of whether [that Convention] applies to the territories which have been occupied by Israel since 1967.

2. Israel has always disputed the applicability in law of the Fourth Convention in the occupied territories, proceeding from a literal interpretation of the second paragraph of Article 2 of that Convention under which

The Convention shall also apply to all cases of partial or total occupation of the *territory of a High Contracting Party*, even if the said occupation meets with no armed resistance.

The Israeli argument is that in cases of occupation that instrument covers only situations where the ousted power enjoys legitimate sovereignty and that that was not the case with regard to the Kingdom of Jordan which had, from 1950 to 1967, annexed the West Bank in violation of the 1949 Armistice Agreement.

By contrast, the overwhelming majority of the international community (including the United States) has always maintained that the Fourth Convention is applicable *de jure* in accordance with the first paragraph of Article 2 which stipulates that

the present Convention shall apply to all cases of declared war or of any other *armed conflict which may arise between two or more High Contracting Parties*, even if the state of war is not recognized by one of them.

However, it is precisely as a result of such a conflict (the Six Day War) between the States Parties to the Fourth Convention (Israel and Jordan) that Israel occupied

the West Bank. That interpretation, which is based essentially on the aim of the Fourth Convention – to grant special protection to civilians who take no part in the hostilities – is further borne out by Article 4 which states that

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Thus, there is a widely accepted opinion that the Fourth Convention does apply in the occupied territories with regard to anyone other than Israeli citizens. Incidentally, the meaning of occupation is defined in Article 32 [*sic*] of Hague Convention No. 4 of 18 October 1907 Respecting the Laws and Customs of War, i.e. territory is considered occupied when it is actually placed under the authority of the hostile army.

However, the question of the applicability in law of the Fourth Convention would appear to be a theoretically one and may remain unresolved as Israel has always declared that it intends to apply it *de facto* in the occupied territories. The Israeli delegate repeated as much to the Security Council on 16 December 1987 in that he said: However, we have decided, since 1967, to act *de facto* in accordance with the humanitarian provisions of that Convention.

Therefore, consideration must be given to the question of whether or not the expulsion of the four Palestinian civilians constitutes a violation of the Fourth Convention.

3. The first paragraph of Article 49 of the Fourth Convention specifically prohibits individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, regardless of their motive. It is an absolute prohibition to which there are no exceptions other than the derogation provided for in the second paragraph (temporary total or partial evacuation of a given area if the security of the population or imperative military reasons so demand). Article 78 dispels any remaining doubts that might exist on the lawfulness of such a decision:

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

In other words, the maintenance of law and order cannot justify any measure taken in that respect, even against activists. In particular, forcible evacuation is among the measures prohibited by the Convention. In this context it should not be forgotten that the very clear prohibition on such practices is due to the tragic experience of the Second World War. The fact that mere expulsions and not collective evacuations are involved alters nothing in terms of their legal nature. The above-mentioned Article 49 prohibits any individual or mass forcible transfers.

Although the Fourth Convention reserves the right of the occupying power to subject the population to criminal provisions which it deems essential for the orderly government of the territory, the criminal provisions laid down and implemented by the occupying power may not pose any obstacle to the clearly stated prohibition on deportations.

Therefore, it would appear that by evacuating four Palestinian civilians – irrespective of whether or not they were agitators – Israel contravened the Fourth Convention. Moreover, it is a grave breach within the meaning of Article 147 which deems unlawful deportation or transfer to constitute such a breach. It is in those terms – grave breach – that the International Committee of the Red Cross publicly condemned the recent Israeli decision.

Note of the Directorate for Public International Law of the Federal Department of Foreign Affairs dated January 20, 1988.

*Unpublished document.*

**Case No. 143, Amnesty International, Breach of the Principle of Distinction****A. Amnesty International Report Calls on Palestinian Armed Groups to Stop Civilian Killings**

[Source: Amnesty International, "Amnesty International report calls on Palestinian armed groups to stop civilian killings" AI INDEX: MDE 15/104/2002, PRESS RELEASE, 11 July 2002 ; available on <http://www.amnesty.org>]

**PRESS RELEASE-AI INDEX: MDE 15/104/2002****11 July 2002**

[...]

Since the beginning of the *Al-Aqsa intifada* in September 2000 at least 350 civilians, most of them Israeli, have been killed in over 128 attacks by Palestinian armed groups and Palestinian individuals, Amnesty International documented in a report launched in Gaza.

The report "*Without distinction: attacks on civilians by Palestinian armed groups*" is the seventh major report on the human rights situation in the region published by the organization since the beginning of the *intifada*.

*"Whatever the cause for which people are fighting, there can never be a justification for direct attacks on civilians,"* said Amnesty International.

The victims of these attacks ranged from children as young as five months to elderly people. The oldest was Chanah Rogan, aged 90. She was killed in the bombing of a hotel at the celebration of Passover on 27 March 2002 in Netanya. Most victims were killed by suicide bomb attacks within Israel claiming 184 victims of the 350 civilians killed.

Palestinian armed groups offer a variety of reasons for targeting Israeli civilians from retaliating against Israeli killing of Palestinian civilians to fighting an occupying power. Other justifications claim that Israeli settlers are not civilians or that striking at civilians is the only way to make an impact on a powerful adversary.

Under international law there is no justification for attacking civilians. Targeting civilians is contrary to fundamental principles of humanity enshrined in international law which should apply in all circumstances at all times. Amnesty International unreservedly condemns attacks on civilians, whatever reason the perpetrators give to their action.

*"Civilians should never be the focus of attacks, not in the name of security and not in the name of liberty. We call on the leadership of all Palestinian armed groups to cease attacking civilians, immediately and unconditionally,"* Amnesty International stressed.

The organization urges the Palestinian Authority to arrest and bring to justice those who order, plan or carry out attacks on civilians. The Palestinian Authority and Israel have a duty to take measures to prevent attacks on civilians. Such measures must always be in accordance with international human rights standards.

Amnesty International also calls on Israel to ensure that all its actions against armed groups and individuals suspected of involvement in attacks against civilians comply with international human rights and humanitarian law standards. Amnesty International calls on the international community to assist the Palestinian Authority to improve the effectiveness of its criminal justice system and its compliance with international human rights standards, in particular by offering international experts to advise on and monitor investigations into attacks against civilians and legal proceedings against those alleged to be responsible.

A growing number of Palestinians believe that targeting civilians is morally wrong. Amnesty International welcomes Palestinian and other voices who publicly condemn attacks on civilians and urges Palestinians and people around the world to appeal to armed groups to end attacks on civilians.

*Background:*

Amnesty International has for many years documented and condemned violations of international human rights and humanitarian law by Israel directed against the Palestinian population of the Occupied Territories. They include unlawful killings, extra-judicial executions, torture and ill-treatment, arbitrary detention and collective punishments such as punitive closures of areas and destruction of homes.

Palestinian armed groups and Palestinian individuals who may not have been acting on behalf of a group are estimated to have killed more than 350 civilians since the 29 September 2000. Among the victims were over 60 children and 64 of the people killed were older than 60 years of age.

Of the 128 lethal attacks against civilians studied by Amnesty International in this report 25 were committed by people who had strapped explosives to themselves and died in the attacks. On six other occasions civilians were killed by explosives that were planted, thrown or fired. Other incidents involved shootings and stabbing.

The great majority of attacks took place in the Occupied Territories. While there were far fewer attacks within Israel, they claimed 210 victims of the 350 civilians killed.

Armed groups reportedly claimed responsibility for about half of the lethal attacks on civilians of the 128 attacks surveyed by Amnesty International. The main groups involved were *Izz al-Din al-Qassam Brigades (Hamas)*, *Al-Aqsa Martyrs Brigade*, *Palestinian Islamic Jihad* and the *Popular Front for the Liberation of Palestine (PLPF)*.

The UN General Assembly has recognized the legitimacy of the struggle of peoples against foreign occupation in the exercise of their right to self-determination and independence. However, international law requires all parties involved in a conflict to always distinguish between civilians and people actively taking part in the hostilities. They must make every effort to protect civilians from harm.

## B. Amnesty International, Without Distinction

[Source: Amnesty International, ISRAEL AND THE OCCUPIED TERRITORIES AND THE PALESTINIAN AUTHORITY *Without distinction – attacks on civilians by Palestinian armed groups*. AI INDEX: MDE 02/003/2002, 11 July 2002. Footnotes are not reproduced; available on <http://www.amnesty.org>]

[...]

### Attacks on civilians as a violation of basic principles of international humanitarian law

[...]

#### Civilians and combatants

[...] Palestinian armed groups and their supporters have suggested that the prohibition on attacking civilians does not apply to settlers in the Occupied Territories because the settlements are illegal under international humanitarian law; because settlements may have military functions; and because many settlers are armed.

Many settlements do indeed have military functions. Settlements account for one third of the total area of the Gaza Strip. Each of these settlements holds military bases and are heavily militarily defended. Although the militarization of settlements is strongest in Gaza, some of the settlements in the West Bank also have military functions. The IDF [Israeli Defence Forces] may use them as staging posts for their operations or to detain people in their custody. A large number of settlers are armed and settlers have sometimes attacked Palestinians and destroyed Palestinian houses and other property. However, settlers as such are civilians, unless they are serving in the Israeli armed forces.

*Fatah* considers attacks against settlers within the Occupied Territories to be legitimate. *Fatah* Secretary General Marwan Barghouti has stated to Amnesty International delegates that *Fatah* considers that no Israelis in the West Bank and Gaza are civilians because “it is all an occupied country” and Palestinians are fighting for their independence. He has also stated publicly that while he and the *Fatah* movement oppose attacking civilians inside Israel, “our future neighbour, I reserve the right to protect myself and resist the Israeli occupation of my country and to fight for my freedom.”

Israeli settlements in the Occupied Territories are unlawful under the provisions of international humanitarian law. The Fourth Geneva Convention prohibits the transfer of civilians from the occupying power’s territory into the occupied territory (Article 49 (6)). However, the unlawful status of Israeli settlements does not affect the civilian status of settlers. Settlers, like any other civilians, cannot be targeted and only lose their protection from attack if and for such time as they take a direct part in hostilities (Article 51 (3) Protocol 1). Similarly, Palestinian residents of the West Bank and Gaza are civilians benefiting from the protection of the Fourth Geneva Convention unless and for such time as they take direct part in hostilities. [...]

## DISCUSSION

1. How do you qualify the conflict with which this case is concerned? Is it an international armed conflict? Are there hostilities between two High Contracting Parties? If not, why would the IHL of international armed conflict be applicable? Because it is a war of national liberation within the meaning of Art. 1(4) of Protocol I? Even though Israel is not party to the Protocol? Because of the



Israeli occupation of territories? Is it important, in order to answer this question, to know whether the territory belongs or belonged to Jordan, Egypt or “Palestine”? (GC I-IV, common Art. 2; P I, Art. 1)

2. a. Are suicide attacks organized by Palestinian armed groups acts of terrorism? How would you define an “act of terrorism”? Does a clear definition exist in international law? In IHL? In your country’s domestic law?
- b. Is terrorism prohibited by IHL? If acts of terrorism were not specifically prohibited, would they still be banned by more general provisions of IHL? Which ones? (GC IV, Art. 33(1); P I, Arts 48 and 51; P II, Arts 4(2)(d) and 13(2); CIHL, Rules 1, 2 and 11-12)
- c. Can such acts be justified by a “just cause”, such as the struggle against a foreign occupier? Can they be justified as reprisals? Are reprisals acceptable in IHL? In reaction to violations of IHL such as “unlawful killings, extra-judicial executions, torture and ill-treatment, arbitrary detention and collective punishments”? (GC I-IV, Arts 46/47/13(3)/33 respectively; P I, Arts 20, 51(6) and 52(1); CIHL, Rules 145-147)
3. a. Who can be held responsible at the international level for these suicide attacks? Only those in charge of the armed groups that organize them? Do such groups have international responsibility, just as States do? [See **Case No. 53**, International Law Commission, Articles on State Responsibility [Part A., Art. 10 and its commentary]] Could the Palestinian Authority be held responsible for attacks carried out from the autonomous territories? Even when it condemns the attacks? Does it have a responsibility to “arrest” and “bring to justice those who order, plan or carry out attacks”? Is this an obligation laid down by IHL? Is the Palestinian Authority bound by IHL? On what grounds? Because the Palestine Liberation Organization declared on 21 June 1989 that it would accede to the Geneva Conventions? Does Israel have a responsibility to arrest and bring these persons to justice? Can it do so? Even if that involves police or military operations in autonomous Palestinian territory? (GC IV, Arts 29, 146 and 148; P I, Arts 85(1) and 91; CIHL, Rules 149-150)
- b. Are suicide attacks as a means of warfare prohibited by IHL? Even if committed against a legitimate military objective? Will your answer differ depending on whether the attacker carries arms openly or has a distinctive sign? Can the instigators and organizers of a suicide attack also be held responsible for the death of its perpetrator? Do you think they ought to be? (P I, Arts 37(1)(c), 43, 44 and 51; CIHL, Rules 11-12 and 106)
4. a. Are Israeli settlements in the occupied territories military objectives? Are they if they are defended by a military base? If many settlers are armed? What is the definition of a military objective? (P I, Arts 48 and 52; CIHL, Rules 1, 6-10)
- b. Is an armed civilian a combatant? Is an armed civilian a legitimate target? In what circumstances? Are settlers always civilians “unless they serve in the Israeli armed forces”? Even those organized in self-defence militias? Even those who carry out attacks against Palestinians or destroy their homes? (GC III, Art. 4; P I, Arts 43, 44, 50 and 51(3); CIHL, Rules 3-6)
- c. Is an unarmed settler a civilian? Even if he belongs to a self-defence militia of his settlement? Does he forfeit the protection offered by IHL, because the settlements are illegal under international law (GC IV, Art. 49(6); CIHL, Rule 130)? Does that violation justify violations of IHL committed against the settlers? (P I, Art. 50; CIHL, Rules 1, 5-6)

**Case No. 144, ICRC/Lebanon, Sabra and Chatila**

[Source: *ICRC Annual Report*, 1982, p. 57]

**LEBANON**

The nature of ICRC activities in Lebanon changed substantially after the intervention of the Israeli armed forces in that country on June 6. [...]

[...]

With a view to the protection not only of the civilian population but also of the combatants captured by the various forces involved in the hostilities, on 7 June the ICRC appealed to the belligerents to respect their obligations under prevailing humanitarian law. Two days later the ICRC made another strong and solemn appeal to the Israeli authorities, requesting that all possible measures be taken to ensure that civilians of all nationalities were spared in the conflict. For its part, the Palestine Liberation Organization (PLO) officially announced that it had decided to respect the Geneva Conventions and Additional Protocol I of 1977. [...]

The massacres at the Palestinian camps of Sabra and Chatila led the ICRC to address an appeal to the international community on 18 September. In the wake of these massacres medical and, above all, protective measures were taken as soon as the ICRC was able to enter the camps on 18 September. [...]

**MASSACRES AT SABRA AND CHATILA**

The ICRC delegates had been in the habit of making daily visits to the southern suburbs of Beirut in order to provide assistance and protection for the civilian population until access to that zone, in which the Palestinian refugee camps were situated, was denied to them by the Israeli army with effect from 15 September.

By 17 September the delegates had been able to transfer the most serious cases being treated in the Gaza and Akka hospitals on the outskirts of the camps to other hospitals in the capital but they were not in a position to intervene until they were able to enter the precincts of the camps the following day, 18 September. (The massacres began on the 16<sup>th</sup>).

On that date, September 18, the ICRC addressed an appeal to the international community in which it condemned the fact that, according to reports from its delegates in Beirut, "hundreds of women, children, adolescents and elderly persons have been killed in Beirut in the district of Chatila, the streets of which are strewn with their bodies. The ICRC is also aware that wounded persons have been killed in hospital beds and that others, including doctors, have been abducted". The ICRC further announced that its delegates had evacuated two hospitals and that hundreds of persons were seeking refuge at the delegation. The appeal ended with the words: "The ICRC solemnly appeals to the international community to intervene to put an immediate stop to the intolerable massacre perpetrated on whole groups of people and to ensure that the wounded and those who treat them are respected and that the basic right to life is observed".

At the same time, in a letter from President Hay to Mr Begin, the ICRC reminded the occupying authorities that, under the provisions of the Fourth Geneva Convention, it was their duty to restore and ensure public order and safety.

On September 18, the Gaza and Akka hospitals at Beirut were completely evacuated. Due to overcrowded conditions in the Beirut hospitals and the prevailing state of insecurity, the ICRC placed the Gaza, Lahoud, Amel-Moussaitb and Najjar hospitals under its own control and protection for several days. About 5,000 persons seeking refuge at the ICRC delegation were given temporary shelter under its protection.

From 18 September the ICRC also organized and participated in the identification and interment of the victims of the massacres. To this end it received substantial help from the Lebanese Red Cross, whose relief workers took part in the operation with the utmost devotion to duty. ICRC medical personnel based in other parts of the country also came to Beirut to help.

Once this first phase was completed, the ICRC continued its daily visits to the camps in order to reassure the population through its presence. A permanent medical service was provided at the Akka and Gaza hospitals until October 11 and 13, respectively.

Due to the prevailing insecurity in southern Lebanon, the delegates made daily visits to the Palestinian camps from September until December in order to protect and reassure the population. [...]

## DISCUSSION

1. How would you qualify the armed conflict in Lebanon in the summer of 1982? Can the IHL of international armed conflicts be applied although Israeli forces were not fighting against Lebanese forces but mainly against the PLO? What was the status of PLO soldiers under IHL? Did Israel as an occupying power have any obligations with regard to Sabra and Chatila at the time of the massacre? (HR, Art. 42; GC I-IV, common Art. 2; GC III, Art. 4)
2. Were the inhabitants of Sabra and Chatila considered protected persons under Convention IV? (GC IV, Art. 4)
3. The massacre having been committed by the Lebanese militias:
  - a. Which provisions of Convention IV should they have respected? If Convention IV was not applicable to the Lebanese militias, was their behaviour not prohibited by other provisions of IHL? (GC IV, Arts 3, 4 and 29)
  - b. Could the massacre also be attributed to Israel as a violation of IHL? Even though those who actually committed it did not receive Israeli orders? Even if Israel was not aware of the militias' actions? (HR, Arts 42 and 43; GC IV, Arts 4 and 27)

**Case No. 145, ICRC/South Lebanon, Closure of Insar Camp**

[Source: ICRC Press Release, No. 1504, Geneva, April 4, 1985]

**SOUTH LEBANON – CLOSURE OF INSAR CAMP**

Geneva (ICRC) – On April 2, 1985, the Israeli Occupation authorities notified the International Committee of the Red Cross (ICRC) of their intention to close Insar camp, in South Lebanon, which contained at the end of March more than 1,800 prisoners regularly visited by ICRC delegates.

A thousand detainees have been transferred to Israel, violating articles 49 and 76 of the Fourth Geneva Convention. The Israeli authorities have told the ICRC that these prisoners will be eventually taken back to Lebanese territory, to a new camp now being built.

The other Insar prisoners, more than 700 people, were handed over to the ICRC on 3 April. ICRC delegates are helping them to rejoin their families.

**DISCUSSION**

1. Under which conditions would those persons detained in Insar who were members of the “Palestine Liberation Army” (the military branch of the PLO) resisting Israeli occupation of Lebanon, with the agreement of the Lebanese government, have had prisoner-of-war status? If so, would it be lawful to deport and detain such prisoners of war in Israel? Would Israel have invoked such a justification for deporting the inmates of Insar to Israel? (GC III, Arts 4, 21 and 22)
2.
  - a. Are all inmates of Insar (arrested in Lebanon) who are not prisoners of war civilians? Regardless of their nationality? Even if they were stateless Palestinian refugees? Even those who fought for the “Palestine Liberation Army” but did not qualify for prisoner-of-war status? (GC IV, Arts 4 and 5)
  - b. May an occupying power transfer protected civilians from an occupied territory to its own territory? Does it matter that the transfer is temporary? When is evacuation permissible? What if evacuation to Israel were unavoidable in order to maintain the detainees’ living conditions or security? (GC IV, Arts 49 and 76; CIHL, Rule 129)
  - c. Was the deportation at least admissible for those who had been convicted of a crime and had not yet served their sentence? (GC IV, Arts 76 and 77)
  - d. Was the deportation at least admissible for those who were detained without trial for imperative security reasons, taking into account that Arts 79-135 of Convention IV do not contain any prohibition of deportations? Why do Arts 79-135 contain no such prohibition, unlike the provisions of Art. 76 for other detainees? (GC IV, Arts 49 and 79)

**Case No. 146, Lebanon, Helicopter Attack on Ambulances**

[Source: ICRC Press Release, December 23, 1987; original in French, unofficial translation.]

**INTERNATIONAL COMMITTEE OF THE RED CROSS  
DELEGATION IN LEBANON**

On December 21, 1987, in the course of a military operation which took place near Nabatiyeh in southern Lebanon, two ambulances, one from the Lebanese Red Cross Society and the other from the Risali Movement, suffered direct hits from helicopter gunfire. A Red Cross first-aid worker was wounded, while two Scout first-aiders and a patient in the other ambulance were killed.

The International Committee of the Red Cross (ICRC) is deeply dismayed to note that first-aid staff have once again become the victims of hostilities while performing their humanitarian duty.

Deeply saddened by this incident, the ICRC delegation in Lebanon appeals to the parties concerned to respect everywhere and at all times the emblem of the Red Cross and Red Crescent, which protects those who provide assistance to all victims of the Lebanese conflict.

Beirut, 23 December 1987

**DISCUSSION**

1. Why was the attack on the ambulances a violation of IHL? Because each ambulance bore a protective emblem, and to attack protective emblems is prohibited under IHL? Or simply because they were ambulances? Why is it useful to mark ambulances with the emblem if it does not give them additional legal protection? Would it have been lawful to attack the ambulance if its use of the emblem was not lawful? If it was transporting wounded “terrorists”? (GC I, Arts 19, 21, 24-26 and 35; GC IV, Art. 21)
2. Which emblems does IHL protect? Who may use these emblems? In which circumstances and under what conditions? Can you assume that the ambulances mentioned in the case were lawfully marked with the emblem? (HR, Art. 23(f); GC I, Arts 38 and 53; GC II, Arts 41-43; P I, Arts 8(l) and 18; P I, Annex, Arts 4-5; P II, Art. 12)
3. What is the purpose of the emblem? How can it be ensured that this purpose is achieved? And that failure to respect the emblem is prevented?

**Case No. 147, Israel, Navy Sinks Dinghy off Lebanon**

[Source: Brilliant, J., *The Jerusalem Post*, August 1, 1990]

**NAVY SINKS DINGHY OFF LEBANON**

HAIFA - An IDF [Israel Defence Force] Dabur patrol boat early yesterday morning sank a small rubber dinghy, off the south Lebanese coast, apparently killing the two men in it. The dinghy appeared to be on its way to Israel but it is unclear whether its passengers were armed.

The Dabur suffered no losses.

The Dabur's crew sighted the dinghy at about 3 a.m. some 2.5 kilometers offshore between Tyre and Ras al-Bayda, in the security zone, shortly after receiving a warning about a possible target from a radar station in the area. A few minutes later the Dabur's cannon and machine guns sank the dinghy with a few bursts.

The rapid chain of events was described at a press conference yesterday with the Dabur's commander, identified as 'Uri,' and Navy Commander Micha Ram. [...]

On this radar screen Uri detected a small dot moving down the coast at about 25 knots, in the direction of Israel.

He ordered his crew to battle stations, manning the cannon, machine guns and detection devices. The Dabur proceeded on an interception course. Three minutes later the crew spotted the dinghy's foam and then the vessel itself.

Uri came within 300 meters of the target and turned on the Dabur's projector. He saw two men on board the dinghy. The Dabur gunners opened fire.

Several Dabur crew members said later they believed the enemy had returned fire but Ram suggested that they were mistaken. Uri said he did not spot any guns aboard the dinghy.

Apparently the enemy vessel was hit immediately. The men on board "tried to disengage, turning southeast, then northwest and later northeast," but the Dabur gunners kept firing.

Thirty to 40 seconds after the initial burst of fire the two men on the dinghy were "blown into the water," Uri related. The dinghy's engine continued working and it began to run around in circles. Two more bursts from the Dabur and the dinghy began to sink.

The Dabur's crew spotted one of the men 50 meters ahead. The Dabur turned both its cannons on the man, and "opened fire and he drowned." The second man was not found.

Asked about the shooting of men in the water, Ram said the "terrorist" did not raise his hands to indicate he was surrendering. There had been cases in which the enemy, under similar circumstances, fired at Israeli craft.

A Red Cross legal expert said that the second Geneva Convention stipulates that shots may not be fired at wounded navy men or “as soon as someone is shipwrecked.” But the Convention does not cover someone “swimming around and fighting.”

Uri, a first lieutenant, turned to leave the press conference, but Ram detained him and promoted him to the rank of captain.

### DISCUSSION

1. Is IHL applicable here? Because since 1949 Israel has been in a state of war with Lebanon? Because Israel occupied a “security zone” in southern Lebanon?
2.
  - a. Were the men in the dinghy combatants? Or civilians? Did the crew of the Dabur have an obligation to ascertain before initially firing whether the men in the dinghy were combatants or civilians? (P I, Arts 51(2) and 85(3); P II, Art. 13; CIHL, Rules 1 and 6)
  - b. Is the distinction between combatants and civilians relevant for being considered shipwrecked? (GC II, Arts 12 and 13; P I, Arts 8(b) and 10) Does this distinction result in different protection for the shipwrecked in the present case?
3.
  - a. When is one considered shipwrecked? Does protection depend on a further indication of surrender, e.g., raising one’s hands? Is there a difference between the regime of protection for shipwrecked persons and that for the wounded and sick? Must wounded and sick surrender in order to gain protection under IHL? (GC II, Art. 12(2); P I, Art. 8(b) and 41(2); P II, Art. 7; CIHL, Rules 109-110)
  - b. Once the men from the dinghy were in the water, was it a violation of IHL to fire upon them? To destroy the wreckage? (GC II, Arts 12(2) and 18; P I, Art. 10) Do such acts constitute grave breaches of IHL? (GC II, Art. 51; P I, Art. 85(2)) Could firing on shipwrecked persons consequently ever be justified under IHL by military necessity?
  - c. Did the crew of the Dabur not have a responsibility to rescue the shipwrecked and take them aboard their ship? (GC II, Art. 18; P I, Art. 17(2); P II, Art. 8; CIHL, Rule 109)
4. How would some answers to the above questions change if the man in the water had fired at the Dabur? Would he still be considered shipwrecked? (GC II, Art. 12; P I, Art. 8(b))

**Case No. 148, Israel, Taking Shelter in Ancient Ruins**

[Source: Cockburn, P., *The Independent*, December 10, 1997, p. 10]

**ISRAELI SOLDIERS TAKE SHELTER IN ANCIENT RUINS  
AS HIZBOLLAH GUERRILLA SQUADS LIE IN WAIT**

From massive fortresses overlooking the Israeli occupation zone in south Lebanon, Israeli troops play a lethal game of cat-and-mouse with Hizbollah guerrillas. [...]

Karkum is a fortress out of the Middle Ages, its garrison protected by 50-foot-high ramparts of concrete and tumbled stone. From steel observation posts capable of withstanding a direct hit from a mortar round, Israeli soldiers peer into the mist, trying to detect Hizbollah guerrilla squads moving through the steep hills of south Lebanon. [...]

Some 219 Israeli troops have been killed and 694 wounded since 1985, in addition to 358 soldiers from the 2,500-strong South Lebanon Army. Divisions in Israel spring from the fact that these seem to be lives wasted because Israel has no policy in Lebanon and because, as never happened with Palestinian guerrillas, Hizbollah shows equal skill to the Israelis in small unit actions.

Karkum, which in Hebrew means “crocus”, is a good place from which to view the guerrilla campaign in south Lebanon. In other parts of the zone the front line positions are manned by the SLA [South Lebanon Army]. But Karkum, although it is only just north of the Israeli border, is an Israeli base which has come under repeated attack because here the zone is only 2.5 miles wide, compared to 14 miles at its widest point.

“In the last one-and-a-half years we have been rebuilding all our posts so they can resist mortars,” says an Israeli officer. “They are not dangerous so long as you obey regulations,” says another commander, explaining that by this he means staying inside the bunker. At Karkum, bizarrely, the tops of ancient Greek columns from a temple which once crowned the hilltop stick out of the Israeli fortifications.

The base has come under co-ordinated attack from Hizbollah three times this year, not counting sporadic bombardment by mortars. On one occasion two Hizbollah were seen on a hilltop and pursued, but they turned out to be the bait for an ambush. More recently an Israeli patrol saw several Hizbollah soldiers on the base’s helicopter pad. When they followed them the patrol’s tracker saw they were walking into brush where Hizbollah had prepared bomb traps. In each case moves by Hizbollah infantry, anti-tank and mortar units were carefully co-ordinated. [...]

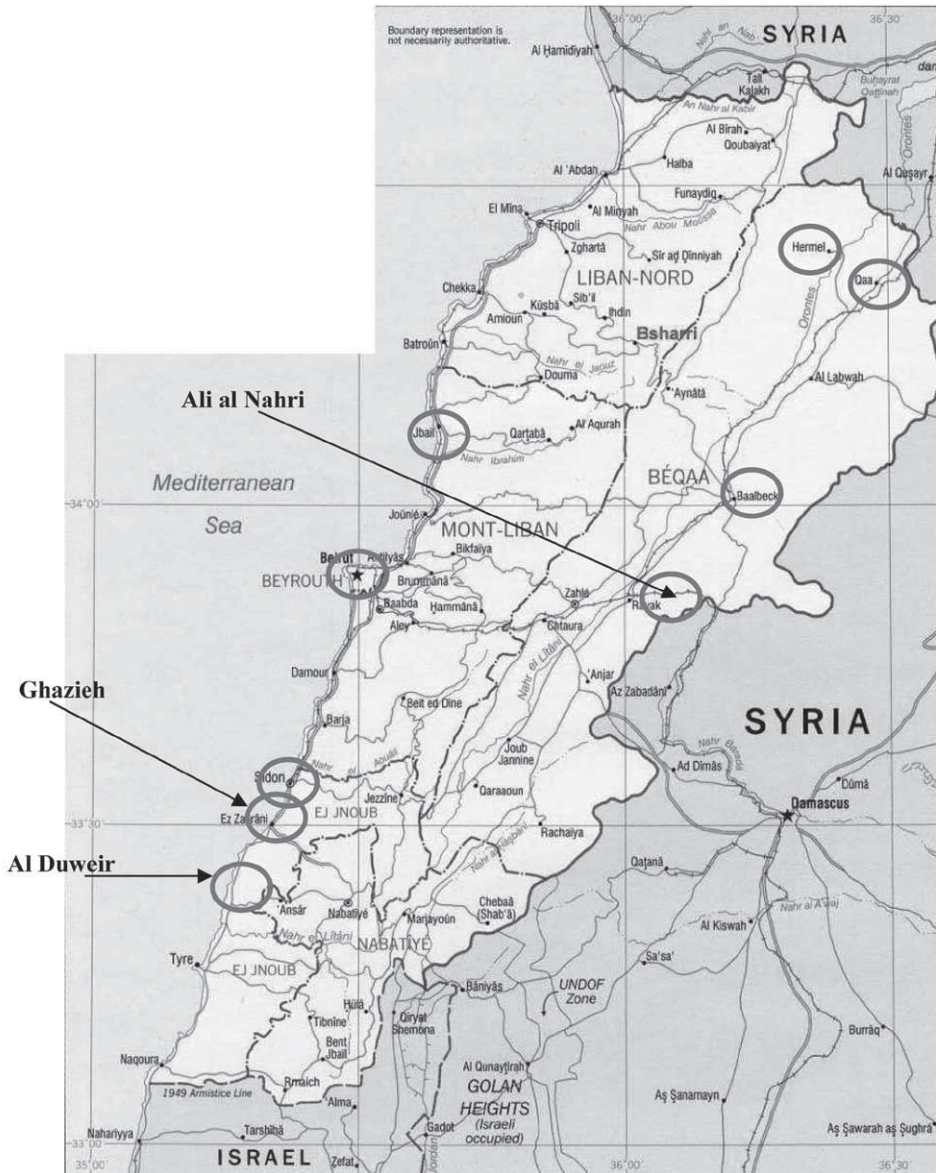
**DISCUSSION**

1. What protection does IHL provide for cultural objects? What constitutes a cultural object? Do the ancient ruins in this article constitute a cultural object? (HR, Art. 27; P I, Arts 52, 53 and 85(4)(d); P II, Art. 16; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict [See **Document No. 10**, Conventions on the Protection of Cultural Property [Part A.]])



2.
  - a. If the site is considered a cultural object, is Hizbollah violating IHL by attacking it? Are Israeli troops violating IHL by taking shelter in the ancient ruins? (P I, Art. 53; P II, Art. 16)
  - b. How does the stationing of Israeli troops at the fortress affect its status? Does, for instance, the protection of this object under IHL cease? Does IHL now permit Hizbollah to attack this cultural object because it has become a legitimate military objective? (P I, Art. 52(2)) If so, what, if any, precautions must be taken prior to attack? (P I, Art. 57)

## Case No. 149, Israel/Lebanon/Hezbollah Conflict in 2006



## **I. Human Rights Council, Report of the Commission of Inquiry on Lebanon**

[Source: Human Rights Council, Report of Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, A/HRC/3/2, 23 November 2006, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.3.2.pdf>, footnotes omitted]

### **Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1**

[...]

#### **I. INTRODUCTION**

[...]

#### **B. The conflict as addressed by the Commission's mandate**

##### **1. Lebanon: profile and background**

[...]

30. During the 1980s Israel carried out frequent military operations, including shellings and air attacks, and undertook an extended occupation of southern Lebanon. The Hezbollah organization, as will be explained later, was created in the context of the Israeli occupation.
31. Israel remained in control of Southern Lebanon until May 2000, when it withdrew its troops in compliance with Security Council resolutions 425 (1978) and 426 (1978).

[...]

35. Despite the Israeli withdrawal, sporadic armed operations along the Israeli-Lebanese southern border continued to oppose the Israeli armed forces to Hezbollah militia, mainly on the grounds of Israel's continued occupation of the Shab'a farms. The Shab'a farms area was occupied by Israel in 1967. In 1981, Israel decided to extend the application of Israeli law to the occupied Shab'a region. The Security Council, in resolution 497 (1981) of 17 December 1981, condemned this action and declared it "null and void and without international legal effect". Lebanon considers the Shab'a farms as part of its territory, as indicated in the Memorandum of 12 May 2000 addressed to the Secretary-General on 12 May 2000. The Hezbollah leadership has pledged to continue opposing Israel as long as it continues its occupation of the Shab'a farms area. [...]

[...]

37. Hezbollah is a Shiite organization that began to take shape during the Lebanese civil war. It originated as a merger of several groups and associations that opposed and fought against the 1982 Israeli occupation of Lebanon. Hezbollah has grown to an organization active in the Lebanese political system and society, where it is represented in the Lebanese parliament and in the cabinet. It also

operates its own armed wing, as well as radio and satellite television stations. It further funds and manages its own social development programmes.

38. Throughout the 1980s, 1990s and after, Hezbollah's *raison d'être* has been the continued occupation by Israel of Lebanese territory and the detention of Lebanese prisoners in Israel. The extent of the destruction and the difficult conditions that the Israeli occupation imposed on the Lebanese population, particularly the Shiite population living in south Lebanon, generated strong popular support for Hezbollah. [...]

[...]

## **2. The July-August 2006 hostilities**

40. On 12 July 2006, a new incident between Hezbollah military wing and IDF led to an upward spiral of hostilities in Lebanon and Israel that resulted in a major armed confrontation. The situation began when Hezbollah fighters fired rockets at Israeli military positions and border villages while another Hezbollah unit crossed the Blue Line, killed eight Israeli soldiers and captured two.
41. Israeli Prime Minister Ehud Olmert described this capture as an action by the sovereign country of Lebanon that attacked Israel and promised a "very painful and far-reaching response." Israel blamed the Government of Lebanon for the raid, as it was carried out from Lebanese territory and Hezbollah was part of the Government.
42. In response, Lebanese Prime Minister Fouad Siniora denied any knowledge of the raid and stated that he did not condone it. An emergency meeting of the Government of Lebanon reaffirmed this position. Furthermore, in a letter dated 13 July 2006 to the Secretary-General and the President of the Security Council, the Government of Lebanon declared that "[T]he Lebanese Government was not aware of the events that occurred and are occurring on the international Lebanese border" and that "[T]he Lebanese Government is not responsible for these events and does not endorse them."
43. From 13 July 2006, the IDF attacked Lebanon by air, sea and land. Israeli ground forces carried out a number of incursions on Lebanese territory. Israel's chief of staff Dan Halutz stated that "if the soldiers are not returned, we will turn Lebanon's clock back 20 years," while the head of Israel's Northern Command Udi Adam said, "this affair is between Israel and the State of Lebanon. Where to attack? Once it is inside Lebanon, everything is legitimate – not just southern Lebanon, not just the line of Hezbollah posts." The Israeli Cabinet authorized "severe and harsh" retaliation on Lebanon.
44. The Government of Lebanon decided on 27 July 2006 that it would extend its authority over its territory in an effort to ensure that there would not be any weapons or authority other than that of the Lebanese State.
45. [...] Lebanon frequently pleaded for the Security Council to call for an immediate, unconditional ceasefire between Israel and Hezbollah.

46. On 11 August 2006, the Security Council adopted resolution 1701 (2006) calling *inter alia* for a "full cessation of hostilities based upon, in particular, the immediate cessation by Hezbollah of all attacks and the immediate cessation by Israel of all offensive military operations, and emphasizing the need to address urgently the causes that have given rise to the current crisis, including by the unconditional release of the abducted Israeli soldiers." On the same day, the Human Rights Council, meeting in special session, adopted resolution S-2/1, condemning Israeli violations of human rights and of international humanitarian law and calling for the establishment of the Commission of Inquiry.
47. Both parties to the conflict agreed on a ceasefire, which took effect on 14 August 2006 at 0800 hours.

[...]

49. The blockade was lifted on 6-7 September 2006. On 1 October, the Israeli army reported that it had completed its withdrawal from southern Lebanon, information that was confirmed by UNIFIL. [...] The situation related to Shab'a Farms remained the same.

### 3. Qualification of the conflict

50. [...] [T]he two key issues that inherently arise are, (a) whether or not between 12 July and 14 August 2006 an armed conflict took place in Lebanon and in Israel, and if so, (b) who were the Parties to it.
51. [...] [I]t is well established in international humanitarian law that for the existence of an armed conflict the decisive element is the factual existence of the use of armed force. That aside, there is authority for the proposition that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies as soon as an armed conflict arises and it binds all the parties thereto to fully comply with it. On the basis of the factual circumstances of the conduct of the hostilities that took place, including the intensity of the violence and the use of armed force, the Commission is of the view that the existence of an armed conflict during the relevant period has been sufficiently established.

[...]

53. A particular characteristic and the *sui generis* nature of the conflict is that active hostilities only took place between Israel and Hezbollah fighters. The Commission found no indication that the Lebanese Armed Forces actively participated in the hostilities that ensued. For its part, IDF attacked the Lebanese Armed Forces and its assets (e.g. military airport at Qliat in northern Lebanon, all radar installations along the Lebanese coast, and the army barracks at Djamhour, 100 kilometres from the southern border with Israel.) A joint Security Force comprising the LAF and the Police offered no resistance to the IDF at Marjayoun on 10 August 2006.

54. On the conflict, the position of the Government of Lebanon is that it was not responsible for and had no prior knowledge of the operation carried out by Hezbollah against an IDF patrol inside Israeli territory on 12 July 2006. This was orally confirmed by Prime Minister Siniora to the Commission when they met in Beirut on 25 September 2006. Lebanon has also stated that it disavowed and did not endorse that act. Furthermore, the Government of Lebanon has emphasized that it is the sole authority that decides on peace and war and the protection of the Lebanese people. It participated effectively in the negotiations leading to the adoption of Security Council resolution 1701 (2006) accepted by both Israel and Lebanon. For its part, the Government of Israel has officially stated that responsibility lies with the Government of Lebanon, from whose territory these acts were launched into Israel, and that the belligerent act was the act of a sovereign State, Lebanon.
55. It is the view of the Commission that hostilities were in actual fact and in the main only between the IDF and Hezbollah. The fact that the Lebanese Armed Forces did not take an active part in them neither denies the character of the conflict as a legally cognizable international armed conflict, nor does it negate that Israel, Lebanon and Hezbollah were parties to it. Regarding this, the Commission stressed three points.
56. First, in Lebanon, Hezbollah is a legally recognized political party, whose members are both nationals and a constituent part of its population. It has duly elected representatives in the Parliament and is part of the Government. Therefore, it integrates and participates in the constitutional organs of the State.
57. Secondly, for the public in Lebanon, resistance means Israeli occupation of Lebanese territory. The effective behaviour of Hezbollah in South Lebanon suggests an inferred link between the Government of Lebanon and Hezbollah in the latter's assumed role over the years as a resistance movement against Israel's occupation of Lebanese territory. In its military expression and in the light of international humanitarian law, Hezbollah constitutes an armed group, a militia, whose conduct and operations enter into the field of application of article 4, paragraph 2 (b), of the Third Geneva Convention of 12 August 1949. Seen from inside Lebanon and in the absence of the regular Lebanese Armed Forces in South Lebanon, Hezbollah constituted and is an expression of the resistance (*'mukawamah'*) for the defence of the territory partly occupied. A government policy statement regarded the Lebanese resistance as a true and natural expression of the right of the Lebanese people in defending its territory and dignity by confronting the Israeli threat and aggression. In his address to the nation, on 18 August 2006, President Emile Lahoud paid tribute to the "National Resistance fighters". Hezbollah had also assumed *de facto* State authority and control in South Lebanon in non-full implementation of Security Council resolutions 1559 (2004) and 1680 (2006), which, *inter alia*, had called for and required the disarmament of all armed groups, and had urged the strict respect of the sovereignty, territorial integrity and unity of Lebanon under the sole and exclusive authority of the Government of Lebanon throughout the country.

58. Thirdly, the State of Lebanon was the subject of direct hostilities conducted by Israel, consisting of such acts, as an aerial and maritime blockade that commenced on 13 July 2006, until their full lifting on 6 and 8 September 2006, respectively; a widespread and systematic campaign of direct and other attacks throughout its territory against its civilian population and civilian objects, as well as massive destruction of its public infrastructure, utilities, and other economic assets; armed attacks on its Armed Forces; hostile acts of interference with its internal affairs, territorial integrity and unity and acts constituting temporary occupation of Lebanese villages and towns by IDF.
59. That aside, a number of Lebanese high government authorities informed the Commission that they considered that, to the extent that Lebanon was a victim, and suffered the devastating effect of armed hostilities by Israel, it was a party to the conflict. In the words of the Minister of Justice: “un agresseé peut être une partie d’un conflit”. Insofar as it is relevant and having regard to common article 2, paragraph 2, of the Geneva Conventions of 1949, international humanitarian law applies even in a situation, where for example the armed forces of a State party temporarily occupy the territory of another State, without meeting any resistance from the latter. On the same legal basis, it has been stated that the Geneva Conventions apply even where a State temporarily occupies another State without an exchange of fire having taken place or in a situation where the Occupying State encounters no military opposition whatsoever.
60. The Commission considers that both Lebanon and Israel were parties to the conflict. They remain bound by the Geneva Conventions of 1949, and customary international humanitarian law existing at the time of the conflict. Hezbollah is equally bound by the same laws. For completeness, and as mentioned earlier, both Israel and Lebanon are parties to the main international human rights instruments, and they remain legally obliged to respect them.
61. Moreover, while Hezbollah’s illegal action under international law of 12 July 2006 provoked an immediate violent reaction by Israel, it is clear that [...] Israel’s military actions very quickly escalated from a riposte to a border incident into a general attack against the entire Lebanese territory. Israel’s response was considered by the Security Council in its resolution 1701(2006) as “offensive military operation”. These actions have the characteristics of an armed aggression, as defined by General Assembly resolution 3314 (XXIX).
62. The fact that Israel considered Hezbollah a terrorist organisation and its fighters as terrorists does not influence the Commission’s qualification of the conflict. Several official declarations of the Government of Israel addressed Lebanon as assuming responsibility. IDF views its operations in Lebanon as an international armed conflict.



#### 4. Applicable law

[...]

##### (a) International Humanitarian Law

65. The basic corpus of international humanitarian law is applicable to the conflict, and both Israel and Lebanon are party to key international humanitarian law instruments. Israel is party to the four Geneva Conventions of 12 August 1949, but has not ratified Additional Protocol I or II on the protection of victims of armed conflict. In addition, Israel is party to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 and its First Protocol (1954); the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980, as well as its Protocol I on non-detectable fragments (1980), Protocol II on prohibitions or restrictions on the use of mines, booby-traps and other devices (1980 and as amended on 3 May 1996), and Protocol IV on Blinding Laser Weapons (1995). Israel has neither ratified Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons (1980), nor Protocol V on Explosive Remnants of War (2003).
66. Lebanon is party to the four Geneva Conventions of 12 August 1949 as well as Additional Protocols I and II relating to the protection of victims of armed conflicts. It is also party to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972), and the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 and its First Protocol. Lebanon is not party to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980, nor to any of its Protocols.
67. In addition to the international treaty obligations, rules of customary international human rights and humanitarian law bind States and other actors. In other words, all of the parties to the conflict are also subject to customary international humanitarian law. As a party to the conflict, Hezbollah is also bound to respect international humanitarian law and human rights.
68. Serious violations of international human rights law and international humanitarian law are regulated *inter alia* by the Rome Statute of the International Criminal Court, as well as customary international law. Israel has signed but has not ratified the Statute. Lebanon has neither signed nor ratified the Statute.

[...]



## **II. THE FACTS AND LEGAL ANALYSIS**

### **A. General approach**

#### **1. On the facts**

[...]

76. The 33-day conflict in Lebanon [...] exacted a heavy human toll and damaged economic and social structures, as well as the environment. During the campaign, Israel's Air Force flew more than 12,000 combat missions. Its Navy fired 2,500 shells, and its Army fired over 100,000 shells, destroying as a consequence large parts of the Lebanese civilian infrastructure, including roads, bridges and other 'targets' such as Beirut International Airport, ports, water and sewage treatment plants, electrical facilities, fuel stations, commercial structures, schools and hospitals, as well as private homes. According to Government of Lebanon figures, 30,000 homes were destroyed or damaged, 109 bridges and 137 roads (445,000 sq. km.) damaged, and 78 health facilities (dispensaries, health centres and hospitals) were seriously affected, with 2 hospitals destroyed. Furthermore, the Lebanese Government indicates that 900 commercial centres and factories were affected, as were 32 other "vital points" (airports, ports, water and sewage treatment, electrical plants). Over 789 cluster-bomb sites have been identified in southern Lebanon, and over one million bomblets have littered the region.
77. The conflict resulted in 1,191 deaths and 4,409 injured. More than 900,000 people fled their homes. It was estimated that one third of the casualties and deaths were children.
78. Israel also suffered serious casualties. Reports indicate that 43 civilians were killed, 997 were injured [...], 6,000 homes were affected and 300,000 persons were displaced by Hezbollah's attacks on Israeli towns in northern Israel.

[...]

### **B. Specific approach**

#### **1. Attacks on the civilian population and objects**

91. One of the most tragic facts of the conflict raises the question of direct and indiscriminate attacks on civilians and civilian objects and the violation of the right to life. [...]

[...]

#### **(a) Southern Lebanon**

93. Numerous villages throughout southern Lebanon suffered extensive bombing and shelling resulting in killings and massive displacement of civilians. Some villages were occupied by Israeli forces and suffered other kinds of damage. The Bekaa Valley also came under attack.

[...]

103. In Taibe, the Commission gathered information on the occupation of part of the town by IDF, which set up sniper positions in the castle from which they could dominate the surrounding area; 136 houses and 2 schools were destroyed in Taibe.
104. Witnesses explained to the Commission that most of the men in the village possessed guns. They stressed, however, that a distinction should be made between professional Hezbollah fighters and civilian militia volunteers from Amal and the Lebanese communist party who took up arms during the conflict. The volunteers were welcomed if they obeyed the Hezbollah rules but were otherwise ordered to leave the area. According to witnesses, Hezbollah did not fire rockets and mortars from within the village, or otherwise use it as a shield for its activities. Rather, Hezbollah used adjoining valleys, as well as caves and tunnels in the surrounding area from which to operate, and the surrounding countryside provided ample cover and security for their operations.

[...]

#### **(b) South Beirut**

116. The Commission visited the South East suburbs of Beirut, which were heavily bombed from the earliest days until the last days of the conflict. This largely Shiite district of high-rise buildings is densely populated and a busy commercial centre, with hundreds of small shops and businesses. It was also a centre for Hezbollah activities in the city, including offices of the political headquarters of the organization, and its associated infrastructure, including *Jihad al Bina*, offices of parliamentarians, and the TV station *Al-Manar*. During the course of the conflict, many displaced persons from the South had sought refuge in the relative safety of this neighbourhood.
117. [...] Throughout the period of the conflict, nearly every day, IDF attacked and destroyed a handful of unoccupied multi-storey buildings. Nearly all of its 220,000 inhabitants have been forced to evacuate at the commencement of the hostilities. The presence of Hezbollah offices, political headquarters and supporters would not justify the targeting of civilians and civilian property as military objectives.

[...]

### **3. Attacks on infrastructure and other objects**

136. During the conflict major damage was inflicted on civilian infrastructure. According to the Government of Lebanon, 32 “vital points” were targeted by IDF. These include for example, the Port of Beirut where the radar was hit. The Commission was told by the Managing Director of the Port that the radar was used for ship navigation tracking, and not for military purposes. In addition, the modern lighthouse of Beirut was put out of use by a strike on 15 July. The airport

of Beirut also suffered severe damage to its five runways and fuel tanks. This major destruction occurred during the first days of the conflict.

137. A total of 109 bridges and 137 roads (445,000 sq. km.) were damaged during the conflict, including some bridges which had been repaired once already. The Commission heard evidence in Qana of the disproportionate use of weapons by IDF. In one incident, for example, IDF rockets were fired at a small bridge, three times with two rockets at a time, while the bridge was a simple construction used by shepherds.
138. [...] On many occasions this destruction occurred after humanitarian organizations had obtained a clearance from Israel to use these roads. In the same vein, the Commission was told that the evacuation of civilians was particularly hampered by the destruction of roads and bridges. [...]
139. Water facilities were destroyed or damaged during this conflict in many parts of the country. [...] Numerous water towers had been hit by a direct fire weapon – probably a tank round. Most had a single round through them, sufficient to empty their content. Israeli soldiers were stationed in Froun, in order to control the water source. This led to a decrease of water distribution to the villages located in the Qada of Marjayoun, south of Taibe. In fact fears of lack of water were one of the reasons why civilians left their villages. In Beirut, in the Christian neighbourhood of Achrafieh, on 19 July, IDF bombed two engineering vehicles used to drill water.
140. Transmission stations used by Lebanese television and radio were also the targets of bombing. A clear distinction has to be made between the Hezbollah-backed Al-Manar television station and others. While the first is clearly a tool used by Hezbollah in order to broadcast propaganda, nothing similar can be said regarding the others. IDF repeatedly targeted Al-Manar at the beginning of the conflict, notably its headquarters in the Beirut suburb of Haret-Hreik.
141. In addition to Al-Manar, Future TV, New TV, and the Lebanese Broadcasting Corporation (LBCI) suffered damages to their infrastructure. The transmission and communication towers of Télé Lumière, a Christian television station founded in 1991, were damaged in six different locations.
142. Regarding the Al-Manar TV station, Israel said that it has for many years served as the main tool for propaganda and incitement by Hezbollah, and has also helped the organization recruit people into its ranks. The Commission wishes to recall that the fact that al-Manar television broadcasts propaganda in support of Hezbollah's attacks against Israel does not render it a legitimate military objective, unless it is used in a way that makes an "effective contribution to military action" and its destruction in the circumstances at the time offers "a definite military advantage." The Commission points out that a TV station can be a legitimate target, for instance, if it called upon its audience to commit war crimes, crimes against humanity or genocide. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target. The Commission was not provided with any evidence of this "effective contribution to military

action". The International Federation of Journalists (IFJ) condemned this attack in a press release of 14 July 2006, "warning that the attack follows a pattern of media targeting that threatens the lives of media staff, violates international law and endorses the use of violence to stifle dissident media".

143. With regard to attacks on other stations, nothing was said by the Israeli authorities and official reports only mention the destruction of the Hezbollah communications infrastructure. For these TV stations, links with Hezbollah could not be documented by the Israeli authorities and the Commission could not find any evidence in that regard. IFJ released a second communiqué on 24 July 2006 to condemn Israeli attacks on the media after one media worker of the Lebanese Broadcasting Corporation was killed in a bombing by IDF in Fatka and two others were wounded in a separate strike.

[...]

146. Israel justified its attacks on the civilian infrastructure by invoking their hypothetical use by Hezbollah. For example, regarding Beirut International Airport, Israel said that it served Hezbollah to re-supply itself with weapons and ammunition. It also said it was a response to reports that it was the intention of Hezbollah to fly the kidnapped Israelis out of Lebanon. However, it underlined that in its operation at Beirut Airport IDF was careful not to damage the central facilities of the airport, including the radar and control towers, allowing the airport to continue to control international flights over its airspace. The same arguments were used regarding roads and bridges.
147. The Commission appreciates that some infrastructure may have had "dual use" but this argument cannot be put forward for each individual object directly hit during this conflict. Even if some claims were true, the collateral harm to the Lebanese population caused by these attacks would have to be weighed against their military advantage, to make sure that the rule on proportionality was being observed. For example, cutting the roads between Tyre and Beirut for several days and preventing UNIFIL from putting up a provisional bridge cannot be justified by international humanitarian law. It jeopardized the lives of many civilians and prevented humanitarian assistance from reaching them. Injured persons needing to be transferred to hospitals north of Tyre could not get the medical care needed.
148. By using this argument, IDF simply changed the status of all civilian objects by making them legitimate targets because they might be used by Hezbollah. The principle of distinction requires the Parties to the conflict to carefully assess the situation of each location they intend to hit to determine whether there is sufficient justification to warrant an attack. Further, the Commission is convinced that damage inflicted to some infrastructure was done for the sake of destruction.

#### 4. Precautionary measures in attacks

##### (a) Warnings: leaflets, phone, text and loudspeaker messages

149. From mid-July on, IDF began warning villagers in the south to evacuate their towns and villages. The warnings were [sic] given by leaflets dropped by aircraft, through recorded messages to telephones and by loudspeaker. [...]

[...]

153. Military planning staff should pay strict attention to the requirement for any warning to be "effective". The timing of the warning is of importance. In some cases IDF is reported to have dropped leaflets or given loudspeaker warnings only two hours before a threatened attack. Having given a warning, the actual physical possibility to react to it must be considered.

[...]

155. Also of great concern was the physical danger [civilians] might face if they heeded the warning and took to the roads. There were number of civilians who, when warned by IDF to evacuate, did so only to be attacked on their way out. [...]

156. If a military force is really serious in its attempts to warn civilians to evacuate because of impending danger, it should take into account how they expect the civilian population to carry out the instruction and not just drop paper messages from an aircraft.

157. To be truly "effective", the message should also give the civilians clear time slots for the evacuation linked to guaranteed safe humanitarian exit corridors that they should use. Military staff should ensure that civilians obeying evacuation orders are not targeted on their evacuation routes.

158. A warning to evacuate does not relieve the military of their ongoing obligation to "take all feasible precautions" to protect civilians who remain behind, and this includes their property. By remaining in place, the people and their property do not suddenly become military objectives which can be attacked. The law requires the cancelling of an attack when it becomes apparent that the target is civilian or that the civilian loss would be disproportionate to the expected military gain. Official statements issued during the conflict by Israeli authorities cast doubt on whether in fact they were fully aware of these obligations. For example, as reported on BBC news on 27 July, Israeli Justice Minister Haim Ramon said: "that in order to prevent casualties among Israeli soldiers battling Hezbollah militants in southern Lebanon, villages should be flattened by the Israeli air force before ground troops moved in". He added that Israel had given the civilians of southern Lebanon ample time to quit the area and therefore anyone still remaining there could be considered a Hezbollah supporter. "All those now in south Lebanon are terrorists who are related in some way to Hezbollah", Mr. Ramon said.

[...]

### 5. Attacks on medical facilities

162. The Commission was able to verify that IDF had carried out attacks on a number of medical facilities in Lebanon, despite their protected character. An assessment by the WHO and the Lebanese Ministry of Public Health on the damage inflicted on primary health care centres and hospitals shows, for example, that 50 per cent of outpatient facilities were either completely destroyed or severely damaged, while one of the region's three hospitals sustained severe damage. This study also reflects serious shortages of fuel, power supply and drinking water. [...]
  163. In Tibnin, the governmental hospital showed signs of being hit by direct fire weapons, possibly a tank shell or a missile strike from a helicopter. The Commission saw at least five direct hits on the hospital's infrastructure. According to reports received by the Commission, on 13 August, the immediate area of the hospital was the object of a cluster bomb attack – just before the ceasefire. According to these reports, the attack took place while some 2,000 civilians were sheltered in the hospital.
  164. IDF would know about the hospital, built on a hill and which stands out for miles around. Whether it had a Red Cross flag flying on its roof is relatively unimportant. In fact the small flag that the Commission saw flying on the hospital would be indiscernible from the air and possibly from the ground. This is in any case irrelevant because of the facts listed above.
  165. According to the information gathered, the Commission finds that from a military perspective there was no justification in either the direct fire on the hospital or the cluster bomb attack. The Commission did not find any evidence that the hospital was being used in any way for military purposes. Furthermore, Israeli intelligence drones, which were extensively used, would have clearly shown that civilians were sheltering in the hospital.
- [...]
170. According to international humanitarian law, medical units exclusively assigned to medical purposes must be respected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. In this respect, the Commission finds that medical facilities were both the object of unjustified direct attacks and the victim of collateral damage. The Commission did not find any explanation by the Israeli authorities that could justify their military operations that affected, directly or indirectly, protected medical facilities. Israel's general explanation that all infrastructure hit was used by the Hezbollah is insufficient to justify IDF's violation of its obligation to abstain from carrying out attacks against protected medical facilities.

## **6. Medical personnel and access to medical and humanitarian relief**

[...]

172. The Commission took note that LRC [Lebanese Red Cross] reported nine different incidents involving ambulances and five others involving medical facilities that were targeted. In total, LRC had one volunteer killed, 14 staff members injured, three ambulances destroyed and four others damaged; one medical facility destroyed and four others damaged. [...]
173. On 23 July, at 2315 hours, two LRC vehicles were hit by munitions in Qana. The two vehicles were clearly marked with the Red Cross emblem on the rooftop. The incident happened while first-aid workers were transferring wounded patients from one ambulance to another. According to LRC reports and witness' accounts, one ambulance left Tibnin with three wounded people and three first-aid workers on board. The second ambulance left Tyre with three first-aid workers on board. Both vehicles met in Qana in order to transfer the patients from one ambulance to the other. As the Tyre ambulance was about to leave, it was hit by Israeli missiles. A few minutes later, as the personnel of the Tyre ambulance tried to call for assistance, the Tibnin ambulance was also hit by a missile. The missile struck the ambulance in the middle of the Red Cross painted on the roof. LRC staff succeeded in calling ICRC, which managed to contact IDF to request that the attack be stopped. The Red Cross workers hid for around two hours, unable to provide assistance to the injured persons who were still in the vehicles. As a result, nine people, including six Red Cross volunteers, were wounded.

[...]

176. [...] The Commission did not find any evidence showing that these attacks were linked in any way to Hezbollah military activities. The Commission finds, therefore, that all these incidents constitute a deliberate and unjustified targeting of protected medical vehicles and personnel.
177. The Lebanese Civil Defence was also the target of attacks by IDF. The Commission was informed that, during the armed conflict, one volunteer was killed and 59 other members of the Civil Defence were injured (11 staff and 48 volunteers). A total of 48 stations were damaged, as well as many vehicles.

[...]

184. ICRC reported on several occasions the difficulties faced by LRC and ICRC to reach people in need of assistance. In a press briefing on 19 July 2006, Mr. Pierre Krähenbühl, ICRC Director of Operations, stated that the principal medical problem within Lebanon was finding ways to evacuate patients to hospitals. [...]
185. The Commission was also informed that ships loaded with humanitarian assistance that had left the port of Larnaca, Cyprus, were not able to enter Lebanese ports until late in the conflict both because of the blockade as well as because of delays in obtaining the required authorization from the Israeli authorities.

186. Under international humanitarian law, "humanitarian relief personnel must be respected and protected". Furthermore, "the parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control". These rules apply whether the armed conflict is international or non-international. [...]

[...]

### **7. Attacks on religious property and places of worship**

188. During its visit to south Lebanon, the Commission saw damage caused by IDF attacks on a number of places of worship. For instance, the Commission found that the village of Qauzah, a Christian village close to the Blue Line, had been occupied by IDF. Most of the villagers had left during the conflict but 10 persons remained. Of particular note was the damage caused to the Christian Maronite church, which was damaged by bombing in the early days of the conflict and was later occupied by Israeli forces and used as its base. The roof had been badly damaged and there was a large shell hole in the front right corner of the wall. The damage to the church's roof and wall of the church appeared to have been caused by a tank round. Furthermore, during their 16-day occupation IDF vandalized the church, breaking religious statues, leaving behind garbage and other waste. The Commission saw a statue of the Virgin Mary that had been smashed and left in the church grounds. When the villagers returned, they found the church had been wrecked, the church benches and confessional box smashed. Silver items remained but had been deliberately broken. There were sandbagged defensive positions within the church grounds. There was no evidence to suggest fighting in and around the church to capture it. It therefore appears that IDF simply took it over. The damage was either caused on their occupation of the village or on their departure.

[...]

191. In most of the incidents the damage to mosques or churches was only partial. Considering the nature of the destruction, the types of damage and vandalism caused and the use of some of these religious buildings and places of worship as temporary bases, it appears to the Commission that while there was clear intent for IDF to cause unnecessary damage to protected religious property and places of worship, their complete destruction was not aimed for.
192. Under international humanitarian law, religious property and places of worship are protected during a conflict. Most of these rules are norms of customary international law, as confirmed by the ICJ in its advisory opinion on the legality of the threat or use of the nuclear weapons case [See Case No. 62, ICJ, Nuclear Weapon Advisory Opinion]. It is also important to stress that the Rome Statute qualifies as a war crime intentionally directing attacks against buildings dedicated to religion.

[...]



### 9. Internal displacement of civilians

199. One of the most striking aspects of this conflict is the massive displacement of civilians which took place during the hostilities. According to Government estimates, 974,184 people – nearly one quarter of the population – were displaced between 12 July and 14 August, with approximately 735,000 seeking shelter within Lebanon and 230,000 abroad. Up to one half of the displaced were children. These figures must be considered against the demographic reality in Lebanon, where many people had already been displaced as a result of previous conflicts and communities still were in the process of recovery and rebuilding. The figures also include the secondary displacement of approximately 16,000 Palestinian refugees.
200. [...] As a result of the massive destruction of houses and other civilian infrastructure, displaced individuals and families were forced to live in crowded and often insecure conditions with limited access to safe drinking water, food, sanitation, electricity and health services. [...]
- [...]
202. Until the last days of the conflict, Ghazieh was seen as a safe haven for displaced civilians coming from the South and, according to the mayor, over 10,000 displaced people arrived in the town over the course of the conflict. According to witness testimonies, on Monday 7 August at around 0800 hours the town was attacked by Israeli air strikes. Several buildings were seriously damaged and at least three houses were completely destroyed by direct hits. Roads and bridges were also badly damaged, resulting in the isolation of Ghazieh from the main points of access into and out of town. [...] In total, at least twenty-nine civilians died in Ghazieh between 6 and 8 August.
- [...]
206. International law prohibits forced displacement in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand. As set out in the Guiding Principles on Internal Displacement, before any decision is made requiring the displacement of persons, the authorities concerned must ensure that all feasible alternatives are explored in order to avoid displacement altogether. In particular, authorities and other actors must respect and ensure respect for their obligations under international law, including human rights and humanitarian law “so as to prevent and avoid conditions that might lead to displacement of persons”. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.
207. Much of the displacement in Lebanon was the result, either direct or indirect, of indiscriminate attacks on civilians and civilian property and infrastructure, as well as the climate of fear and panic among the civilian population caused by the warnings, threats and attacks by IDF. Furthermore, in many cases, the attacks were disproportionate in nature and could not be justified on the basis of military necessity. Taking into account all of these facts, the Commission notes that the displacement itself constitutes a violation of international law.

208. The Commission further recalls that displaced persons are entitled to the full protection afforded under international human rights and humanitarian law. At the same time, they have specific needs distinct from those of the non-displaced population which must be addressed by specific protection and assistance measures. The Commission notes that, throughout the period of the conflict, IDPs often did not have access to humanitarian assistance to meet their needs.

### 10. Environment

209. Already in the early stages of the conflict, IDF attacks on Lebanese infrastructure created large-scale environmental damage. The Commission considered the devastating effect the oil spill from the Jiyeh power plant has had and will continue to have in the years to come over the flora and fauna on the Lebanese coast. This very serious event took place when the Israeli Air Force bombed the fuel storage tanks of the Jiyeh electrical power station, situated 30 km south of Beirut. Due to its location by the sea, the attack resulted in an environmental disaster. The plant's damaged storage tanks gave way. According to the Lebanese Ministry of Environment, between 10,000 and 15,000 tons of oil spilled into the eastern Mediterranean Sea. A 10 km-wide oil slick covered 170 km of the Lebanese coastline.
210. The Commission was informed by the Director of the Jiyeh power plant that the compound had been subject to two different attacks. The first strike took place on 13 July and was directed at one storage tank with a capacity of 10,000 tons of oil. Oil flowed from the tank but was held by the external retainer wall of the power plant building, which was some 4 metres high. Firefighters were able to put out the fire that ensued. The second attack, on 15 July, was directed at another storage tank, with a capacity of 15,000 tons of oil. The explosion and subsequent fire caused the explosion of another tank, with a capacity of 25,000 tons. The explosion and the very high temperature caused by the fire destroyed the retaining wall, thus leading to the massive flow of oil into the sea.
211. The Commission is convinced that the attack was premeditated and was not a target of opportunity. Indeed, the strike was directly aimed at those tanks that had been filled in the days preceding the attacks. No missile was directed at empty tanks, nor at the main generator and machinery, which are just a few meters away from the storage tanks.
212. The spill affected two thirds of Lebanon's coastline. Beaches and rocks were covered in a black sludge up to Byblos, north of Beirut and extended into the southern parts of Syria. According to the Lebanon Marine and Coastal Oil Pollution International Assistance Action Plan prepared by the Expert Working Group for Lebanon, winds and surface sea currents caused the oil slick to move north, some 150 km from the source in a matter of a few days. This rapid movement of the slick caused significant damages on the Lebanese coastline, as well as the Syrian coast. Furthermore, due to the air blockade no air surveillance and assessment actions were possible. The only possibility left was to use satellite remote-sensing

images. While cleaning up measures were undertaken a few days before the end of the conflict, under the authority of the Lebanese Ministry of Environment and the Lebanese Army, weeks after the ceasefire there were reports of oil slicks still floating in different areas.

213. The Commission found that the environmental damage caused by the intensive Israeli bombing goes beyond the Jiyeh oil spill. Damaged power transformers, collapsed buildings, attacks on fuel stations, and the destruction of chemical plants and other industries may have leaked or discharged hazardous substances and materials to the ground, such as asbestos and chlorinated compounds. These hazardous materials may gravely affect underground and surface water supplies, as well as the health and fertility of arable land.

[...]

215. Furthermore, the Commission has also considered that direct attacks on fuel storage tanks and petrol stations, as well as on factories such as the Maliban glass factory, the Sai El-Deen plastics facility and the Liban Lait dairy plant, among others, have created increased risks of pollution by chemical agents that may have contaminated water sources, arable land and the air, posing a direct threat to the health of the Lebanese population.
216. Article 35(3) of Additional Protocol I to the 1949 Geneva Conventions establishes a general prohibition on employing methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Similarly, article 55(1) of the Protocol further indicates that special care shall be taken during armed conflict to protect the natural environment against widespread, long-term and severe damage.
217. Furthermore, as indicated by the International Court of Justice (ICJ) and reiterated in the legal literature, the principle that parties to a conflict shall take all necessary measures to avoid serious damage to the natural environment constitutes a norm of customary international law. [...]
218. Moreover, under article 8(2)(b)(iv) of the Rome Statute, the intentional launching of an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment is considered a war crime.
219. The Commission finds that, while Israel may argue that attacks on these facilities were justified under military necessity, the fact is that it clearly ignored or chose to ignore the potential threats these attacks posed to the well-being of the civilian population. While Israel may have attained its military objective, it did so by putting the health of part of the population at risk. The Commission does not see how this potential threat can be outweighed by considerations of military necessity. It thus finds that Israel violated its international legal obligations to adequately take into consideration environmental and health minimum standards when evaluating the legitimacy of the attacks against the above-mentioned facilities.

220. Furthermore, the Commission holds the view that Israel should have taken into account the possibility that the attacks on the Jiyeh power plant could lead to a massive oil spill into the sea. Despite the risks, IDF went ahead and attacked the site, with the consequences already explained. Whether the attack was justified or not by military necessity, the fact remains that the consequences went far beyond whatever military objective Israel may have had.

### **11. Attacks on cultural and historical property**

221. The Commission witnessed the damage on the Byblos archaeological site caused by the oil spill originating from IDF attack on the Jiyeh thermo-electrical plant in Saida. The site, listed on the UNESCO World Heritage List, suffered substantially from the oil pollution. In this respect, for example, the UNESCO Mission to assess the effects of the war on Lebanon's Cultural Heritage indicated in its September 2006 report the following on this exceptional archaeological site[.]

[...]

222. The Commission was able to verify the impact of the spill on the site's coastal archaeological foundations. The Commission saw the damage to rocks and foundations caused by the oil, which according to the Ministry of Culture's experts, has permeated the surface of the rock. [...]

[...]

228. After reviewing the material received and based on its visits to some of these sites, the Commission finds that Israeli attacks caused considerable and disproportionate damage to cultural, archaeological and historical property in Lebanon, which cannot be justified under military necessity. These unjustified attacks include, firstly, sites that, while not listed in the UNESCO World Heritage List, constitute nevertheless sites of extreme historical importance to the Lebanese population. That is the case of the destruction of sites in Chamaa, Khyam, Tibnin, and Bent J'Beil. Second, Israel's attacks in the vicinity of sites listed in the UNESCO World Heritage List, such as in the case of Baalbeck's Jupiter's temple, Byblos archaeological site and Tyre's archaeological property, while not constituting a direct attack, caused important damage to specially protected property. The Commission finds that Israel could have and should have employed the necessary precautionary measures to avoid direct or indirect damage to especially protected cultural, historical and archaeological sites in Lebanese territory.

229. Taking into account the number and gravity of incidents affecting protected cultural property, the Commission finds that these attacks constitute a violation of existing norms of international law and international humanitarian law requiring the special protection of cultural, historical and archaeological sites.

[...]

### **13. United Nations Peacekeepers – UNIFIL/Observer Group Lebanon**

233. During the conflict a number of UNIFIL and Observer Group Lebanon (OGL) positions were either directly hit by IDF fire or were the subject of firing close to their positions. All these United Nations positions are clearly marked, most are on prominent hill tops to aid observation. Their positions were notified in 12 figure grid references to IDF. On 12 July, IDF issued a warning to UNIFIL that “any person – including United Nations personnel – moving close to the Blue Line would be shot at”. On 15 July, UNIFIL was informed by IDF that Israel would establish a “special security zone” between 21 villages along the Blue Line and the Israeli technical fence. IDF informed UNIFIL that any vehicle entering the area would be shot at. This security zone was directly within the UNIFIL area of operation, which made it impossible to support (or evacuate, if necessary) many UNIFIL positions located in the zone. In effect, these warnings prevented UNIFIL from discharging its mandate conferred upon it by Security Council resolution 1655(2006) of 31 January 2006.
234. The Commission found that there were 30 recorded direct attacks by IDF on UNIFIL and OGL positions during the conflict. These attacks resulted, among others, in the death of four unarmed United Nations observers at the Khiyam base. A staff member and his wife died in an air strike on their apartment in Tyre. In addition, five Ghanaian, three Chinese and one French soldier of UNIFIL were injured, together with one officer from OGL.
235. It is significant that, towards the end of the conflict, after the ceasefire had been announced, there was a dramatic increase in IDF direct attacks on UNIFIL positions. For example on 13 August there were five direct hits, on positions at Tiri, Bayt Yahun, and Tibnin (on three occasions during the reporting period). There was extensive material damage in all these locations. On 14 August there were nine direct hits, on positions at Tibnin (four times), Haris (twice), Tiri (twice), and Marun al Ras (once).
236. A total of 85 artillery rounds impacted inside these UNIFIL bases on these two days alone, 35 in Tibnin. These attacks caused “massive material damage” to all the positions. All UNIFIL personnel were forced into shelters, which prevented casualties.
237. The attack on the UNIFIL Khiyam base of 25 July 2006 was a major incident during the conflict and is the subject of a separate UN report. [...] UNIFIL records show that during the conflict a total of 36 IDF air strikes occurred within 500 metres of the base, 12 of these within 100 metres. In addition there had been 12 artillery bombardments within 100 metres of the base; four of these hit the base directly. While Hezbollah had a base 150 metres away, as well as some form of operational base in a nearby prison, UNIFIL reported that there was no Hezbollah firing taking place within the immediate vicinity of the base that day. Throughout 25 July, UNIFIL had protested directly to IDF after each of the incidents of close firing to the base.

238. At 1925 hours on 25 July 2006 the base was struck by a 500 kilogramme precision-guided aerial bomb and destroyed. The United Nations Board of Inquiry noted that the Israeli authorities accepted full responsibility for the incident and apologized to the United Nations for what they say was an “operational level” mistake. The Board did not have access to operational or tactical level IDF commanders involved in the incident, and was, therefore, unable to determine why the attacks on the United Nations position were not halted, despite repeated demarches to the Israeli authorities from United Nations personnel, both in the field and at Headquarters. The report concluded that all standard operating procedures were followed and no additional actions could have been taken by United Nations personnel that would have changed the outcome.

[...]

241. State practice treats United Nations peacekeeping forces as civilians because they are not members of a party to the conflict and are deemed to be entitled to the same protection against attack as that accorded to civilians, as long as they are not taking a direct part in hostilities. By the same token, objects involved in a peacekeeping operation are considered to be civilian objects, protected against attack. Under the Rome Statute, intentionally directing attacks against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations constitutes a war crime as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law [See Case No. 23, The International Criminal Court, Art. 8(2)(b)(iii)].

242. The Commission has found no justification for the attacks on United Nations positions by IDF. Each United Nations position was clearly notified to IDF. In any case the locations have been in place for many years; they are easily recognized and built on prominent hilltop positions. There can be no doubt that both ground and air forces of IDF would have been fully aware of their locations. Firing of rockets by Hezbollah from the vicinity of these bases might explain the large number of “close firings” described above. However, from an international humanitarian law perspective of military necessity, and bearing in mind the principle of distinction, the Commission does not see how IDF can possibly justify the 30 direct attacks on United Nations positions and the deaths and injury to protected United Nations personnel.

243. Furthermore, the significant increase in the bombardment of United Nations positions on 13 and 14 August cannot be described as being of imperative or even of vague necessity from a military perspective.

244. With regard to Hezbollah firings from and into the immediate vicinity of United Nations positions, the Commission finds, based on the daily UNIFIL press releases, that there were six incidents of direct fire against UNIFIL positions and 62 incidents where Hezbollah fired their rockets from the close proximity of United Nations positions towards Israel.

245. The Commission finds that Hezbollah fighters were using the vicinity of United Nations positions as shields for the launching of their rockets. This is an obvious

violation of international humanitarian law and also put the United Nations forces in danger. However, “the vicinity” does not mean from within the bases as mentioned above. The direct targeting by IDF, when they have the advantage of modern precision weapons, remains inexcusable.

246. The direct firing on United Nations positions by Hezbollah is equally illegal and inexcusable and would appear to be an attempt by them to blame IDF for such incidents.

#### 14. Use of weapons

[...]

##### (a) Cluster munitions

249. Cluster munitions were used extensively by IDF throughout Lebanon. These consisted of both ground-based [...] and air-dropped [...].

There is ample evidence pointing to a significant increase in the intensity of the overall bombardment including cluster munitions in the last 72 hours of the conflict, including the period after the adoption of Security Council resolution 1701 (2006). OCHA affirms that 90 per cent of all cluster bombs and their sub-munitions were fired by IDF into south Lebanon during these last 72 hours of the conflict. For example, cluster bombardments were particularly heavy in and around the Tibnin hospital grounds, especially on 13 August when 2,000 civilians were seeking shelter there.

250. UNMACC, in cooperation with the Lebanese armed forces (National De-mining Office), has identified a total of 789 cluster strike locations throughout Lebanon. As of 31 October 2006, the estimate is that over one million cluster bombs had been fired in Lebanon. The reported dud rate of cluster munitions is as high as 40 per cent. In other words, many of the bomblets did not explode but, rather like anti-personnel mines, they littered the ground with the potential to explode at any time later.
251. This wide use of cluster bombs has been admitted by Israeli forces. On 12 September, the Haaretz newspaper quoted an IDF unit commander stating that “[I]n order to compensate for the rockets’ imprecision, the order was to “flood” the area with them. ... We have no option of striking an isolated target, and the commanders know this very well”. He also stated that the reserve soldiers were surprised by the use of MLRS rockets, because during their regular army service, they were told these are ‘judgment day weapons’ of IDF and intended for use in a full-scale war. An Israeli reservist soldier interviewed by the same newspaper also stated that “[I]n the last 72 hours we fired all the munitions we had, all at the same spot, we didn’t even alter the direction of the gun. Friends of mine in the battalion told me they also fired everything in the last three days – ordinary shells, clusters, whatever they had.” With regard to the exact timing of the launching of the cluster rockets, a unit commander said “[T]hey told us that this is a good time because people are coming out of the mosques and the rockets

would deter them.” The commander also said that at least in one case, they were asked to fire cluster rockets toward “a village’s outskirts” in the early morning.

[...]

256. Considering the indiscriminate manner in which cluster munitions were used, in the absence of any reasonable explanation from IDF, the Commission finds that their use was excessive and not justified by any reason of military necessity. When all is considered, the Commission finds that these weapons were used deliberately to turn large areas of fertile agricultural land into “no go” areas for the civilian population. Furthermore, in view of the foreseeable high dud rate, their use amounted to a *de facto* scattering of anti-personnel mines across wide tracts of Lebanese land.

[...]

**(c) White phosphorous/incendiary weapons**

258. White phosphorous is designed for use by artillery, mortars or tanks to put down an instant smoke screen to cover movement in, for example, an attack or flanking manoeuvre. The phosphorous ignites on contact with air and gives off a thick smoke. If the chemical touches skin it will continue to burn until it reaches the bone unless deprived of oxygen. It is not designed as an incendiary weapon *per se*, for example in the same way as a flame thrower or the petroleum jelly substance used in napalm.
259. The Commission received a number of reports concerning the use of this type of ammunition. On 16 July, Lebanese President Emile Lahoud and Lebanese military sources stated that IDF had “used white phosphorous incendiary bombs against civilian targets on villages in the Arqoub area” in southern Lebanon. In addition, the Commission was told about and witnessed a number of sites where the possible use of white phosphorous had occurred, among others, at Marwaheen on 16 July during the gathering of the civilians in the village prior to their evacuation under UNIFIL supervision. This was witnessed by civilians concerned and interviewed by the Commission. It was also confirmed by UNIFIL officers on the scene that 12 white phosphorous rounds were fired directly at the civilians.

[...]

**(d) Dense inert metal explosives (DIME)**

263. Various media have reported on the possible use by IDF of Dense inert metal explosives (DIME), a new weapon, in Lebanon. It was reported that Israeli Air Force Major General Yitzhak Ben-Israel had described the weapon as being designed “to allow those targeted to be hit without causing damage to bystanders or other persons”. It was brought to the Commission’s attention by a number of expert medical witnesses that some of the casualties had suffered from inexplicable burn injuries not witnessed before. These witnesses had extensive experience of war wounds from previous conflicts; their testimony is therefore



of some relevance. IDF have strongly denied the use of such weapons. If they were effectively used, the Commission finds that they would be illegal under international humanitarian law. Protocol I of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (hereafter “the Conventional Weapons Convention”) [See Document No. 13, Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention)], to which Israel is a signatory, prohibits the use of any weapon the primary effect of which is to injure by fragments which cannot be detected by X-rays. The Commission was unable in the time available to thoroughly investigate the claims. However, in drawing attention to this weapon and in particular to the expert witnesses’ testimonies, it finds that the possible use of such weapons in Lebanon should be the subject of further investigation.

[...]

267. None of the weapons known to have been used by IDF are illegal *per se* under international humanitarian law. However, the way in which the weapons were used in some cases transgresses the law. The use of cluster munitions has already been addressed. The Commission’s findings, detailed earlier in this report in relation to the direct targeting of civilian objects, infrastructure and protected property is at odds with the apparent interpretation of IDF and the application of the principle of distinction. The vast destruction of civilian objects throughout the Lebanon, but especially in the South where some villages were virtually completely destroyed indicates that weapons systems were not used in a professional manner, despite assurances from IDF that legal advice was being taken in the planning process. The record shows this: 1,191 persons killed; 30,000 houses destroyed; 30 UNIFIL and OGL positions directly targeted with 6 dead and 10 injured; and 789 cluster munitions strike locations.

## 15. Blockade

268. On 13 July 2006 Israeli naval ships entered Lebanese waters to impose a comprehensive blockade of Lebanese ports and harbours. The next day, on 14 July, Israel’s air force imposed an air blockade and proceeded to hit runways and fuel tanks at Rafik Hariri International Airport, Lebanon’s only international airport.
269. Israel justified the sea blockade with the argument that “[T]he ports and harbours of Lebanon are used to transfer terrorists and weapons by the terrorist organizations operating against the citizens of Israel from within Lebanon, mainly Hezbollah”. IDF further stated that “The Lebanese government is openly violating the decisions of the Security Council by doing nothing to remove the Hezbollah threat on the Lebanese border, and is therefore fully responsible for the current aggression.”
270. In his 12 September 2006 report on the implementation of Security Council 1701 (2006) the Secretary-General informed the Council that he had undertaken discussions with all concerned parties and that Israel had lifted the aerial blockade on 6 September and the maritime blockade on 7 September.

[...]

272. Parties to a conflict need to take into consideration the impact of the conflict on the civilian population. One of the most important aspects to consider is that of access to humanitarian assistance. Yet, as indicated by OCHA at the outset of the conflict, the Israeli-imposed blockade limited tremendously the work of humanitarian agencies by leaving only one entry point, by land, through Damascus. It was not until the second week of the conflict that Israel began considering expanding humanitarian entry points for relief aid to be sent into Lebanon. In this respect, for example, OCHA reported on 25 July that it was still seeking authorization for two ships arriving from Cyprus with an aid cargo to be allowed to land in Beirut. On 30 July, OCHA indicated that “the road between Aarida, on the Lebanon-Syria border, and Beirut is currently the only road open continuously”. Yet, on 4 August this road was also bombarded by IDF, thus seriously disrupting the overall provision of humanitarian aid. In general, access to ports in Beirut, Tripoli and Tyre was, at best, sporadic, thus forcing humanitarian agencies to continue using ground transportation through Damascus as the sole means for the transfer of aid supplies to the entire country. [...]

273. The Commission also considered the impact of the blockade on the environmental catastrophe that followed the Israeli attacks on the Jiyeh power station. The Commission finds that the blockade unnecessarily obstructed the deployment of immediate measures to clean or contain the oil spill. It was not until shortly before the end of the conflict that initial clean up operations along the coast could actually be initiated under the authority of the Lebanese Ministry of Environment and the Lebanese Army. By then, the oil slick had moved north and had already contaminated a large extent of the Lebanese coast, including its archaeological sites, as well as parts of the Syrian coast. The Commission finds that the Israeli Government should have ordered an immediate relaxation of the blockade to allow the necessary urgent evaluation to be made, assessment measures to be adopted and the necessary cleanup measures to be carried out. In the view of the Commission there is no reason that justifies a failure to do so. Israel’s engagement in an armed conflict does not exempt it from its general obligation to protect the environment and to react to an environmental catastrophe such as that which took place on the Lebanese coasts.

[...]

275. The Commission believes that the impact of the blockade on human life, on the environment and on the Lebanese economy seems to outweigh any military advantage Israel wished to obtain through this action. The Commission finds that the blockade should have been adapted to the situation on the ground, instead of being carried out in a comprehensive and inflexible manner that resulted in great suffering to the civilian population, damage to the environment, and substantial economic loss.

[...]

## **II. Human Rights Watch, Report on Civilian Casualties in Lebanon during the 2006 War**

[Source: Human Rights Watch, *Why They Died. Civilian Casualties during the 2006 War*, Report, Vol. 19, No. 5(E), September 2007, available at [www.hrw.org](http://www.hrw.org), footnotes omitted]

### **Why They Died Civilian Casualties in Lebanon during the 2006 War**

[...]

## **IV. Legal Standards Applicable to the Conflict**

### **A. Applicable International Law**

[...]

- [1] There has been controversy over the humanitarian law applicable to Hezbollah. Unless Hezbollah forces are considered to be a part of the Lebanese armed forces, demonstrated allegiance to such forces, or were under the direction or effective control of the government of Lebanon, there is a basis for finding that hostilities between Israel and Hezbollah are covered by the humanitarian law rules for a non-international (that is, non-intergovernmental) armed conflict. Under such a characterization, applicable treaty law would be common article 3 to the 1949 Geneva Conventions [...]. Whether captured Hezbollah or Israeli fighters would be entitled to the protections of the Third Geneva Convention for prisoners of war, the Fourth Geneva Convention for protected persons, or only the basic protections of common article 3, would depend on the legal characterization of the conflict and a factual analysis of Hezbollah and its relationship to the Lebanese armed forces. [...]

[...]

## **VI. Hezbollah Conduct during the War**

- [2] Hezbollah was responsible for numerous serious violations of the laws of war during its conflict with Israel. [...]

[...]

### **B. Hezbollah's Weapons Storage**

- [3] Human Rights Watch documented a number of cases where Hezbollah violated the laws of war by storing weapons and ammunition in populated areas and making no effort to remove the civilians under their control from the area. Humanitarian law requires warring parties to take all feasible precautions to protect civilian populations in areas under their control from the affects [*sic*] of attacks. This includes avoiding deploying military targets such as weapons and

ammunition in densely populated areas, and when this is not possible, removing civilians from the vicinity of military objectives. [...]

- [4] Intentionally using civilians to protect a military objective from attack would be shielding.

[...]

### **C. Hezbollah's Rocket Firing Positions**

- [5] In most southern Lebanese villages visited by Human Rights Watch, local villagers consistently stated that Hezbollah fighters had not fired rockets from within the village, but from nearby fields and orchards, or from more remote uninhabited valleys. On a few occasions, Human Rights Watch was able to establish through eyewitness interviews that Hezbollah fighters did fire directly from inhabited villages, a practice that would have put the civilian population of those villages at great risk of Israeli counterfire. While international humanitarian law recognizes that fighting from or near populated areas is permissible if there are no feasible alternatives, Hezbollah did have alternatives when it fired from inside villages in the [majority] of cases examined by Human Rights Watch. This is evidenced by the fact that Hezbollah had bunkers and positions outside villages and was able to actually use them a great deal of the time.

[...]

### **D. Claims of Hezbollah "Human Shielding" Practices**

- [6] Israeli officials have repeatedly accused Hezbollah of using the Lebanese civilian population as "human shields" by deploying their forces – fighters, weapons, and equipment – in civilian areas for the purpose of deterring IDF attack. On many occasions, Israeli officials blamed these alleged shielding practices as the primary cause for Lebanese civilian deaths. [...]

[...]

- [7] A key element of the humanitarian law violation of shielding is intention: the purposeful use of civilians to render military objectives immune from attack.

- [8] As noted above, we documented cases where Hezbollah stored weapons inside civilian homes or fired rockets from inside populated civilian areas. At minimum, that violated the legal duty to take all feasible precautions to spare civilians the hazards of armed conflict, and in some cases it suggests the intentional use of civilians to shield against attack. However, these cases were far less numerous than Israeli officials have suggested. The handful of cases of probable shielding that we did find does not begin to account for the civilian death toll in Lebanon. [...]

- [9] The Israeli government's allegations seem to stem from an unwillingness to distinguish the prohibition against human shielding – the intentional use of

civilians to shield a military objective from attack – from that against endangering the civilian population by failing to take all feasible precautions to minimize civilian harm, and even from instances where Hezbollah conducted operations in residential areas empty of civilians. Individuals responsible for shielding can be prosecuted for war crimes; failing to fully minimize harm to civilians is not considered a violation prosecutable as a war crime.

- [10] To constitute shielding, there needs to be a specific intent to use civilians to deter an attack.

[...]

- [11] [...] Our investigation revealed that Hezbollah violated the prohibition against unnecessarily endangering civilians when they took over civilian homes in the populated village, fired rockets close to homes, and drove through the village in at least one instance with weapons in their cars. However, the available evidence does not demonstrate human shielding – the purposeful use of civilians to deter an attack – in Ain Ebel. Hezbollah did not seize any inhabited houses in the village; even witnesses that criticized Hezbollah's behavior agreed that Hezbollah took over only houses that had no one in them. While Hezbollah fired rockets from within the village, none of the witnesses interviewed by Human Rights Watch claimed that Hezbollah fired from or near homes that were populated at the time, or fled into populated areas of the village after firing their rockets. [...]

[...]

### **E. Hezbollah Firing from Near UN Positions**

- [12] [...] [T]here is strong evidence to suggest that Hezbollah fired much more frequently from the vicinity of UN outposts in southern Lebanon. According to reliable UNIFIL records, Hezbollah fighters fired rockets on an almost daily basis from close proximity to UN observer posts in southern Lebanon, often drawing retaliatory Israeli fire on the nearby UN positions as a result. There are two likely motives for this conduct, which are not mutually exclusive. On the one hand, the hills on which most observation posts are located are also good places from Hezbollah's perspective for firing on Israel. On the other hand, Hezbollah commanders may have at times selected those positions for firing because the presence of UN personnel made it more difficult for Israel to counterattack. Insofar as the latter consideration motivated Hezbollah combatants, that would constitute shielding.
- [13] Peacekeeping forces are not parties to a conflict, even if they are usually professional soldiers. As long as they do not take part in hostilities, they are entitled to the same protections under the laws of war afforded to civilians and other non-combatants. Deploying military forces or materiel near a UN base or outpost would violate at the very least the duty to take all feasible precautions to avoid harm to non combatants if there were feasible alternatives. Intentionally

using the presence of peacekeepers to make one's forces immune from attack amounts to human shielding.

[...]

#### **F. Hezbollah Combatants in Civilian Clothes**

- [14] On the few occasions that Human Rights Watch researchers encountered Hezbollah fighters in the field during the conflict, those Hezbollah fighters were invariably dressed in civilian clothes, and often had no visible weaponry on them. Especially away from the frontlines, Hezbollah fighters appear to have operated in small cells of fighters, dressed in civilian clothes and maintaining contact with each other as well as Hezbollah fighters in other cells with handheld radios. Away from active areas of combat, Hezbollah fighters were normally unarmed, keeping their weapons out of sight until needed. Only during active confrontations with Israeli forces did some Hezbollah fighters, particularly Hezbollah's elite fighters, fight in military uniforms.
- [15] While the humanitarian law applicable during the Israeli conflict with Hezbollah placed no obligation on those participating in the hostilities to wear uniforms, the routine appearance of Hezbollah fighters in civilian clothes and their failure to carry their weapons openly put the civilian population of Lebanon at risk. Since Hezbollah fighters regularly appeared in civilian clothes, Israeli forces would have had difficulty distinguishing between fighters and other male, fighting-age civilians, and such difficulty increased the dangers of IDF operations to the civilian population of Lebanon. However, the failure of Hezbollah fighters to consistently distinguish themselves as combatants does not relieve Israeli forces of their obligation to distinguish at all times between combatants and civilians and to target only combatants. The difficulty of making that distinction does not negate Israel's obligation. In cases of doubt, a person must be considered a civilian and not a legitimate military target.

[...]

## DISCUSSION

### A. Qualification of the conflict and applicable law

1. (*Part I, paras 53-55; Part II, para. [1]*) How does the Human Rights Council (HRC) Commission of Inquiry (hereinafter “the Commission”) qualify the conflict? How does Human Rights Watch qualify it? How do you qualify it? (GC I-IV, common Art. 2; P I, Art. 1; P II, Art. 2)
2. Was it an international armed conflict only because Lebanon never consented to the military operations carried out by Israel against Hezbollah? What is the threshold for qualification as an international armed conflict? Is it sufficient that the armed forces of a State cross its border and enter foreign territory? Is it sufficient if only one soldier crosses the border? (GC I-IV, common Art. 2)
3. (*Part I, paras 57; Part II, paras [14]-[15]*) Do you agree with the Commission that Hezbollah may be qualified as a militia under Art. 4(A)(2) of GC III? Is this in accordance with the Commission’s conclusion that Lebanon and Hezbollah were two different parties to the conflict (*para. 55*)? What are the necessary conditions for an armed group to be considered a militia under Art. 4(A)(2) of GC III? Does Hezbollah fulfil all the requirements listed in Art. 4(A)(2)(a)-(d)? Can Hezbollah be regarded as a militia even though the Lebanese government does not endorse its actions? Could the mere fact that Lebanon’s President Emile Lahoud “paid tribute to the National Resistance fighters” be enough to infer a relationship of subordination between Lebanon and Hezbollah? What consequences does your answer to these questions have for the qualification of the conflict? [See also **Case No. 261**, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base]
4. (*Part I, paras 41, 54*) Do you agree with Israel that Lebanon is responsible for the acts of Hezbollah? May Hezbollah be considered a State organ only because it is represented in the Parliament and in the Cabinet? Or may it be argued that it was exercising elements of governmental authority? From the information given in the report, can it be said that Hezbollah is acting on the instructions of Lebanon or under Lebanon’s direction or control? Which test should be used here to determine whether Lebanon is internationally responsible for the acts committed by Hezbollah? Which elements should be taken into account? If Lebanon was not responsible for Hezbollah’s acts, could the hostilities still qualify as an international armed conflict? Should the same test be used to determine both the nature of the conflict and the responsibility of Lebanon? [See also **Case No. 53**, International Law Commission, Articles on State Responsibility, Arts 4, 5, 7, 8; **Case No. 153**, ICJ, *Nicaragua v. United States*; **Case No. 211**, ICTY, *The Prosecutor v. Tadic*, in particular Part D., *Bosnia and Herzegovina v. Serbia and Montenegro*]
5. (*Part I, paras 53, 58; Part II, para. [1]*) Could the conflict be purely non-international even though IDF conducted operations on Lebanese soil and targeted Lebanese installations? (GC I-IV, common Art. 2; P II, Art. 1)
6. Could both the IHL of international armed conflicts apply to IDF attacks on Lebanon and IDF occupation of Lebanese territory and the IHL of non-international armed conflicts apply to hostilities between IDF and Hezbollah? If yes, how would one distinguish whether an attack on a given target or the detention of a given person is covered by the IHL of international or of non-international armed conflicts? May Hezbollah fighters detained by Israel be both protected persons under GC IV and members of an armed group covered by common Art. 3?

### B. Qualification of the persons

7. (*Part I, para. 40*) What is the status of the two Israeli soldiers captured by Hezbollah? What protection are they afforded under IHL? What would be the status of Hezbollah members captured by IDF? (GC III, Art. 4; GC IV, Art. 4; P II, Art. 5)

8. (*Part I, para. 104*) Do you agree that “a distinction should be made between professional Hezbollah fighters and civilian militia volunteers (...) who took up arms during the conflict”? Does such a distinction exist in IHL? What is the status of each of these two categories in the conduct of hostilities? When may they be directly targeted? What is their status when they fall into the power of Israel? [See **Case No. 136**, Israel, The Targeted Killings Case] (GC III, Art. 4; GC IV, Arts 4 and 5; P I, Art. 51(3); P II, Art. 13)
9. (*Part I, para. 158*) Do you agree that after issuing an order to the population to evacuate southern Lebanon, Israel was allowed to consider every person remaining in the area to be a Hezbollah supporter who could be directly targeted? (P I, Arts 50(1) and 51(3); P II, Art. 13)

### C. Conduct of hostilities

10. (*Part I, paras 116-117*) Do you agree with the Commission that Hezbollah offices and political headquarters are not necessarily military objectives? In which circumstances may such buildings be attacked? (P I, Art. 52(2); CIHL, Rules 8-10)
11. (*Part I, para. 139*) What is the status of water facilities? May they be attacked? Why? (P I, Art. 54; P II, Art. 14; CIHL, Rules 53-54)
12.
  - a. (*Part I, paras 140-143*) What is the status of the Lebanese TV and radio stations? Do you agree with the report that a distinction should be made between the Hezbollah-backed TV and the Lebanese TV stations? If there is an international armed conflict with Lebanon, what is the status of the Lebanese TV stations? (P I, Art. 52(2) and (3))
  - b. Do you agree that “merely disseminating propaganda to generate support for the war effort” does not suffice to turn a TV station into a legitimate military objective? Is the Al-Manar TV station a legitimate military objective, taking into account the fact that it “has also helped the organization recruit people into its ranks”? May the dissemination of propaganda be considered as an effective contribution to military action? Is a radio station a military objective if it calls upon its audience to commit war crimes? To commit lawful hostile acts? (P I, Art. 52(2); CIHL, Rules 8-10)
  - c. Do you agree that even Al-Manar TV is not a legitimate military target? Is the Commission’s finding here consistent with the conclusion of the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia? [See **Case No. 226**, Federal Republic of Yugoslavia, NATO Intervention, paras 71-79] In your opinion, when may a TV station be attacked? (P I, Art. 52(2); CIHL, Rule 10)
13. (*Part I, paras 146-148*) Does a hypothetical use of a civilian building or object by the enemy suffice to turn it into a legitimate military objective? Would this be in accordance with the principle that a military objective must provide the enemy with an “effective contribution to military action”? Do you agree with the Commission that the “dual use” argument turns every civilian object into a potential military target? (P I, Art. 52(2) and (3))
14. (*Part I, paras 149-158*) What does the obligation to give the civilian population, when possible, “effective advance warning” entail? What renders a warning effective? May Israel, by issuing a warning or imposing curfews, be allowed not to distinguish between fighters and non-fighters? May Israel assume that after it has taken such measures, civilians have cleared the area, therefore allowing for its bombardment? Do such measures dispense a party from taking precautions to verify that no civilians are present in the area to be targeted? (P I, Art. 57(2)(c); CIHL, Rule 20)
15. (*Part I, paras 163-164*) Do you agree that the fact whether or not the hospital “had a Red Cross flag flying on its roof is relatively unimportant”? Is there an obligation under IHL for hospitals to be marked with the emblem in wartime? When they do display an emblem in wartime, what size



should it be? What is the role of the emblem in such cases? May hospitals be targeted when they do not display any emblem? (GC I, Art. 42; GC IV, Art. 18(3)-(4); P I, Art. 12; P II, Art. 12; CIHL, Rules 28 and 30)

16. a. (*Part I, paras 172-177*) What is the status of National Red Cross and Red Crescent Societies? Of civil defence organizations? What protection are they afforded under IHL? Were the IDF attacks against the Lebanese Red Cross and the Lebanese Civil Defence war crimes? Were they grave breaches? (GC I, Art. 26; P I, Arts 8(c), 61-67, 71, 85; CIHL, Rule 31; ICC Statute, Art. 8(2)(b)(iii) and (xxiv))
- b. (*Part I, paras 184-186*) What are the obligations of the parties to an armed conflict regarding the passage of goods and humanitarian relief? May the establishment of a blockade dispense the parties from their obligations to allow the free passage of humanitarian relief? Should a party cancel an attack on a legitimate military objective if it is evident that the attack will impede the free passage of humanitarian workers and relief supplies? (GC IV, Art. 23; P I, Arts 51(5)(b), 52(2) and 70; CIHL, Rules 55-56)
17. (*Part I, paras 188-192*) What is protected by the rules of IHL relating to religious objects? Do they only protect places of worship, or also spiritual and religious objects such as those mentioned in para. 188? Does the conduct criticized in para. 188 constitute an attack? Are only attacks against religious objects prohibited? May IDF use such objects? Is the exception provided for in Art. 4(2) of the Hague Convention of 1954 also applicable to places of worship? [See **Document No. 10**, Conventions on the Protection of Cultural Property, Part A.] (HR, Art. 27; P I, Art. 53; P II, Art. 16; CIHL, Rules 38-40)
18. a. (*Part I, paras 199-208*) What is the protection granted to internally displaced persons (IDPs) under IHL? Do they benefit from special protection? What is the status of IDPs under IHL? (GC IV, Art. 4; CIHL, Arts 129-133)
- b. (*Part I, para. 207*) Is internal displacement necessarily unlawful? When may evacuation be lawful under IHL? What are the obligations of the parties when civilians voluntarily choose to leave the region because of the armed conflict? Does the displacement itself become a violation of IHL when it is caused by indiscriminate attacks from which the civilian population tries to escape? Does every displacement amount to deportation? Are deportations during an armed conflict always prohibited? (GC IV, Arts 49, 147; P II, Art. 17)
19. (*Part I, paras 209-220*) Was the Jiyeh power plant a military target? Considering the probable effect on the environment, was it lawful to attack it? Why? Do you assess the legality of the two attacks the same way? Do you think that all the necessary precautionary measures were taken by IDF before the second attack? Could they foresee that the retaining wall would collapse (*para. 210*)? Did the attack cause “widespread, long-term and severe damage” to the environment? How do you define these terms? (P I, Arts 35(3), 52(2) and 55(1); CIHL, Rules 43-45; Rome Statute, 8(2)(b)(iv))
20. (*Part I, paras 213-215*) Were the damaged chemical plants protected by IHL? Considering that they released chemical substances into the ground, into water sources and into the air, may they be considered as installations containing dangerous forces and be protected as such? What is protected by Art. 56 of Protocol I? Are only dams, dykes and nuclear power stations protected? (P II, Arts 52 and 56)
21. (*Part I, paras 221-229*) How is cultural and historical property protected in wartime? Are historical sites protected even when they are not included in the UNESCO World Heritage List? Should an attack be cancelled or suspended when, though not directly targeting a cultural site, it may cause some damage to it? (P I, Art. 53; CIHL, Rules 38-41; Rome Statute, 8(2)(b)(ix)) [See also **Document No. 10**, Conventions on the Protection of Cultural Property]

22. a. (*Part I, paras 233-246*) Does IHL apply to UNIFIL personnel and personnel of the Observer Group Lebanon? Does IHL protect them? What is their status? (GC III, Art. 4; GC IV, Art. 4)
- b. (*Part I, paras 233-246; Part II, paras [12]-[13]*) May IDF directly target UNIFIL personnel? May it attack Hezbollah positions near UNIFIL outposts? In which circumstances, if ever, may members of peacekeeping operations be directly targeted? [See **Case No. 22**, Convention on the Safety of UN Personnel, Arts 2, 7]
- c. (*Part I, para. 233*) May IDF directly target United Nations personnel moving close to the Blue Line? If it has previously issued a warning? May IDF shoot indiscriminately at any vehicle entering the security zone? (P I, Art. 52(2); CIHL, Rule 33)
23. a. (*Part I, paras 249-256*) Were cluster munitions prohibited during the conflict? In which circumstances may a State use cluster munitions? Which rules apply to them? Do you think that their use by IDF was proportionate (*para. 251*)? [See **Document No. 19**, Convention on Cluster Munitions]
- b. (*Part I, paras 258-259*) Is the use of white phosphorous weapons prohibited under IHL? If not, what are the rules governing its use? Was the use of white phosphorous weapons by Israel in the present case lawful? Why? [See **Document 14**, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention), in particular Art. 1(b)(i)] (CIHL, Rules 70-71)
- c. (*Part I, para. 263*) Was the use of dense inert metal explosives (DIME) by Israel lawful under IHL? [See **Document No. 13**, Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention)] (CIHL, Rule 79)
24. a. (*Part I, paras 268-275*) Was the sea and air blockade of Lebanon by Israel lawful under IHL? Does the fact that Hezbollah was using the harbours justify the sea blockade? Does this amount to reprisals? To collective punishments? [See also **Document No. 83**, San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Arts 93-104] (P I, Arts 49(3), 51(6), 54, 70 and 75(2))
- b. (*Part I, para. 272*) Does the blockade dispense the parties to the conflict from their obligations to allow and facilitate the passage of humanitarian relief? [See also **Document No. 83**, San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Arts 93-104] (P I, Arts 49(3), 51(6), 54, 70 and 75(2); CIHL, Rules 55-56)
25. (*Part II, paras [6]-[11]*) Do you agree with Human Rights Watch that human shielding should be distinguished from the failure to take all necessary passive precautions to minimize harm to civilians? Is the difference between the two obligations based upon intent? Does it make a difference for the adverse party when it plans an attack? Would Israel be allowed to target the Hezbollah members among the civilian population in either of the two situations? Would it be easy for the adverse party to distinguish between human shielding and a failure to take passive precautions for the benefit of the civilian population? (P I, Arts 51(8) and 58; CIHL, Rule 97)

#### D. Applicability of IHL to armed groups

26. (*Part I, paras 60 and 67; Part II*) Do you agree with the Commission and Human Rights Watch that Hezbollah is bound by IHL? Does the answer to this question depend on the nature of the armed conflict (international or non-international)? If the conflict is international, is Hezbollah a party to it?

**Case No. 150, Israel, Report of the Winograd Commission**

[**N. B.:** The "Winograd Commission" is an Israeli-government-appointed commission of inquiry chaired by Judge Eliyahu Winograd, charged to review the preparation and conduct of the Israeli military operations during the war against Hezbollah in 2006.]

[**Source:** Report of the Winograd Commission, 30 January 2008, Chapter 14 "The Conduct of Israel in Light of International Law," available in Hebrew at <http://www.vaadatwino.org.il/>, unofficial translation]

**Chapter Fourteen:****The Conduct of Israel in Light of International Law****General**

1. Humanitarian law is a set of norms that is part of international law, which applies to Israel as it does to every state. For our purposes regarding the present war, it includes the **laws of war**.
2. The laws of war are divided into two categories:
  - The first examines the decision to go to war (*jus ad bellum*). The general principle of international law is that war is justified only if it is waged in reaction to an act of aggression.
  - The second category of laws of armed conflict, or laws of war (*jus in bello*), deals with **the manner in which hostilities are conducted**. The supreme requirement, which is the most central principle of the laws of armed conflict, is the distinction between military combatants and targets and non-combatants and non-military targets. The general principle is that intentional targeting of only the former is permissible. The laws of war also determine the types of weapons and munitions that are forbidden for use in all circumstances, those that are permitted and those that are restricted in use. In addition, the laws of armed conflict require the parties to the hostilities to reduce the risk of harming civilians by moving the military targets and acts of combat away from civilian population centers. The use of civilians as a "human shield" is absolutely forbidden. In addition, according to the laws of war, military action should be "proportionate," and a reasonable relationship must be maintained between the anticipated harm to civilians as a result of the action and the military advantage it is expected to yield. In addition, the parties to the conflict must enable humanitarian aid to reach the civilian population located in the areas of combat.
3. The manner in which the combat is waged is examined separately to the question of the decision to engage war, and the laws of armed conflict apply to all those who engage in acts of combat, aggressive and defensive alike. This is in order to protect the civilians of both sides and also because in many cases the question of who is the aggressor and who the defender is controversial and cannot be clearly determined. In addition, this principle alone ensures that the aggressor will also have an incentive to abide by the laws of armed conflict.

[...]

5. [...] [T]he only subject that we will address here is an assessment of the conduct of Israel in light of the laws of armed conflict.

#### **A. The Way the Committee Addresses the Subject**

[...]

8. We examined a large volume material and in light of this we made the decision to limit ourselves to **general** comments regarding the conduct of the political echelons and the IDF forces in the context of the rules of international law. We recommend that an authorized examination also be held where the facts seem to indicate deviation from the rules of international law, in general and regarding the Second Lebanon War, in particular. Only on one issue – the use of cluster bombs – do we recommend an additional examination. [...]

9. Here we mention only some of the principle general findings:

- The Second Lebanon War caused severe damage in loss of life, dislocation of people from their homes and vast destruction, in both states. The Government of Israel expressed sorrow for the harm inflicted on the citizens of Lebanon and we share this sorrow. However, such damage occurs in war. The fact that civilians were hurt or that civilian infrastructures were damaged does not in itself constitute evidence that Israel failed to adhere to the rules of international law.

[...]

- We did not encounter any case in which an act was taken despite the decision maker or commander being told that it was illegal prior to its implementation. Nor did we encounter any case in which commanders or soldiers knowingly performed acts that violate international law.
- [...] We found that both in the political echelons and within the IDF, there was generally a high and constant level of awareness of the rules of international law and its restrictions, and of the need to ensure that the forces act in accordance with them.
- In cases in which there arose – during or after the war – a significant question regarding the conduct of hostilities in terms of the laws of war – special teams were set up to study the events. Such was the case regarding the killing of UN members at their post, regarding the attack that caused the killing of civilians in Kfar Kana and regarding the way in which cluster bombs were employed.

[...]

15. [...] [W]e will concentrate on examining the general norms, the operational plans for the Lebanese arena and the issue of legal counsel during the war. We will add some general guidelines on the subject of the appropriate investigation of military activity, in general, and of the events of the Second Lebanon War, in particular.

[...]

**B. Instilment of International Law in the IDF and Legal Counsel during Hostilities**

[...]

20. [...] [I]t is in Israel's interest that its leaders, commanders and fighters act in both a legal and moral manner. For this purpose there must be effective dissemination of the norms of international law – independently or as part of strict adherence to Israeli law, military law or purity of arms – among state leaders, IDF commanders and to the very last combat soldier. This education is essential both in order to guide the behavior and to provide a normative foundation for examining specific events. It is also essential to place responsibility when necessary, on the one hand, and to provide genuine support to people who acted on behalf of the state in the framework of the rules, on the other hand.
21. It is precisely because international law on these subjects is unclear and indeterminate, and because the mechanisms for its enforcement are lacking and in some cases politically biased, that it is also very important to deal in this context with problems regarding any legal order: In some cases there is great tension between what the legal rule commands – such as the duty to obey orders or the duty not to harm civilians – and what is dictated by common sense, existential need or morality itself.
22. The law itself sometimes refers to these tensions. For example, the legal and moral duty not to obey a manifestly illegal order is a case in which the law directs the soldier not to obey an order.
23. Sometimes there is concern that the fear of international law (or the danger of being put on criminal or military trial) will paralyze soldiers from discharging their missions and from carrying out action that would enable fulfillment of the mission. Such concern also exists in Israel, and it is important to examine ways to ensure that combatants and commanders are not paralyzed in operational action. This is not a matter of permitting acts that are contrary to local or international law, but clarification that the principles of international law (and domestic criminal law) are not intended to stultify the ability to take military action in defense of the state and its citizens.
24. At any rate, these problems are not special to international law, and the need to deal with them should not be construed as a deviation from the principle that the rules of humanitarian law are binding upon Israel.
25. As noted above, it seems to us that the authorities are aware of these duties, and that they generally act, and acted during the war, in conscious awareness of these duties and out of a desire to honor them.
26. Thus, for instance, at critical crossroads of decision in the political echelons, the presence – and sometimes the approval in legal terms – of the Attorney General was requested. The examination dealt with both legal and factual aspects. Even when the target seemed to be a legitimate target – the political echelons took care to make their approval of action contingent upon explicit prior warning and reliable intelligence estimates that there was no civilian population in the location. The operative plans included a detailed appendix that dealt with international

law, and also included special guidelines for special types of arms (such as cluster bombs). [...]

27. The practice noted – providing legal consultation in real time to the military and political echelons – expressed an interesting and not at all simple decision that was taken by the legal advisors – both in the military and the political echelons. [...] [Its] essence: the members of the legal advisory staff are involved in decisions **prior to the act or in real time while hostilities are underway**. There are acts that are not carried out because they do not give legal approval for them, and there are acts that they do approve, and statesmen and combatants act according to the approval, although others may claim that these acts are illegal and even that they constitute war crimes.
28. Despite all the above in favor of “close” legal consultation, we would like to address the question of whether such a heightened level of legal consultation in real time was indeed desirable.
29. The natural tendency – for reasons of personal responsibility – to seek the assistance of legal counsel even, and perhaps mainly, in real time is clear to us; nevertheless, we fear that increased reliance on legal counsel during a military action is liable to cause a diversion of responsibility from elected officials and commanders onto the advisors, and is liable to impair both the essential quality of the decision and the operational activity.
30. In principle, we consider preferable a position according to which the general norms regarding the application of discretion and force, alongside guidelines for action, education and training to uphold the rules of combat according to international law, including all the ethical, political and legal restrictions, should be instilled **prior to action** as a matter of routine. **During the action** (that is, during combat, in real time) the decision makers and combatants should be allowed to act in accordance with these norms, which were instilled as said. **After the fact**, incidents should be examined, including placing responsibility in cases where it emerges that there was a significant deviation from the binding norms that were instilled.
31. Our discussion refers mainly to legal counsel in real time to those who are in the actual combat situation. It seems to us that it is appropriate that the combat forces, and certainly the field ranks, should concentrate on combat and not on consultation with legal advisors. This certainly holds when the constraints of legality and purity of arms have already been instilled in them during their professional training.
32. Another advantage that arises from giving greater weight to operational judgment (where the legal and ethical norms have already been instilled) lies in the fact that this will also enable the echelons of the legal counsel not to put themselves in situations in which they will be prevented – due to personal involvement – from rendering a professional opinion after the fact, or even from effective representation of the members of the combat forces in Israel and abroad, simply because their members already legitimized the action or determined that it was illegal in real time.

33. In order to eliminate any doubt, we clarify further that the difficulty we describe does not arise in relation to the approval of plans or standing orders, which are part of the system of **preparation and education** of the IDF. This system must bring the difficulties to the surface, in time, and it must include clear guidelines regarding the degree of legality of the general plans and orders. As noted, in the complete orders that we examined we did indeed find organized chapters that dealt with international law in general, and with restrictions corresponding to the specific plan, such, in particular, was the case regarding types of armament. These materials are one of the essential tools for effective inculcation of the instructions in IDF units.
34. We also remind the readers that the soldier, every soldier, bears the legal duty not to obey a manifestly illegal order, orders over which there waves a “black flag” [clearly immoral]. The military system – and the political echelons that supervise over it – are obligated to ensure that standing orders and plans do not include such orders, and that this duty is instilled in an orderly manner during the training of the combatants and the commanders. This is important not only because of international law, but also in order to create the correct consistency between the education and the system of commands in general, and in times of emergency and war in particular.
35. The situation differs with regard to the senior political echelons. Here the issue of dealing with legal questions in the course of combat does not usually arise. Among other things, the information that the leaders consider regarding a concrete decision must also include the international law aspects of the issue at hand. [...]
36. As noted, operational considerations are not the main focus of leaders’ decisions. Here we note only that the Attorney General’s determination that a given action being considered by the political echelon is liable to be interpreted as contradicting international law is an authoritative determination of the legal situation as far as the government is concerned.
37. Some believe that this determination, in itself, does not require the government to act or refrain from acting. In their opinion – the government bears the responsibility for managing state affairs in a manner that protects the state’s security and essential interests, and if it seems to it essential to act in a certain manner in order to protect a critical interest of the state – it has the right and perhaps also the duty to do so, even if the Attorney General has determined that it is liable to be interpreted as contradicting international law. In contrast to those who believe this, there are others who hold that the opinion of the Attorney General is binding and that the political echelons must refrain from such an action. Our view is that the senior political echelon bears the ultimate responsibility for decisions on central political-security issues. Such decisions must be made by the state leaders, and not the professional advisory echelons, however senior they may be. It goes without saying that such decisions will be made only extremely rarely and in cases of clear and essential necessity, and that those who make such a decision – in the knowledge that it contradicts the accepted interpretation of the applicable law – must also be prepared to take responsibility for its consequences, if and insofar as this is required. This is an inherent aspect of leadership.



### C. International Law and the Effectiveness of Combat

38. A difficult question is whether the types of war conducted today, and those that are increasingly developing – in which there are in many cases many elements of asymmetry between the parties, where injury is inflicted on civilians of one state by forces whose political or military base is very distant from the state, and in which there is prolonged confrontation (which may be of low, high or varying intensity) – justify or require rethinking of the laws of war and the political positions regarding war or the use of military force that were developed mainly on the basis of lessons of “ordinary” wars between states and armies. We clarify:
39. The laws of armed conflict indeed apply in the most appropriate way to the “old” pattern of war – a war between organized armies of sovereign states, which have a beginning and an end, where the outcome of the war is determined by the outcome of the fighting forces and the consequences of the outcome of the war influence the political order obtained as a result of it.
40. The facts in the arena of Lebanon – and in other places in the region and in the world – have created a situation that poses a serious challenge to the dominion of the laws of armed conflict contained in international law. In the Lebanese arena there is a situation of an “ineffective state” in whose realm Hezbollah – a sub-state force that has characteristics of a military organization, a militia and a fanatic ideological religious movement – operates. Hezbollah is connected spiritually, economically and militarily to bodies and states outside of Lebanon, but it also represents an authentic Lebanese community, and is an active participant in the governing institutions of Lebanon. As described, Hezbollah in fact controlled southern Lebanon and it maintains an independent military presence throughout the country. We described the complex array that it built against the State of Israel. During the war, Hezbollah – intentionally – attacked the citizens of Israel indiscriminately, and tried to attack infrastructural targets, including electricity and petrochemical installations. It made massive use of imprecise munitions and in many cases also aimed these munitions at clear population centers. Throughout the war the Lebanese Army made no attempt to impair or limit the military action of Hezbollah towards Israel from Lebanese territory. In contrast, Israel itself restricted its attacks on centers of power and infrastructures that were not directly identified with Hezbollah and its ability to fight.
41. On the other hand, Israel’s ability to damage Hezbollah and its combatants in a focused and direct manner was very limited, as Hezbollah had almost no fixed centers of attack, such as visible bases and commands, it was not clear whether its activists were combatants or civilians, and whichever the case, they acted in many cases from within the civilian population and in built-up areas. Moreover, their early preparations for a military confrontation afforded them, on the one hand, high durability of their means of attack, as the majority was buried underground in a way that protected them from the Israeli bombs – and on the other hand, defensive and fortified preparations that were liable to take a heavy toll of life on the Israeli ground troops that would try to attack its centers. Furthermore, some



of the instruments of attack of Hezbollah were deliberately hidden in residential homes and even in places of worship.

[...]

43. Therefore, in addition to military preparations that respond effectively to the special type of threat posed to Israel from the Lebanese arena – it would be good if Israel – as it does to a great extent, and as other nations are also doing already – continues to examine the laws of armed conflict according to the conditions and apply them, in keeping with their spirit, in a way that enables Israel to take effective action against those who attack it and endanger its citizens, while honoring the accepted **principles** of international law with the flexibility incorporated in them.
44. We emphasize that the challenge that we raised here is urgent and it has far-reaching implications. The power of individuals or small groups to harm countries and their citizens is expanding constantly and rapidly. It is necessary to adapt the laws of armed conflict (and enforcement of the law) to the changing conditions, while ensuring the right balance between protection of a state's citizens from aggressors – and preserving human rights and rules of international law.
45. Israel's prolonged endurance of different types of combat, including these new characteristics, makes it an important focal point for the adaptation of the laws of armed conflict to changing conditions. It is important that this adaptation be based on continual discourse with leaders, senior commanders and legal advisors of the states that are facing similar threats. This is not a unique issue to Israel and it would be an error to relate to it as such. [...]

### Investigations and Examinations

46. We recall that the fact that Israel undertook to abide by the principles of the laws of war imposed a duty upon the authorized authorities in Israel, which have the appropriate tools for doing so, to examine the individual events regarding which claims were raised that necessitate examination. In addition, it is also the duty of the authorities to examine further the general and principal implications of the claims that were voiced against Israel on this issue and to draw conclusions for the future accordingly. [...]
47. Following hostilities, particularly those that end in death or significant damage, there are liable to be claims against the IDF forces. Such claims may refer to deviation from the rules of international war – with which we deal in this chapter – or issues of negligence or other flaws in the circumstances that led to the terrible result.
48. The need to balance between the effectiveness and the speed of the investigation, and between the desire not to expose operational details and the credibility of the investigation creates a difficult set of circumstances. We stress that a credible investigation in cases of allegedly well-established claims of deviation from international law by IDF forces is not only a moral necessity, but it is also vital to the ability of the state to respond to political claims and legal suits. This is true in general as well as regarding the specific events of the Lebanon War.

[...]

## Recommendations

Based on our examination and analysis, we recommend:

**52. Recommendation No. 1: Systematic and orderly dissemination of the laws of armed conflict in the state, professional and security force echelons.**

- The issues of international law and laws of armed conflict will be included in the IDF plans and training of combat soldiers and commanders. These norms will be instilled in all ranks of the IDF. The relationships between the instructions of international law and the values of the IDF, in general, and the element of purity of arms will be stressed in particular. Special attention will be given to these issues in relevant units (such as units that employ restricted munitions, or units whose actions are liable to have severe consequences in terms of injury to a civilian population).
- The issues of purity of arms, international law and laws of armed conflict will be instilled in the professional and state echelons and will be presented as part of the staff work regarding relevant decisions.
- The examination of operational plans and instructions in terms of their compatibility with international law will be an obligatory stage prior to their approval.

**53. Recommendation No. 2: The State of Israel and the IDF will be sure to conduct as immediate and reliable an investigation as possible of events in which concern arises regarding deviation from military law, the laws of Israel or the laws of armed conflict contained in international law.**

- Such investigations will differentiate between the element of drawing conclusions and the element of personal responsibility.
- A correct balance will be maintained between supporting combatants under the conditions of operational action and enforcement of norms of purity of arms and international law.
- The results of the investigations will be published subject to considerations of information security and privacy.
- **Investigations related to the Lebanon War will be conducted or completed under the supervision of and together with a body external to the systems regarding whose action the complaint is made.**

**54. Recommendation No. 3: As part of the preparation for military action, care must be taken to ensure effective established and embedded preparation for humanitarian responses in emergency and war.**

**55. Recommendation No. 4: It is necessary to continue promoting the preparation of the IDF and the legal counsel to improve the effectiveness of combat within the framework of the principles of international law.**

**56. Recommendation No. 5: According to the lessons learned from the war, the issue of using cluster munitions shall be reexamined, in order to clarify the rules for use of these munitions in the future and ensure their instilment and enforcement.**

[...]

### DISCUSSION

1. What does this report show about Israel's attitude towards IHL? Towards accusations that it violated IHL in that conflict?
2. a. (*Para. 20*) What are the rules in IHL regarding its dissemination among armed forces? Is there an obligation for States to include the teaching of IHL in military training? (GC I-IV, Arts 47/48/127/144; P I, Art. 83; P II, Art. 19; CIHL, Rule 142)
- b. (*Para. 21*) Do you agree with the Commission that the rules of IHL are "unclear and indeterminate" and that "the mechanisms for [their] enforcement are lacking and in some cases politically biased"? Is this also true of the rules on dissemination? What dissemination mechanisms does IHL provide for or recommend? (GC I-IV, Arts 47/48/127/144; P I, Art. 83; P II, Art. 19; CIHL, Rules 142 and 143)
3. (*Para. 21*) Do you agree with the Commission that there may sometimes be tension between the international legal rule and morality? According to you, what kind of situation does the Commission refer to? Could you think of examples where such a tension would exist? When could the duty not to harm civilians be contrary to morality or common sense?
4. (*Para. 26*) What do you think of the Commission's statement that "[e]ven when the target seemed to be a legitimate target – the political echelons took care to make their approval of action contingent upon explicit prior warning and reliable intelligence estimates that there was no civilian population in the location"? Could it be otherwise? What must be done before launching an attack? Does the fact that the target is a military objective suffice? What does IHL say about precautions to be taken before an attack? (P I, Arts 51, 52, 57; CIHL, Rules 15-21)
5. a. (*Paras 26-33*) Is there an obligation under IHL to consult legal advisers before launching an attack? What does the Commission recommend with regard to the involvement of legal counsel during operational decision-making? Should it be assumed that political and military leaders, when weighing military necessity against humanitarian considerations, will always follow IHL? What are the dangers of removing legal counsel from the decision-making process? What are the dangers, from a military and from a humanitarian perspective, of legal advisors being involved in operational decisions? Of them having the final word? (P I, Art. 82; CIHL, Rule 141)
- b. (*Para. 37*) Under IHL, is the legal advisers' determination of a situation binding upon the political echelon? Should it be? Would this requirement be realistic?
- c. (*Para. 37*) May necessity legitimize violations of IHL? Can necessity be a defence?
6. a. (*Paras 38-45*) Do you agree that IHL is no longer adapted to contemporary conflicts? Should IHL rules be reconsidered and reformulated to meet the specific needs of asymmetric conflicts? What are the dangers of such an argument? Should the existing rules of IHL cease to apply until new rules are agreed upon?
- b. (*Paras 38-45*) What are the difficulties of applying IHL in an asymmetric conflict? Could they be overcome without reformulating existing rules?

7. (*Para. 46*) Is there an obligation to investigate violations of IHL? Is there an obligation to investigate when a claim is brought to the State's attention by an individual? Why are credible investigations into alleged violations important? For the victims of violations? For the State accused of violations? To enhance respect for IHL in future conflicts? (GC I, Arts 49 and 52; GC II, Arts 50 and 53; GC III, Arts 129 and 132; GC IV, Arts 146 and 149; CIHL, Rule 158)
8. (*Paras 52-56*) What do you think of the Commission's recommendations? Could you think of other recommendations it could have formulated? What other enforcement mechanisms does IHL provide for?

**Case No. 151, ECHR, Cyprus v. Turkey****A. European Court of Human Rights, *Cyprus v. Turkey***

[Source: European Court of Human Rights, *Cyprus v. Turkey*, Judgment of 10 May 2001, available on <http://hudoc.echr.coe.int>]

**Case of Cyprus v. Turkey  
The European Court of Human Rights****(Application no. 25781/94)****Judgment****Strasbourg, 10 May 2001**

[...]

**PROCEDURE [...]**

3. The applicant Government alleged with respect to the situation that has existed in Cyprus since the start of Turkey's military operations in northern Cyprus in July 1974 that the Government of Turkey ("the respondent Government") have continued to violate the Convention [Convention for the Protection of Human Rights and Fundamental Freedoms] [...]. The applicant Government invoked in particular Articles 1 to 11 and 13 of the Convention as well as Articles 14, 17 and 18 read in conjunction with the aforementioned provisions. They further invoked Articles 1, 2 and 3 of Protocol No. 1.

These complaints were invoked, as appropriate, with reference to the following subject-matters: Greek-Cypriot missing persons and their relatives; the home and property of displaced persons; the right of displaced Greek Cypriots to hold free elections; the living conditions of Greek Cypriots in northern Cyprus; and the situation of Turkish Cypriots and the Gypsy community living in northern Cyprus. [...]

**THE FACTS****THE CIRCUMSTANCES OF THE CASE****A. General context**

13. The complaints raised in this application arise out of the Turkish military operations in northern Cyprus in July and August 1974 and the continuing division of the territory of Cyprus. At the time of the Court's consideration of the merits of the *Loizidou v. Turkey* case in 1996, the Turkish military presence at the material time was described in the following terms [...]:

16. "Turkish armed forces of more than 30,000 personnel are stationed throughout the whole of the occupied area of northern Cyprus, which is constantly patrolled and has checkpoints on all main lines of communication. [...]"
14. A major development in the continuing division of Cyprus occurred in November 1983 with the proclamation of the "Turkish Republic of Northern Cyprus" (the "TRNC") and the subsequent enactment of the "TRNC Constitution" on 7 May 1985.

This development was condemned by the international community. On 18 November 1983 the United Nations Security Council adopted Resolution 541 (1983) declaring the proclamation of the establishment of the "TRNC" legally invalid and calling upon all States not to recognise any Cypriot State other than the Republic of Cyprus. A similar call was made by the Security Council on 11 May 1984 in its Resolution 550 (1984). In November 1983 the Committee of Ministers of the Council of Europe decided that it continued to regard the government of the Republic of Cyprus as the sole legitimate government of Cyprus and called for respect of the sovereignty, independence, territorial integrity and unity of the Republic of Cyprus.

15. According to the respondent Government, the "TRNC" is a democratic and constitutional State which is politically independent of all other sovereign States including Turkey, and the administration in northern Cyprus has been set up by the Turkish-Cypriot people in the exercise of its right to self-determination and not by Turkey. Notwithstanding this view, it is only the Cypriot government which is recognised internationally as the government of the Republic of Cyprus in the context of diplomatic and treaty relations and the working of international organisations.
16. United Nations peacekeeping forces ("UNFICYP") maintain a buffer-zone. [...] Furthermore, and of relevance to the instant application, in 1981 the United Nations Committee on Missing Persons ("CMP") was set up to "look into cases of persons reported missing in the inter-communal fighting as well as in the events of July 1974 and afterwards" and "to draw up comprehensive lists of missing persons of both communities, specifying as appropriate whether they are still alive or dead, and in the latter case approximate times of death". The CMP has not yet completed its investigations. [...]

#### **D. The Commission's findings of fact in the instant application [...]**

1. ***Alleged violations of the rights of Greek-Cypriot missing persons and their relatives*** [...]
22. The Commission proceeded on the understanding that its task was not to establish what actually happened to the Greek-Cypriot persons who went missing following the Turkish military operations conducted in northern Cyprus in July and August 1974. Rather, it saw its task as one of determining whether or not the alleged failure of the respondent State to clarify the facts surrounding the disappearances constituted a continuing violation of the Convention. [...]

24. In the present case, the Commission further recalled that in its 1983 report it found it established that there were sufficient indications in an indefinite number of cases that missing Greek Cypriots had been in Turkish custody in 1974 and that this finding once again created a presumption of Turkish responsibility for the fate of these persons.
25. The Commission found that the evidence submitted to it in the instant case confirmed its earlier findings that certain of the missing persons were last seen in Turkish or Turkish-Cypriot custody. [...]
26. The Commission concluded that, notwithstanding evidence of the killing of Greek-Cypriot prisoners and civilians, there was no proof that any of the missing persons were killed in circumstances for which the respondent State could be held responsible; nor did the Commission find any evidence to the effect that any of the persons taken into custody were still being detained or kept in servitude by the respondent State. On the other hand, the Commission found it established that the facts surrounding the fate of the missing persons had not been clarified by the authorities and brought to the notice of the victims' relatives.
27. The Commission further concluded that its examination of the applicant Government's complaints in the instant application was not precluded by the ongoing work of the CMP. It noted in this connection that the scope of the investigation being conducted by the CMP was limited to determining whether or not any of the missing persons on its list were dead or alive; nor was the CMP empowered to make findings either on the cause of death or on the issue of responsibility for any deaths so established. Furthermore, the territorial jurisdiction of the CMP was limited to the island of Cyprus, thus excluding investigations in Turkey where some of the disappearances were claimed to have occurred. The Commission also observed that persons who might be responsible for violations of the Convention were promised impunity and that it was doubtful whether the CMP's investigation could extend to actions by the Turkish army or Turkish officials on Cypriot territory.

**2. *Alleged violations of the rights of the displaced persons to respect for their home and property***

28. The Commission established the facts under this heading against the background of the applicant Government's principal submission that over 211,000 displaced Greek Cypriots and their children continued to be prevented as a matter of policy from returning to their homes in northern Cyprus and from having access to their property there for any purpose. The applicant Government submitted that the presence of the Turkish army together with "TRNC"-imposed border restrictions ensured that the return of displaced persons was rendered physically impossible and, as a corollary, that their cross-border family visits were gravely impeded. [...]
30. The Commission found that it was common knowledge that with the exception of a few hundred Maronites living in the Kormakiti area and Greek Cypriots living in the Karpas peninsula, the whole Greek-Cypriot population which before 1974

resided in the northern part of Cyprus had left that area, the large majority of these people now living in southern Cyprus. The reality of this situation was not contested by the respondent Government. [...]

**3. *Alleged violations arising out of the living conditions of Greek Cypriots in northern Cyprus* [...]**

39. The Commission further found that there existed a functioning court system in the "TRNC" which was in principle accessible to Greek Cypriots living in northern Cyprus. It appeared that at least in cases of trespass to property or personal injury there had been some successful actions brought by Greek-Cypriot litigants before the civil and criminal courts. However, in view of the scarcity of cases brought by Greek Cypriots, the Commission was led to conclude that the effectiveness of the judicial system for resident Greek Cypriots had not really been tested.
40. In a further conclusion, the Commission found that there was no evidence of continuing wrongful allocation of properties of resident Greek Cypriots to other persons during the period under consideration. However, the Commission did find it established that there was a continuing practice of the "TRNC" authorities to allocate to Turkish-Cypriots or immigrants the property of Greek Cypriots who had died or left northern Cyprus.
41. In the absence of legal proceedings before the "TRNC" courts, the Commission noted that it had not been tested whether or not Greek Cypriots or Maronites living in northern Cyprus were in fact considered as citizens enjoying the protection of the "TRNC Constitution". It did however find it established that, in so far as the groups at issue complained of administrative practices such as restrictions on their freedom of movement or on family visits which were based on decisions of the "TRNC Council of Ministers", any legal challenge to these restrictions would be futile given that such decisions were not open to review by the courts.
42. Although the Commission found no evidence of cases of actual detention of members of the enclaved population, it was satisfied that there was clear evidence that restrictions on movement and family visits continued to be applied to Greek Cypriots and Maronites notwithstanding recent improvements. [...]
43. The Commission found it established that there were restrictions on the freedom of movement of Greek-Cypriot and Maronite schoolchildren attending schools in the south. [...]
44. As to educational facilities, the Commission held that, although there was a system of primary-school education for the children of Greek Cypriots living in northern Cyprus, there were no secondary schools for them. The vast majority of schoolchildren went to the south for their secondary education and the restriction on the return of Greek-Cypriot and Maronite schoolchildren to the north after the completion of their studies had led to the separation of many families. [...]



47. As to alleged restrictions on religious worship, the Commission found that the main problem for Greek Cypriots in this connection stemmed from the fact that there was only one priest for the whole Karpas area and that the Turkish-Cypriot authorities were not favourable to the appointment of additional priests from the south. The Commission delegates were unable to confirm during their visit to the Karpas area whether access to the Apostolos Andreas Monastery was free at any time for Karpas Greek Cypriots. [...]

**4. *Alleged violations in respect of the rights of Turkish Cypriots and the Turkish-Cypriot Gypsy community in northern Cyprus* [...]**

52. The Commission found that there existed rivalry and social conflict between the original Turkish Cypriots and immigrants from Turkey who continued to arrive in considerable numbers. Some of the original Turkish Cypriots and their political groups and media resented the "TRNC" policy of full integration for the settlers.
53. Furthermore, while there was a significant incidence of emigration from the "TRNC" for economic reasons, it could not be excluded that there were also cases of Turkish Cypriots having fled the "TRNC" out of fear of political persecution. The Commission considered that there was no reason to doubt the correctness of witnesses' assertions that in a few cases complaints of harassment or discrimination by private groups of or against political opponents were not followed up by the "TRNC" police. However, it concluded that it was not established beyond reasonable doubt that there was in fact a consistent administrative practice of the "TRNC" authorities, including the courts, of refusing protection to political opponents of the ruling parties. [...]
54. Regarding the alleged discrimination against and arbitrary treatment of members of the Turkish-Cypriot Gypsy community, the Commission found that judicial remedies had apparently not been used in respect of particularly grave incidents such as the pulling down of shacks near Morphou and the refusal of airline companies to transport Gypsies to the United Kingdom without a visa.
55. In a further conclusion, the Commission observed that there was no evidence before it of Turkish-Cypriot civilians having been subjected to the jurisdiction of military courts during the period under consideration. [...]

## **THE LAW**

### **I. PRELIMINARY ISSUES [...]**

#### **Issues reserved by the Commission to the merits stage [...]**

**3. *As to the respondent State's responsibility under the Convention in respect of the alleged violations***

69. The respondent Government disputed Turkey's liability under the Convention for the allegations set out in the application. In their submissions to the Commission, the respondent Government claimed that the acts and omissions complained

of were imputable exclusively to the “Turkish Republic of Northern Cyprus” (the “TRNC”), [...].

77. [...] Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey’s “jurisdiction” must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey. [...]

**4. *As to the requirement to exhaust domestic remedies* [...]**

101. The Court does wish to add, [...] that the applicant Government’s reliance on the illegality of the “TRNC” courts seems to contradict the assertion made by that same Government that Turkey is responsible for the violations alleged in northern Cyprus – an assertion which has been accepted by the Court [...]. It appears indeed difficult to admit that a State is made responsible for the acts occurring in a territory unlawfully occupied and administered by it and to deny that State the opportunity to try to avoid such responsibility by correcting the wrongs imputable to it in its courts. To allow that opportunity to the respondent State in the framework of the present application in no way amounts to an indirect legitimisation of a regime which is unlawful under international law. [...]
102. The Court concludes accordingly that, for the purposes of former Article 26 (current Article 35 para. 1) of the Convention, remedies available in the “TRNC” may be regarded as “domestic remedies” of the respondent State and that the question of their effectiveness is to be considered in the specific circumstances where it arises. [...]

**III. ALLEGED VIOLATIONS OF THE RIGHTS OF GREEK-CYPRriot MISSING PERSONS AND THEIR RELATIVES**

**A. Greek-Cypriot missing persons [...]**

**2. *As to the merits of the applicant Government’s complaints***

**(a) Article 2 of the Convention [Right to life] [...]**

129. The Court observes that the applicant Government contend first and foremost that the missing persons must be presumed to be still alive unless there is clear evidence to the contrary [...]. Although the evidence adduced before the Commission confirms a very high incidence of military and civilian deaths during the military operations of July and August 1974, the Court reiterates that it cannot speculate as to whether any of the missing persons have in fact been killed by either the Turkish forces or Turkish-Cypriot paramilitaries into whose hands they may have fallen. [...]

130. The Court notes that the evidence given of killings carried out directly by Turkish soldiers or with their connivance relates to a period which is outside the scope of the present application. [...] The Court concludes, therefore, that it cannot accept the applicant Government's allegations that the facts disclose a substantive violation of Article 2 of the Convention in respect of any of the missing persons.
131. For the Court, the applicant Government's allegations must, however, be examined in the context of a Contracting State's procedural obligation under Article 2 to protect the right to life. It recalls in this connection that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State [...].
133. Against this background, the Court observes that the evidence bears out the applicant Government's claim that many persons now missing were detained either by Turkish or Turkish-Cypriot forces. Their detention occurred at a time when the conduct of military operations was accompanied by arrests and killings on a large scale. [...]
134. [...] The Court cannot but note that the authorities of the respondent State have never undertaken any investigation into the claims made by the relatives of the missing persons that the latter had disappeared after being detained in circumstances in which there was real cause to fear for their welfare. [...] It does not appear either that any official inquiry was made into the claim that Greek-Cypriot prisoners were transferred to Turkey.
135. The Court agrees with the applicant Government that the respondent State's procedural obligation at issue cannot be discharged through its contribution to the investigatory work of the CMP. Like the Commission, the Court notes that, although the CMP's procedures are undoubtedly useful for the humanitarian purpose for which they were established, they are not of themselves sufficient to meet the standard of an effective investigation required by Article 2 of the Convention, especially in view of the narrow scope of that body's investigations [...].
136. Having regard to the above considerations, the Court concludes that there has been a continuing violation of Article 2 on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances. [...]

**(c) Article 5 of the Convention [Right to liberty and safety] [...]**

143. According to the applicant Government, the fact that the authorities of the respondent State had failed to carry out a prompt and effective investigation into the well-documented circumstances surrounding the detention and subsequent

disappearance of a large but indefinite number of Greek-Cypriot missing persons gave rise to a violation of the procedural obligations inherent in Article 5. [...]

147. The Court stresses at the outset that the unacknowledged detention of an individual is a complete negation of the guarantees of liberty and security of the person contained in Article 5 of the Convention and a most grave violation of that Article. Having assumed control over a given individual, it is incumbent on the authorities to account for his or her whereabouts. [...]
148. The Court refers to the irrefutable evidence that Greek Cypriots were held by Turkish or Turkish-Cypriot forces. There is no indication of any records having been kept of either the identities of those detained or the dates or location of their detention. From a humanitarian point of view, this failing cannot be excused with reference either to the fighting which took place at the relevant time or to the overall confused and tense state of affairs. Seen in terms of Article 5 of the Convention, the absence of such information has made it impossible to allay the concerns of the relatives of the missing persons about the latter's fate. Notwithstanding the impossibility of naming those who were taken into custody, the respondent State should have made other inquiries with a view to accounting for the disappearances. [...]
150. The Court concludes that, during the period under consideration, there has been a continuing violation of Article 5 of the Convention by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of the missing Greek-Cypriot persons in respect of whom there is an arguable claim that they were in custody at the time they disappeared. [...]

## **B. Greek-Cypriot missing persons' relatives**

1. ***Article 3 of the Convention [Prohibition of torture and inhuman or degrading treatment or punishment]*** [...]
156. The Court recalls that the question whether a family member of a "disappeared person" is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give the suffering of the person concerned a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court further recalls that the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather in the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct [...].

157. The Court observes that the authorities of the respondent State have failed to undertake any investigation into the circumstances surrounding the disappearance of the missing persons. In the absence of any information about their fate, the relatives of persons who went missing during the events of July and August 1974 were condemned to live in a prolonged state of acute anxiety which cannot be said to have been erased with the passage of time. [...] [The Court] recalls that the military operation resulted in a considerable loss of life, large-scale arrests and detentions and enforced separation of families. The overall context must still be vivid in the minds of the relatives of persons whose fate has never been accounted for by the authorities. They endure the agony of not knowing whether family members were killed in the conflict or are still in detention or, if detained, have since died. The fact that a very substantial number of Greek Cypriots had to seek refuge in the south coupled with the continuing division of Cyprus must be considered to constitute very serious obstacles to their quest for information. The provision of such information is the responsibility of the authorities of the respondent State. This responsibility has not been discharged. For the Court, the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3. [...]

#### **IV. ALLEGED VIOLATIONS OF THE RIGHTS OF DISPLACED PERSONS TO RESPECT FOR THEIR HOME AND PROPERTY [...]**

##### **B. As to the merits of the applicant Government's complaints**

##### **1. Article 8 of the Convention [Right to the respect of private and family life, home and correspondence] [...]**

171. The Court notes that in the proceedings before the Commission the respondent Government did not dispute the applicant Government's assertion that it was not possible for displaced Greek Cypriots to return to their homes in the north. [...]
172. The Court observes that the official policy of the "TRNC" authorities to deny the right of the displaced persons to return to their homes is reinforced by the very tight restrictions operated by the same authorities on visits to the north by Greek Cypriots living in the south. Accordingly, not only are displaced persons unable to apply to the authorities to reoccupy the homes which they left behind, they are physically prevented from even visiting them.
173. The Court further notes that the situation impugned by the applicant Government has obtained since the events of 1974 in northern Cyprus. It would appear that it has never been reflected in "legislation" [...].
174. The Court would make the following observations in this connection: firstly, the complete denial of the right of displaced persons to respect for their homes has no basis in law within the meaning of Article 8 para. 2 of the Convention [...];

secondly, the inter-communal talks cannot be invoked in order to legitimate a violation of the Convention; thirdly, the violation at issue has endured as a matter of policy since 1974 and must be considered continuing.

175. In view of these considerations, the Court concludes that there has been a continuing violation of Article 8 of the Convention by reason of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus. [...]

## **2. *Article 1 of Protocol No. 1 [Property rights]* [...]**

183. The Commission [...] concluded that during the period under consideration there had been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus were being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights.
184. The Court agrees with the [...] analysis. [...] It would appear that the legality of the interference with the displaced persons' property is unassailable before the "TRNC" courts. Accordingly, there is no requirement for the persons concerned to use domestic remedies to secure redress for their complaints. [...]
187. [...] The continuing and total denial of access to their property is a clear interference with the right of the displaced Greek Cypriots to the peaceful enjoyment of possessions within the meaning of the first sentence of Article 1 of Protocol No. 1. It further notes that, as regards the purported expropriation, no compensation has been paid to the displaced persons in respect of the interferences which they have suffered and continue to suffer in respect of their property rights. [...]
189. For the above reasons the Court concludes that there has been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights. [...]

## **V. ALLEGED VIOLATIONS ARISING OUT OF THE LIVING CONDITIONS OF GREEK CYPRIOTS IN NORTHERN CYPRUS**

207. The applicant Government asserted that the living conditions to which the Greek Cypriots who had remained in the north were subjected gave rise to substantial violations of the Convention. They stressed that these violations were committed as a matter of practice and were directed against a depleted and now largely elderly population living in the Karpas area of northern Cyprus in furtherance of a policy of ethnic cleansing, the success of which could be measured by the fact that from some 20,000 Greek Cypriots living in the Karpas in 1974 only 429 currently remained. Maronites, of whom there were currently 177 still living in northern Cyprus, also laboured under similar, if less severe, restrictions. [...]

**B. As to the merits of the applicant Government's complaints [...]****4. Article 9 of the Convention [Freedom of religion]**

241. The applicant Government alleged that the facts disclosed an interference with the enclaved Greek Cypriots' right to manifest their religion, in breach of Article 9 of the Convention [...].
243. The Commission observed that the existence of a number of measures limited the religious life of the enclaved Greek-Cypriot population. It noted in this respect that, at least until recently, restrictions were placed on their access to the Apostolos Andreas Monastery as well as on their ability to travel outside their villages to attend religious ceremonies. In addition, the "TRNC" authorities had not approved the appointment of further priests for the area, there being only one priest for the whole of the Karpas region. [...]
244. The Commission accordingly concluded that during the period under consideration there had been a violation of Article 9 of the Convention in respect of Greek Cypriots living in northern Cyprus.
245. The Court accepts the facts as found by the Commission, which are not disputed by the applicant Government. It has not been contended by the applicant Government that the "TRNC" authorities have interfered as such with the right of the Greek-Cypriot population to manifest their religion either alone or in the company of others. Indeed there is no evidence of such interference. However, the restrictions placed on the freedom of movement of that population during the period under consideration considerably curtailed their ability to observe their religious beliefs, in particular their access to places of worship outside their villages and their participation in other aspects of religious life.
246. The Court concludes that there has been a violation of Article 9 of the Convention in respect of Greek Cypriots living in northern Cyprus. [...]

**7. Article 1 of Protocol No. 1 [Right to and respect of property] [...]**

265. In a further submission, the applicant Government pointed to their claim that third parties interfered with the property of the persons concerned, whether situated inside their villages or beyond the three-mile zone and that the "TRNC" authorities acquiesced in or tolerated these interferences. In the applicant Government's view, the evidence adduced before the Commission clearly demonstrated that the local police did not, as a matter of administrative practice, investigate unlawful acts of trespass, burglary and damage to property [...].
268. As to the criminal acts of third parties referred to by the applicant Government, the Commission considered that the evidence did not bear out their allegations that the "TRNC" authorities had either participated in or encouraged criminal damage or trespass. It noted that a number of civil and criminal actions had been successfully brought before the courts in respect of complaints arising out of such incidents and that there was a recent increase in criminal prosecutions. [...]

269. The Court notes from the facts established by the Commission that, as regards ownership of property in the north, the “TRNC” practice is not to make any distinction between displaced Greek-Cypriot owners and Karpas Greek-Cypriot owners who leave the “TRNC” permanently, with the result that the latter’s immovable property is deemed to be “abandoned” and liable to reallocation to third parties in the “TRNC”.

For the Court, these facts disclose a continuing violation of Article 1 of Protocol No. 1 in respect of Greek Cypriots living in northern Cyprus in that their right to the peaceful enjoyment of their possessions was not secured in case of their permanent departure from that territory.

270. The Court further observes that the evidence taken in respect of this complaint also strongly suggests that the property of Greek Cypriots in the north cannot be bequeathed by them on death and that it passes to the authorities as “abandoned” property. [...]

#### **8. Article 2 of Protocol No. 1 [Right to education] [...]**

277. The Court notes that children of Greek-Cypriot parents in northern Cyprus wishing to pursue a secondary education through the medium of the Greek language are obliged to transfer to schools in the south, this facility being unavailable in the “TRNC” ever since the decision of the Turkish-Cypriot authorities to abolish it. Admittedly, it is open to children, on reaching the age of 12, to continue their education at a Turkish or English-language school in the north. [...]

278. [...] [I]n the Court’s opinion, the option available to Greek-Cypriot parents to continue their children’s education in the north is unrealistic in view of the fact that the children in question have already received their primary education in a Greek-Cypriot school there. The authorities must no doubt be aware that it is the wish of Greek-Cypriot parents that the schooling of their children be completed through the medium of the Greek language. [...]

280. Having regard to the above considerations, the Court concludes that there has been a violation of Article 2 of Protocol No. 1 in respect of Greek Cypriots living in northern Cyprus in so far as no appropriate secondary-school facilities were available to them. [...]

### **VII. ALLEGED VIOLATIONS IN RESPECT OF THE RIGHTS OF TURKISH CYPRIOTS, INCLUDING MEMBERS OF THE GYPSY COMMUNITY, LIVING IN NORTHERN CYPRUS [...]**

#### **C. The merits of the applicant Government’s complaints [...]**

#### **3. Alleged violation of Article 6 of the Convention [Right to fair and regular trial]**

354. The applicant Government contended that the “TRNC” authorities, as a matter of law and practice, violated Article 6 of the Convention in that civil rights and obligations and criminal charges against persons could not be determined by



an independent and impartial tribunal established by law within the meaning of that provision. [...]

355. The applicant Government further submitted that the “TRNC” authorities operated a system of military courts which had jurisdiction to try cases against civilians in respect of matters categorised as military offences. In their view it followed from the Court’s *Incal v. Turkey* judgment of 9 June 1998 (*Reports* 1998-IV) that a civilian tried before a military court was denied a fair hearing before an independent and impartial tribunal. The jurisdiction of the military courts in this respect was laid down in “Article 156 of the TRNC Constitution”, with the result that their composition could not be challenged. [...]
357. The Court considers that it does not have to be satisfied on the evidence that there was an administrative practice of trying civilians before military courts in the “TRNC”. [...]
358. For the Court, examination in *abstracto* of the impugned “constitutional provision” and the “Prohibited Military Areas Decree” leads it to conclude that these texts clearly introduced and authorised the trial of civilians by military courts. It considers that there is no reason to doubt that these courts suffer from the same defects of independence and impartiality which were highlighted in its *Incal v. Turkey* judgment in respect of the system of National Security Courts established in Turkey by the respondent State [...], in particular the close structural links between the executive power and the military officers serving on the “TRNC” military courts. In the Court’s view, civilians in the “TRNC” accused of acts characterised as military offences before such courts could legitimately fear that they lacked independence and impartiality.
359. For the above reasons the Court finds that there has been a violation of Article 6 of the Convention on account of the legislative practice of authorising the trial of civilians by military courts. [...]

#### PARTLY DISSENTING OPINION OF JUDGE FUAD

[...]

10. The nettle must be grasped. The Court’s majority judgment must mean that unless every Cypriot who wishes to recover possession of his or her property is allowed to do so, crossing the UN-controlled buffer-zone as may be necessary, immediately and before a solution to the Cyprus problem has been found, there will be a violation of Convention rights in respect of the person whose wish is denied. As matters stand today (and sadly, have stood for over a quarter of a century) could anyone, armed with his title deed, go up to a unit of the UN peace-keeping force and demand the right to cross the buffer-zone to resume possession of his or her property? Who would police the operation? What might be the attitude of any present occupier of the property in question? Would not serious breaches of the peace inevitably occur? Who would enforce any eviction which was necessary to allow the registered owner to retake possession?

11. If considerations of this kind are relevant (and I do not see how they can be brushed aside) then, it seems to me, it must be acknowledged that in present-day Cyprus it is simply not realistic to allow every dispossessed property owner to demand the immediate right to resume possession of his or her property wherever it lies. In my opinion, these problems are not overcome by giving such persons the solace of an award of compensation and/or damages because their property rights cannot, for practical reasons, be restored to them. [...]
12. Events over the past thirty years or so have shown that despite the devoted and unremitting efforts of the United Nations (through successive holders of the office of Secretary-General and members of their staff), other organisations and friendly governments, a solution acceptable to both sides has not been found. This is surely an indication of the complexity and difficulty of the Cyprus problem. These efforts continue: talks were in progress in New York as the Court was sitting.
13. Sadly, it may be that when a solution is ultimately found it will be one that fails to satisfy the understandable desire of every Cypriot to return to his or her home and fields, etc. [...]
19. [...] The UN General Assembly called for the establishment of an investigatory body to resolve the cases of missing persons from both communities. The General Assembly requested the Secretary-General to support the establishment of such a body with the participation of the International Committee of the Red Cross ("ICRC") "which would be in a position to function impartially, effectively and speedily so as to resolve the problem without undue delay".
20. Eventually it was decided that the CMP should comprise three members: representatives from the Greek and the Turkish side and a representative of the Secretary-General nominated by the ICRC. What seems clear is that the United Nations, for obvious reasons, envisaged a body that would perform its sad and difficult task objectively and without bias. The UN's call was met by the composition of the CMP. Very wisely, if I may say so, the ICRC was to be involved so that its resources and wide experience in the often heartbreaking task involved could be called upon. [...]
22. Turkey's stand on the whole issue of the missing persons is well known. I have seen no evidence that Turkey has refused to cooperate with the CMP or obstructed its work. If the Terms of Reference, the Rules or the Guidelines that govern the way that the CMP operates are unsatisfactory these can be amended with good will and the help of the Secretary-General. I am not able to agree with my colleagues that the CMP procedures are not of themselves sufficient to meet the standard of an effective investigation required by Article 2. As the applicable Rules and Guidelines, read with the Terms of Reference, have developed, provided both sides give their ungrudging cooperation to the CMP, an effective investigating team has been created. That the CMP was the appropriate body to make the necessary investigations was acknowledged by the UN Working Group on Enforced and Involuntary Disappearances. [...]

**B. European Court of Human Rights, *Varnava and Others v. Turkey***

[Source: European Court of Human Rights, *Varnava and Others v. Turkey*, Judgment of 18 September 2009, available on <http://hudoc.echr.coe.int>]

**CASE OF VARNAVA AND OTHERS v. TURKEY**

**(Application nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90)**

**JUDGMENT****STRASBOURG**

**18 September 2009**

[...]

**PROCEDURE**

1. The case originated in nine applications [...] against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eighteen Cypriot nationals [...].
3. The applicants alleged that the first applicants in the above applications had disappeared after being detained by Turkish military forces from 1974 and that the Turkish authorities had not accounted for them since. They invoked Articles 2, 3, 4, 5, 6, 8, 10, 12, 13 and 14 of the Convention.

[...]

**THE LAW**

[...]

**III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION**

[...]

**A. The Chamber judgment**

174. The Chamber found no reason to differ from the conclusion of the Grand Chamber in the fourth inter-State case [i.e. *Cyprus v. Turkey*], holding that the nine men had disappeared against the same life-threatening background and that while there might not have been an evidential basis to substantiate that all nine men had been last seen in the custody of agents of the respondent State, there was an obligation under Article 2 to take due measures to protect the lives of the wounded, prisoners of war or civilians in zones of international conflict and this extended to providing an effective investigation for those who disappeared in such circumstances. No effective investigation had been provided, by the CMP [United Nations Committee on Missing Persons] or otherwise.

[...]

## C. The Court's assessment

[...]

### 1. The burden of proof

181. The Court notes that the procedural obligation was stated as arising where individuals, last seen in the custody of agents of the State, subsequently disappeared in a life-threatening context. In the context of the inter-State case it was not necessary to specify which individuals were included in the "many persons" shown by the evidence to have been detained by Turkish or Turkish Cypriot forces at the time of their disappearance. There is no basis on which it can be assumed that the missing men in the present case were included in the Court's findings. It must therefore be determined in this case whether the conditions for a procedural obligation arose.
182. In response to the respondent Government's argument about the burden of proof, the Court would concur that the standard of proof generally applicable in individual applications is that of beyond reasonable doubt [...].
185. Turning to the present case, the Court would note that the respondent Government did not accept that the missing men had been taken into custody under their responsibility. Nor is it for the Court to seek to establish what occurred in 1974, which is outside its temporal jurisdiction. However, it is satisfied that there is a strongly arguable case that two men were last seen in circumstances falling within the control of the Turkish or Turkish Cypriots forces, [...] who were included on an ICRC list as detainees [...]. As concerns the other seven men, no such documentary evidence of actual detention has been forthcoming. There is nonetheless an arguable case that the other seven men were last seen in an area under the control, or about to come under the control of the Turkish armed forces. Whether they died, in the fighting or of their wounds, or whether they were captured as prisoners, they must still be accounted for. Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict [...].

[Footnote: See the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (first adopted in 1864, last revision in 1949); Second Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (first adopted in 1949); Third Geneva Convention relative to the Treatment of Prisoners of War (first adopted in 1929, last revised in 1949); and Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (first adopted in 1949), together with three additional amendment protocols, Protocol I (1977), Protocol II (1977) and Protocol III (2005).]

The Court therefore concurs with the reasoning of the Chamber in holding that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide

information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.

186. In the present case, the respondent Government have not put forward any materials or concrete information that would show that any of the missing men were found dead or were killed in the conflict zone under their control. Nor is there any other convincing explanation as to what might have happened to them that might counter the applicants' claims that the men disappeared in areas under the respondent Government's exclusive control. In light of the findings in the fourth inter-State case, which have not been controverted, these disappearances occurred in life-threatening circumstances where the conduct of military operations was accompanied by widespread arrests and killings. Article 2 therefore imposes a continuing obligation on the respondent Government to account for the whereabouts and fate of the missing men in the present case; if warranted, consequent measures for redress could then be effectively adopted.

## 2. *Compliance with the procedural obligation*

[...]

192. The Court finds no indication that the CMP is going beyond its limited terms of reference to play any role in determining the facts surrounding the deaths of the missing persons who have been identified or in collecting or assessing evidence with a view to holding any perpetrators of unlawful violence to account in a criminal prosecution. Nor is any other body or authority taking on that role. It may be that investigations would prove inconclusive, or insufficient evidence would be available. However, that outcome is not inevitable even at this late stage and the respondent Government cannot be absolved from making the requisite efforts. [...]
194. The Court concludes that there has been a continuing violation of Article 2 on account of the failure of the respondent State to provide for an effective investigation aimed at clarifying the fate of the nine men who went missing in 1974.

[...]

## DISCUSSION

**[N.B.:** The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR") is available at <http://conventions.coe.int>]

1. a. Does international humanitarian law (IHL) apply to the events in northern Cyprus in 1974 and to the continuing division of the territory of Cyprus? Does the Court qualify the situation? Does it say that IHL applies?
- b. In *Cyprus v. Turkey*, did the Court apply IHL? Could it have done so? Does the Court even refer to IHL? Could it have done so? Should it have done so?

(Art. 15 of the ECHR stipulates that:

- “1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
  2. No derogation (...), except in respect of deaths resulting from lawful acts of war, (...) shall be made under this provision [protecting the right to life]. (...)”
- c. In *Varnava and Others v. Turkey*, did the Court apply IHL? Did the Court find that Turkey had violated IHL? May the Court find and condemn violations of IHL? Does Article 15 give the Court the possibility to apply IHL?
- d. In *Varnava and Others v. Turkey*, was the Court under the obligation to interpret Art. 2 of the ECHR in light of IHL? Why didn't it do so in *Cyprus v. Turkey*, although the facts were similar? Why has the Court been so reluctant to refer to IHL?
2. (*Cyprus v. Turkey*) Is northern Cyprus an occupied territory within the meaning of IHL? Would it be, even if Turkey's invasion of northern Cyprus in 1974 had been lawful? Even if the “Turkish Republic of Northern Cyprus” (TRNC) were an independent State? Even if Turkey had no more troops in northern Cyprus? (GC IV, Art. 2; P I, Preamble, para. 5)
3. a. (*Cyprus v. Turkey*) For each problem considered by the Court, determine whether there was any violation of IHL. (HR, Arts 43 and 46; GC IV, Arts 25, 26, 49(1), 50(3), 53, 58, 64, 66, 136, 137 and 140)
- b. When a practice in an occupied territory is a violation of IHL, is it also necessarily a violation of the ECHR (see Art. 15 thereof in question 1b above)? If a practice of an occupying power is allowed under IHL but not under the ECHR, is it a violation of international law?
4. a. Are the following people under the jurisdiction of Turkey?
  - a) missing Greek Cypriots
  - b) families of missing Greek Cypriots living in southern Cyprus
  - c) inhabitants of southern Cyprus denied access to northern Cyprus
  - d) Greek Cypriots living in northern Cyprus
  - e) Turkish Cypriots living in northern Cyprus
- b. Does IHL protect the people listed above? Which of these are “protected persons”? (GC IV, Arts 4, 13, 25 and 26)
5. (*Cyprus v. Turkey*) Is Turkey responsible for the acts of its armed forces in northern Cyprus? Is it responsible for the acts of the TRNC? Because it occupies the territory of the TRNC? Because it established the TRNC? Because it gives instructions to the organs of the TRNC? Does Turkey have a responsibility only in the terms of the ECHR, or also in the terms of IHL? (GC IV, Arts 29 and 47)
6. Must the TRNC authorities comply with the rules of GC IV applicable to occupied territories? With respect to the Greek Cypriots? With respect to the Turkish Cypriots? With respect to the Turkish settlers? (GC IV, Arts 4, 13, 25, 26, 29 and 47)
7. Under IHL, is Turkey responsible for the acts of Turkish settlers in northern Cyprus? On what grounds could it be responsible? By virtue of the ECHR? By virtue of IHL? Why does the Court not recognize such a responsibility in this particular case? On factual or legal grounds? (HR, Art. 43; GC IV, Arts 1, 4, 29 and 49(6))
8. Does the Court recognize the legal system of the TRNC? On what grounds? According to IHL, could Turkey have allowed the TRNC to set up such a legal system? (HR, Art. 43; GC IV, Arts 47, 54, 64 and 66)

9. (*Cyprus v. Turkey*)
  - a. How did Turkey violate the right to life and liberty of the missing Greek Cypriots? By killing them? Are their deaths attributable to Turkey? By detaining them? Were they ever detained by Turkey? Under the ECHR, is Turkey responsible for these missing people? What are Turkey's obligations with regard to the families of these missing people?
  - b. What would Turkey's obligations towards missing people have been under IHL? Did it fulfil these obligations? (GC IV, Arts 25, 26, 136, 137 and 140; P I, Arts 32-34)
  - c. Can Turkey investigate the fate of the missing people on its own?
  - d. Doesn't the existence of an international investigative body (the CMP) relieve Turkey of its obligation to investigate the missing people's fate? Do these two "types" of investigation have the same objectives?
  - e. Does the fact that the ICRC, or a body in which the ICRC participates, is handling the problem of missing people prevent another body from establishing where responsibility for the disappearances lies? In what areas could the activity of each reduce the other's chances of success? Should the two bodies exchange the information obtained?
10. (*Varnava and Others v. Turkey*) On which basis did the Court find that Art. 2 had been violated? Was it because Turkey did not collect and provide information about the identity and fate of missing persons? Did Turkey have such an obligation under IHL? Under the ECHR? Why did the Court refer here to IHL regarding this obligation, but did not do so in *Cyprus v. Turkey* when dealing with the same obligation?
11. Discuss the dissenting opinion of Judge Fuad. Do you think that the Court's decision will be respected? What would be the consequence of a mass movement of Greek Cypriots to their properties in the north? Are there situations in which respect for human rights is better achieved through political negotiations than by the decision of a court of law recognizing individual rights? Can a similar result be achieved by the work of humanitarian organizations on the ground?
12.
  - a. Is IHL more suitable than the ECHR for dealing with the problems of humanitarian concern identified in this case? What are the advantages and disadvantages of the two branches of international law in such a situation?
  - b. Which problems of humanitarian concern identified in this case is the ICRC best able to resolve? For which of them is the Court best placed? Are there drawbacks to pooling the efforts of both organizations?

**Case No. 152, Chile, Prosecution of Osvaldo Romo Mena**

[Source: Appeal Court of Santiago, Case Lumi Videla, Role No. 13.597-94, 26 September 1994; original in Spanish, unofficial translation.]

**Appeal Court of Santiago [de Chile]  
(Third Criminal Chamber)  
September 26, 1994**

[...]

6. It should moreover be determined whether in this case the Geneva Conventions of 1949 are applicable, for pursuant thereto the illegal acts now under investigation should be declared imprescriptible and unamenable to amnesty.
7. The Geneva Conventions form part of our legislation since they were approved by the National Congress, promulgated by Decree 752, published in the Official Gazette on April 17, 18, 19 and 20, 1951 and have been in force for internal purposes from the latter date to the present.
8. Since the Geneva Conventions apply only in the event of war, it must be determined whether a state of war existed in Chile at the time when Lumi Videla was kidnapped on September 21, 1974 and during her captivity, torture and eventual death on November 3, 1974; her body being subsequently dumped at the Italian Embassy in Santiago on November 4, 1974 [...].

For the above purposes the following should be borne in mind:

- a) War is an exceptional state and entails the application of exceptional rules. In wartime the law of war which governs relations between enemies holds sway.
- b) Minimum humanitarian principles which protect the intangible rights of the adversaries apply in the event of war and outlaw inhuman acts such as killing, torture and cruel treatment.
- c) Article 418 of the Military Code of Justice was in force in Chile in 1974 and provides that for the purposes of the code a state of war shall be deemed to exist and wartime to prevail not only when war or a state of siege has officially been declared pursuant to the relevant laws but also when war is effectively taking place or mobilization therefore has been decreed even if war has not been officially declared.
- d) A state of siege prevailed in Chile in 1974, having been applied since September 18, 1973 and regulated by Decree Law 640 of September 10, 1974, it being pointed out that war prevails in the country when the situations referred to in Article 418 of the Military Code of Justice arise and a state of siege takes place in the event of internal or external war; since there was no external war, an internal war situation clearly existed [...].



- e) A state of siege for internal defence purposes existed between September 11, 1974 and 10 September 1975, which means that internal disturbances were being caused by organized rebel or seditious forces operating openly or clandestinely (Decree Law 640, Article 6 (b)). [...]
  - h) In those circumstances the Geneva Conventions protecting the human rights of the organized enemy forces and the affected civilian population are fully applicable and punish war crimes, which are a form of abuse of the force produced within a substantive situation created by an internal or international armed conflict.
9. It is necessary to determine the meaning and scope of the international treaties under Chilean legislation: the Political Constitution of the Republic contains no express rule assigning them a given category among the sources of law, which means that the matter must be determined by interpretation.

To the above ends the following must be taken into account:

- a) Our point of departure must be that since among Chilean legislation only the Political Constitution is empowered to determine the existence of other rules, the rules of international law would be valid in so far as the Constitution so decides. But as a basic rule the Fundamental Charter may also refer to international rules that are unavailable to it in its own validity, which would be applicable together with those produced through the internal procedures provided and regulated by the Constitution.
- b) The Political Constitution of the Republic regulates the procedure for incorporating and integrating international rules in Chilean legislation; thus, once the procedure provided in the Fundamental Charter has been completed, an internationally valid rule becomes internally applicable.
- c) Chile's Fundamental Charter contains only rules for incorporating international treaty law; indeed, Article 32 No. 17 empowers the President of the Republic to conclude, sign and ratify international treaties and Article 50 No. 1 of the Constitution stipulates that only the Congress is authorized to approve or reject any international treaty submitted to it by the President of the Republic prior to ratification, the approval of a treaty being subject to the enactment of a law.

This means that the treaty forms part of internal law once it has been approved by Congress; it must then be ratified by the President of the Republic and published in the Official Gazette. Moreover, Article 82 No. 2 of the Constitution grants the Constitutional Court the power to settle any issues of constitutionality that may arise during the negotiation of treaties submitted for approval to Congress, which verifies compliance with the principle of constitutional supremacy. Once the treaty has been validly incorporated in national legislation, it will cease to be a part of it only if it is denounced [...].

- d) [...] It is for approval by parliament that a treaty must be subject to the enactment of a law, which is very different from maintaining that treaties are subject to the passage of a law [...].

- e) National doctrine necessarily places international treaties and conventions in a hierarchy above the law in so far as, on incorporating a treaty in its internal legislation in accordance with the procedure provided in the Fundamental Charter, the State wants its organs to comply with that treaty for so long as there is no will to denounce it [...]  
[...]
  - h) The Political Constitution of the Republic lays the foundations of not the validity but the applicability of international rules. Once validly incorporated in internal law, it is the international convention itself which decides how its rules should be applied once the Constitution has made them applicable and invalidated those laws which deal with the same subject as the treaty incorporated in national legislation; this is suggested by the fact that it is the Congress itself which approves laws and must approve an international treaty prior to its ratification. In relation to subsequent laws, the rules of international conventions must be applied preferentially in accordance with the principle of applicability [...].
  - i) According to Article 27 of the Vienna Convention on the Law of Treaties, a party may not invoke the provisions of its internal law as justification for [not] complying with a treaty.
  - j) In accordance with the general *pacta sunt servanda* or *bona fide* principle of international law, *bona fide* States Parties must comply with treaties until such time as they are internationally declared inapplicable.
  - k) This implies that, once a treaty is incorporated in Chilean legislation, no internal rule may decide its inapplicability or loss of validity.
  - l) That does not mean that the national legislator is perpetually disempowered from dealing with the subject contained in the treaty but that, if he is to recover competence in the matter regulated by the treaty, the State must denounce the treaty in accordance with the procedures established in the treaty in question or in the rules of international law.
  - m) As a result, given a contradiction between the law and a treaty, the problem lies not in the scope of validity of such rules but in their field of applicability, within which an ordinary judge must rule and preferentially apply the treaty.
  - n) Any failure to comply with the content of an international treaty not only constitutes an infringement of international law which casts doubt on the honour or trustworthiness of the Chilean State but, in addition, is a clear infringement of its own national legislation.
10. [...]
- l) Any clash or conflict between the principles of legal soundness and justice and the binding force of human rights necessarily forces the judiciary to declare invalid, or inapplicable, acts or rules handed down by political authorities who

fail to recognize them or which reflect procedures in which such essential rights have been ignored.

11. The Geneva Conventions have been binding upon the Chilean State since April 1951 and their provisions protect the human rights of the contestants in the event of external war or a conflict between organized armed forces within the State, which latter situation effectively prevailed in the country in 1974 [...].
12. The 1949 Geneva Conventions are fully applicable and Article 3 common thereto lays down that, in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party shall be bound to extend humanitarian treatment to persons taking no active part in the hostilities or who have placed themselves *hors de combat* for various reasons, and prohibits at any time and in any place violence to life and person, mutilation, cruel treatment and torture, humiliating and degrading treatment and the passing of summary sentences. Article 146 (of the Fourth Convention relative to the Protection of Civilian Persons in Time of War) states that each High Contracting Party shall be under obligation "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts". Then again, Article 147 thereof stipulates that "grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health ...", which is reinforced in Protocol II relating to the Protection of Victims of Non-International Armed Conflicts. Article 158 [sic][148] of the same Convention stipulates that "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article" [...]. Accordingly, such offences as constitute grave breaches of the Convention are imprescriptible and unamenable to amnesty; the ten-year prescription of legal action in respect of the crimes provided for in Article 94 of the Penal Code cannot apply, nor is it appropriate to apply amnesty as a way of extinguishing criminal liability. Any attempt by a State to tamper with the criminality of and consequent liability for acts which infringe the laws of war and the rights of persons in wartime is beyond the State's competence while it is a Party to the Geneva Conventions on humanitarian law. Such an attempt would be more serious still if it sought to cover up not only individual liability but also that of agents of the State or public officials, since that would be tantamount to self-absolution which is repugnant to every basic notion of justice for respecting human rights and international common and treaty human rights law; it would also infringe the basic values and principles of our own constitutional legislation, as maintained in the third preambular paragraph of this resolution. [...]
16. The American Human Rights Convention or Pact of San José (Costa Rica) forms part of our legislation [...] and places on all the organs of State and particularly the courts of justice a duty to apply Article 1 (1) thereof, which states that "the States Parties to the Convention thereby undertake to respect the rights and freedoms recognized

therein and to guarantee the free and full exercise thereof to every person subject to their jurisdiction, with no discrimination whatever". That rule establishes that the rights enshrined in the Convention are self-executing as determined by the Inter-American Court of Human Rights, except for a few provisions which require legislative development, which the States Parties undertake to ensure since failure to do so would be a breach of the Convention punishable at supranational jurisdictional headquarters by the Inter-American Court of Human Rights. Pursuant to the provision mentioned, the States Parties are under obligation to investigate human rights violations and punish those responsible, as did the Inter-American Court of Human Rights when sentencing in the Velázquez Rodríguez case, stating that "an amnesty law which prohibits investigation and the establishment of liability and competence by responsible agents of the State would violate the obligation established under Article 1(1) of the Convention. If declared valid, amnesty laws of such scope would make national laws legal impediments to compliance with the American Convention and other international instruments". This court shares that reasoning and, in maintaining the hierarchical supremacy and preferential application of human rights treaties over internal laws, it considers fundamental human rights to be part of the substantive Constitution pursuant to Article 5 of the Fundamental Charter which places a limit on State sovereignty by express provision [...].

17. The right to justice for criminal violations of human rights rules out any stay in accordance with Article 15 (2) of the International Covenant of Civil and Political Rights, which states that "nothing provided therein shall oppose the trial and sentencing of any person for acts or omissions which at the time they were committed were criminal according to the general principles of law recognized by the international community". That rule admits no stay whatever, not even in a state of internal or external war. The principle of legality or non-retroactivity of the law cannot be upheld against that rule because justice must be exercised in accordance with the general principles of law recognized by the international community, which do and must take precedence over internal law wherever they conflict with it and even in the event of a threat to the very life of the nation, as established in Article 4, para. 6 of the United Nations International Covenant on Civil and Political Rights. [...]
20. The antecedents listed in charge sheet 503 and those produced subsequent to the above-mentioned resolution provide sound reasons for presuming that Osvaldo Enrique Romo Mena participated as a perpetrator in the offences of kidnapping and illegal association established in Articles 141, 292 and 293 of the Penal Code, respectively. [...]

Given those reasons, constitutional provisions, international conventions and the legal provisions mentioned and, further, in view [...] of the Code of Criminal Procedure, [...] for the record this case is hereby restored to charge status so that the appropriate court may fully carry out the formalities indicated in [...] this resolution [...]; and, having regard to the formalities mentioned in preambular para. 20, the charge [...] against Osvaldo Enrique Romo Mena, against whom a prison order must be issued in this case, is hereby upheld.

**DISCUSSION**

1. How does the Court qualify the situation in Chile in 1974? Is this qualification derived from IHL or from Chilean legislation? Did the killing and the torture allegedly committed by the accused violate Art. 3 common to the Conventions, even though the victim did not belong to the other party to the non-international armed conflict?
2. How were the Geneva Conventions incorporated into Chilean law? Are all provisions of the Conventions directly applicable now in Chile? Must a Chilean court apply them even if they are not self-executing?
3. Do the Geneva Conventions take precedence over Chilean laws? Even if the latter have been adopted subsequently? Why?
4. Are Arts 146, 147 and 148 of Convention IV applicable to violations of Art. 3 of Convention IV?
5.
  - a. If the Conventions had been denounced by Chile during the events of 1974, would they be inapplicable to this case? (GC IV, Art. 158)
  - b. Is Art. 158 of Convention IV applicable to Art. 3 of Convention IV?
6.
  - a. Do Arts 146 and 147 of Convention IV imply that grave breaches are imprescriptible? Do national laws providing for statutory limitations for grave breaches violate IHL?
  - b. Do the said Convention articles imply that amnesty may not cover such crimes? Is that compatible with Art. 6(5) of Protocol II? [*See also Case No. 169*, South Africa, AZAPO v. Republic of South Africa, and *Case No. 243*, Colombia, Constitutional Conformity of Protocol II]
  - c. Is the reasoning of the Inter-American Court referred to in para. 16 of the decision equally valid for IHL? Does it exclude amnesty for human rights violations?
7. Does the subsequent non-application of statutory limitations covering grave breaches violate the prohibition of retroactive penal laws? At least if one considers, unlike the Court, that IHL does not prohibit such statutory limitations?

**Case No. 153, ICJ, Nicaragua v. United States**

[Source: ICJ, *Nicaragua v. United States of America, Military and Paramilitary Activities*, Judgement of 27 June 1986, Merits; online: <http://www.icj-cij.org>]

**INTERNATIONAL COURT OF JUSTICE,  
Judgment of 27 June 1986,**

**CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES  
IN AND AGAINST NICARAGUA**

**(NICARAGUA v. UNITED STATES OF AMERICA),  
MERITS**

[...]

80. [...] [T]he Court finds it established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports; that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines; and that personal and material injury was caused by the explosion of the mines [...].

[...]

99. The Court finds at all events that from 1981 until September 30, 1984 the United States Government was providing funds for military and paramilitary activities by the *contras* [the armed opposition to the government of Nicaragua] in Nicaragua, and thereafter for “humanitarian assistance”. [...]

[...]

115. The [...] United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the

control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

116. The Court does not consider that the assistance given by the United States to the *contras* warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the *contras* remain responsible for their acts, and that the United States is not responsible for the acts of the *contras*, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the *contras*. What the court has to investigate is not the complaints relating to alleged violations of humanitarian law by the *contras*, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the *contras*. The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the *contras* may or may not have been guilty. It is for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the *contras* were in fact committed by them. At the same time, the question whether the United States Government was, or must have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the *contras* is relevant to an assessment of the lawfulness of the action of the United States. In this respect, the material facts are primarily those connected with the issue in 1983 of a manual of psychological operations.
117. Nicaragua has in fact produced in evidence before the Court two publications which it claims were prepared by the CIA and supplied to the *contras* in 1983. The first of these, in Spanish, is entitled "*Operaciones psicológicas en guerra de guerrillas*" (Psychological Operations in Guerrilla Warfare), by "Tayacan", the certified copy supplied to the Court carries no publisher's name or date. In its Preface, the publication is described as

"a manual for training of guerrillas in psychological operations, and its application to the concrete case of the Christian and democratic crusade being waged in Nicaragua by the Freedom Commandos". [...]

122. The Court concludes that in 1983 an agency of the United States Government supplied to the FDN a manual on psychological guerrilla warfare which, while expressly discouraging indiscriminate violence against civilians, considered the possible necessity of shooting civilians who were attempting to leave a town; and advised the "neutralization" for propaganda purposes of local judges, officials or notables after the semblance of trial in the presence of the population. The text supplied to the *contras* also advised the use of professional criminals to perform unspecified "jobs", and the use of provocation at mass demonstrations to produce violence on the part of the authorities so as to make "martyrs". [...]

[Because of a reservation made by the US in accepting the jurisdiction of the ICJ, the Court could not apply multilateral treaties to the facts of the case.]

174. [...] The Court would observe that, according to the United States argument, it should refrain from applying the rules of customary international law because they have been “subsumed” and “supervened” by those of international treaty law, and especially those of the United Nations Charter. Thus the United States apparently takes the view that the existence of principles in the United Nations Charter precludes the possibility that similar rules might exist independently in customary international law, either because existing customary rules had been incorporated into the Charter, or because the Charter influenced the later adoption of customary rules with a corresponding content.
175. The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty law rule which had caused the reservation to become effective.
176. [...] The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. [...]
177. [...] The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the *North Sea Continental Shelf* cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to “crystallize”, or because it had influenced its subsequent adoption. The Court [...] considered it to be clear that certain other articles of the treaty in question “were ... regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law” (*I.C.J. Reports 1969*, p. 39, para. 63). [...]
178. There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and



on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability. In a legal dispute affecting two States, one of them may argue that the applicability of a treaty rule to its own conduct depends on the other State's conduct in respect of the application of other rules, on other subjects, also included in the same treaty. [...] Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application. A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule. Thus, if that rule parallels a rule of customary international law, two rules of the same content are subject to separate treatment as regards the organs competent to verify their implementation, depending on whether they are customary rules or treaty rules. The present dispute illustrates this point. [...]

181. [...] Far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it. [...]
182. The Court concludes that it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law [...].
185. In the present dispute, the Court, while exercising its jurisdiction only in respect of the application of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law. Furthermore, in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this "subjective element" – the expression used by the Court in its 1969 Judgement in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 44) – that the Court has to appraise the relevant practice.
186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of States conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima*

*facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. [...]

207. [...] The significance for the Court of cases of State conduct *prima facie* inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. [...]

[...]

215. The Court has noted above (paragraph 77 *in fine*) that the United States did not issue any warning or notification of the presence of the mines which had been laid in or near the ports of Nicaragua. Yet even in time of war, the Convention relative to the laying of automatic submarine contact mines of October 18, 1907 (the Hague Convention No. VIII) provides that "every possible precaution must be taken for the security of peaceful shipping" and belligerents are bound

"to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel" (Art. 3).

Neutral Powers which lay mines off their own coasts must issue a similar notification, in advance (Art. 4). It has already been made clear above that in peacetime for one State to lay mines in the internal or territorial water of another is an unlawful act; but in addition, if a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907. Those principles were expressed by the Court in the *Corfu Channel* case as follows:

"certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war" (*I.C.J. Reports 1949*, p. 22).

216. This last consideration leads the Court on to examination of the international humanitarian law applicable to the dispute. Clearly, use of force may in some circumstances raise questions of such law. [...]
218. [...] The conduct of the United States may be judged according to the fundamental general principles of humanitarian law; in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles. It is significant in this respect that, according to the terms of the Conventions, the denunciation of one of them

“shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usage established among civilized peoples, from the laws of humanity and the dictates of the public conscience” (Convention I, Art. 63; Convention II, Art. 62; Convention III, Art. 142; Convention IV, Art. 158).

Article 3 which is common to all four Geneva Conventions of August 12, 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called “elementary considerations of humanity” (*Corfu Channel, Merits, I.C.J. Reports 1949*, p. 22; paragraph 215 above). The Court may therefore find them applicable to the present dispute, and is thus not required to decide what role the United States multilateral treaty reservation might otherwise play in regard to the treaties in question.

[In his separate opinion, *I.C.J. Reports 1986*, p. 183, Roberto Ago writes on this point: “6. [...] I am bound to express serious reservations with regard to the seeming facility with which the Court – while expressly denying that all the customary rules are identical in content to the rule in the treaties (para. 175) – has nevertheless concluded in respect of certain key matters that there is a virtual identity of content as between customary international law and the law enshrined in certain major multilateral treaties concluded on a universal or regional plane. [...] I am moreover most reluctant to be persuaded that any broad identity of content exists between the Geneva Conventions and certain ‘fundamental general principles of humanitarian law’, which, according to the Court, were pre-existent in customary law, to which the Conventions ‘merely give expression’ (para. 220) or of which they are at most ‘in some respects a development’ (para. 218). Fortunately, after pointing out that the Applicant has not relied on the four Geneva Conventions of 12 August 1949, the Court has shown caution in regard to the consequences of applying this idea, which in itself is debatable.”]

219. The conflict between the *contras*’ forces and those of the Government of Nicaragua is an armed conflict which is “not of an international character”. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of August 12, 1949, the text of which, identical in each Convention, expressly refers to conflict not having an international character.
220. The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the

provisions of Article 3 common to the four 1949 Geneva Conventions, which reads as follows:

[Here the full text of this Article is quoted] [...]

242. The Court therefore finds that the support given by the United States, up to the end of September 1984, to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention. The Court has however taken note that, with effect from the beginning of the United States governmental financial year 1985, namely 1 October 1984, the United States Congress has restricted the use of the funds appropriated for assistance to the *contras* to “humanitarian assistance” [...]. There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross, that

“The Red Cross, born of desire to bring assistance without discrimination to the wounded on the battlefield, endeavours – in its international and national capacity – to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples”

and that

“It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress.”

243. The United States legislation which limited aid to the *contras* to humanitarian assistance however also defined what was meant by such assistance, namely:

“the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death” [...].

It is also to be noted that, while the United States Congress has directed that the CIA and Department of Defense are not to administer any of the funds voted, it was understood that intelligence information might be “shared” with the *contras*. Since the Court has no information as to the interpretation in fact given to the Congress decision, or as to whether intelligence information is in fact still being supplied to the *contras*, it will limit itself to a declaration as to how the law applies in this respect. An essential feature of truly humanitarian aid is that it is given “without discrimination” of any kind. In view of the Court, if the provision of “humanitarian assistance” is to escape condemnation as an

intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely “to prevent and alleviate human suffering”, and “to protect life and health and to ensure respect for the human being”; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependants.

[...]

254. The Court now turns to the question of the application of humanitarian law to the activities of the United States complained of in this case. Mention has already been made (paragraph 215 above) of the violations of customary international law by reason of the failure to give notice of the mining of the Nicaraguan ports, for which the Court has found the United States directly responsible. Except as regards the mines, Nicaragua has not however attributed any breach of humanitarian law to either United States personnel or the “UCLAs” [“Unilaterally Controlled Latino Assets” acronym used by the CIA for Latin American citizens, paid by, and acting under the direct instructions of, United States military or intelligence personnel], as distinct from the *contras*. The Applicant has claimed that acts perpetrated by the *contras* constitute breaches of the “fundamental norms protecting human rights”; it has not raised the question of the law applicable in the event of conflict such as that between the *contras* and the established Government. In effect, Nicaragua is accusing the *contras* of violations both of the law of human rights and humanitarian law, and is attributing responsibility for these acts to the United States. The Court has however found (paragraphs 115, 216) that this submission of Nicaragua cannot be upheld; but it has also found the United States responsible for the publication and dissemination of the manual on “Psychological Operations in Guerrilla Warfare” referred to in paragraphs 118 to 122 above.
255. The Court has also found (paragraphs 219 and 220 above) that general principles of humanitarian law include a particular prohibition, accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not. By virtue of such general principles, the United States is bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of Article 3 which is common to all four Geneva Conventions of August 12, 1949. The question here does not of course relate to the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement. The Court takes note of the advice given in the manual on psychological operations to “neutralize” certain “carefully selected and planned targets”, including judges, police officers, State Security officials, etc., after the local population have been gathered in order to “take part in the act and formulate accusations against the oppressor”. In view of the Court, this must be regarded as contrary to the prohibition in Article 3 of the Geneva Conventions, with respect to non-combatants, of

“the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court,

affording all the judicial guarantees which are recognized as indispensable by civilized peoples”

and probably also of the prohibition of “violence to life and person, in particular murder to all kinds, ... .”

256. It is also appropriate to recall the circumstances in which the manual of psychological operations was issued. When considering whether the publication of such a manual, encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable. The Court has however found [...] that at the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law; it was in fact even claimed by the CIA that the purpose of the manual was to “moderate” such behaviour. The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties. [...]

292. For these reasons,

## THE COURT

[...]

(8) By fourteen votes to one,

*Decides* that the United States of America, by failing to make known the existence and location of the mines laid by it, referred to in subparagraph (6) hereof, has acted in breach of its obligations under customary international law in this respect; [...]

(9) By fourteen votes to one,

*Finds* that the United States of America, by producing in 1983 a manual entitled *Operaciones psicológicas en guerra de guerrillas*, and disseminating it to *contra* forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law: but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America; [...]

## DISCUSSION

1. (*Paras 174-178, 181*) Does a rule of customary international law continue to be in force between States party to a multilateral treaty codifying that rule? Even if the two rules are identical? Why? May the contents of the customary rule be influenced by the treaty rule? By the practice of States bound by the treaty?

2. (*Paras 185, 186, 207*) Does a treaty commitment “count” as practice for customary international law? Can a rule belong to customary international law even if the behaviour of States frequently fails to conform with the rule in question? What is the importance of the Court’s ruling on these points for IHL?
3. (*Para. 219*) How does the Court qualify the conflict in Nicaragua?
4. (*Paras 80, 215, 254*) Was the laying of mines in or near the ports of Nicaragua a violation of international law? Of IHL? What did violate IHL? Was IHL at all applicable? (Hague Convention VIII, Arts 3-4)
5. (*Paras 218, 219*) Does Art. 3 common to the Conventions apply to international armed conflicts? As customary law? Does the Martens Clause prove that Art. 3 common to the Conventions is customary law? That the whole of IHL is customary law?
6. (*Para. 220*) Is Art. 1 common to the Conventions applicable in non-international armed conflicts? As a treaty rule? As a customary rule? Or both?
7. (*Paras 115-122, 254-256, 292(9)*)
  - a. Is the US responsible for all acts of the *contras*? For their violations of IHL? For some of the IHL violations? Why? Under which conditions would the US be responsible for all acts of the *contras*? Would that modify the Court’s qualification of the conflict?
  - b. Is the US violating IHL by providing the Manual “*Operaciones psicológicas en guerra de guerrillas*”? Regardless of whether the *contras* actually committed the recommended acts? Which rules of IHL are violated?
8. (*Paras 242, 243*)
  - a. Can providing humanitarian assistance violate international law? Are the rules violated those of IHL or those of *jus ad bellum*?
  - b. Are the conditions for lawful humanitarian assistance prescribed by IHL? (GC IV, Arts 23 and 59; P I, Art. 70; P II, Art. 18; CIHL, Rules 55-56) Are the fundamental principles of the Red Cross part of IHL? To whom are they addressed? Must States comply with the fundamental principles of the Red Cross?
  - c. Which aspect of the US humanitarian assistance to the *contras* violated international law? (P I, Art. 70; P II, Art. 18)
  - d. Does a State providing strictly humanitarian assistance to only one side in an international armed conflict violate international law? Does the other side have an obligation to let such assistance through? (P I, Art. 70; GC IV, Arts 23 and 59)

**Case No. 154, Inter-American Court of Human Rights,  
Bámaca-Velasquez v. Guatemala**

[Source: Inter-American Court of Human Rights, *Case of Bámaca-Velasquez v. Guatemala*, Judgement of November 25, 2000 (Merits), Series C No. 70, available at: <http://www.corteidh.or.cr/casos.cfm>, footnotes omitted]

**Inter-American Court of Human Rights**

**Case of Bámaca-Velásquez v. Guatemala**

**Judgment of November 25, 2000  
(Merits)**

[...]

**I**

**INTRODUCTION OF THE CASE**

1. On August 30, 1996, pursuant to articles 50 and 51 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) the Inter-American Commission on Human Rights (hereinafter “the Commission” or the Inter-American Commission”) submitted an application to the Court against the Republic of Guatemala (hereinafter “the State” or “Guatemala”) [...].
2. The Commission stated that the purpose of the application was for the Court to decide whether the State had violated the following rights of Efraín Bámaca Velásquez:

[...] Article 3 common to the Geneva Conventions.

[...]

**III**

**PROCEDURE BEFORE THE COMMISSION**

4. The Inter-American Commission opened case No. 11.129 as the result of a complaint filed by the petitioners on March 5, 1993, regarding a request for precautionary measures, based on the detention and mistreatment inflicted on [Efraín] Bámaca [Velásquez] and other combatants of the URNG [Guatemalan National Revolutionary Unit (hereinafter “the URNG”)]”. [...]

[...]

**IV**

**PROCEDURE BEFORE THE COURT**

18. [...] The Court summarizes the facts set out in the application as follows:



- a. Efraín Bámaca Velásquez, known as “Comandante Everardo”, formed part of the Revolutionary Organization of the People in Arms (hereinafter “ORPA”), one of the guerrilla groups that made up the URNG; Bámaca Velásquez led this group’s Luis Ixmatá Front.
- b. Efraín Bámaca Velásquez disappeared on March 12, 1992, after an encounter between the Army and the guerrilla in the village of Montúfar, near Nuevo San Carlos, Retalhuleu, in the western part of Guatemala.
- c. Bámaca Velásquez was alive when the Guatemalan armed forces took him prisoner, and “they imprisoned him secretly in several military installations, where they tortured and eventually executed him.”

[...]

## IX PROVEN FACTS

121. The Court now proceeds to consider the relevant facts that it finds have been proved, which it will present chronologically. They result from the examination of the documents provided by the State and the Inter-American Commission, and also the documentary, testimonial and expert evidence submitted in the instant case.

[...]

- b) At the time when the facts relating to this case took place, Guatemala was convulsed by an internal conflict.

[...]

- d) In 1992, there was a guerrilla group called the Organization of the People in Arms (ORPA) in Guatemala, which operated on four fronts, one of which was the Luis Ixmatá Front, commanded by Efraín Bámaca Velásquez, known as Everardo.
- e) On February 15, 1992, the Quetzal Task Force, established by the Army to combat the guerrilla in the southwestern zone of the country, began its activities. Its command post was initially at the Santa Ana Berlín military detachment, in Coatepeque, Quetzaltenango. Other military zones, such as Military Zone No. 18 in San Marcos also collaborated with it.
- f) It was the Army’s practice to capture guerrillas and keep them in clandestine confinement in order to obtain information that was useful for the Army, through physical and mental torture. These guerrillas were frequently transferred from one military detachment to another and, following several months of this situation, were used as guides to determine where the guerrilla were active and to identify individuals who were fighting with the guerrilla. Many of those detained were then executed, which completed the figure of forced disappearance.

- g) At the time of the facts of this case, various former guerrillas were collaborating with the Army, and providing it with useful information. [...]
- h) On March 12, 1992, there was an armed encounter between guerrilla combatants belonging to the Luis Ixmatá Front and members of the Army on the banks of the Ixcucua River, in the municipality of Nuevo San Carlos, Department of Retalhuleu. Efraín Bámaca Velásquez was captured alive during this encounter.
- i) Efraín Bámaca Velásquez, who was wounded, was taken by his captors to the Santa Ana Berlín military detachment, Military Zone No. 1715, located in Coatepeque, Quetzaltenango. During his confinement at this detachment, Bámaca Velásquez remained tied up, with his eyes covered, and was submitted to unlawful coercion and threats while he was being interrogated.
- j) Efraín Bámaca Velásquez remained at the Santa Ana Berlín military detachment from March 12, 1992, until April 15 or 20 that year. Subsequently, he was transferred to the detention center known as *La Isla* (the Island), in Guatemala City.
- k) After his stay in Guatemala City, Efraín Bámaca Velásquez was transferred to the military bases of Quetzaltenango, San Marcos and Las Cabañas.
- l) On about July 18, 1992, Efraín Bámaca Velásquez was in Military Zone No. 18 in San Marcos. Here he was interrogated and tortured. The last time that he was seen, he was in the infirmary of that military base, tied to a metal bed.
- m) As a result of the facts of this case, several judicial proceedings were initiated in Guatemala, including: petitions for *habeas corpus*, a special pre-trial investigation procedure and various criminal lawsuits, none of which was effective, and the whereabouts of Efraín Bámaca Velásquez are still unknown. As a result of those proceedings, on various occasions, exhumation procedures were ordered in order to find his corpse. These procedures did not have positive results as they were obstructed by State agents.

[...]

### XIII VIOLATION OF ARTICLE 4 (RIGHT TO LIFE)

[...]

173. In this case, the circumstances in which the detention by State agents of Bámaca Velásquez occurred, the victim's condition as a guerrilla commander, the State practice of forced disappearances and extrajudicial executions (*supra* 121 b, d, f, g) and the passage of eight years and eight months since he was captured, without any more news of him, cause the Court to presume that Bámaca Velásquez was executed.

[...]

**XVII**  
**FAILURE TO COMPLY WITH ARTICLE 1(1)**  
**IN RELATION TO ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS**  
**(OBLIGATION TO RESPECT RIGHTS)**

203. As for the violation of Article 1(1) of the American Convention and its relation to Article 3 common to the Geneva Conventions, the Commission alleged that:
- a) the forced disappearance, torture and execution of Efraín Bámaca Velásquez by agents of the Guatemalan armed forces shows that the State violated its obligation to respect and guarantee the rights established in Article 1(1) of the Convention. These violations cannot be justified by the fact that the State was faced with a guerrilla movement, because, although the State has the right and obligation to guarantee its own security and maintain public order, it must do so in accordance with law and ethics, including the international legislation to protect human rights;
  - b) when a State faces a rebel movement or terrorism that truly threatens its “independence or security”, it may restrict or temporarily suspend the exercise of certain human rights, but only in accordance with the rigorous conditions indicated in Article 27 of the Convention. Article 27(2) of the Convention strictly forbids the suspension of certain rights and, thus, forced disappearances, summary executions and torture are forbidden, even in states of emergency;
  - c) according to Article 29 of the Convention, its provisions may not be interpreted in the sense of restricting the enjoyment of the rights recognized by other conventions to which Guatemala is a party; for example, the Geneva Conventions of August 12, 1949. Therefore, considering that Article 3 common to those Conventions provides for prohibitions against violations of the right to life and ensures protection against torture and summary executions, Bámaca Velásquez should have received humane treatment in accordance with the common Article 3 and the American Convention; and
  - d) Article 3, common to the Geneva Conventions, constitutes a valuable parameter for interpreting the provisions of the American Convention, as regards the treatment of Bámaca Velásquez by State agents.
204. With regard to applying international humanitarian law to the case, in its final oral arguments the State indicated that, although the case was instituted under the terms of the American Convention, since the Court had “extensive faculties of interpretation of international law, it could [apply] any other provision that it deemed appropriate.”

\*

\*      \*

205. Article 1(1) of the Convention provides that

[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

206. Article 3 common to the 1949 Geneva Conventions provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

[... t]he following acts are and shall remain prohibited at any time and in any place whatsoever [...]:

- a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b) taking of hostages;
- c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

[...]

207. The Court considers that it has been proved that, at the time of the facts of this case, an internal conflict was taking place in Guatemala (*supra* 121 b). [...] [I]nstead of exonerating the State from its obligations to respect and guarantee human rights, this fact obliged it to act in accordance with such obligations. Therefore, and as established in Article 3 common to the Geneva Conventions of August 12, 1949, confronted with an internal armed conflict, the State should grant those persons who are not participating directly in the hostilities or who have been placed *hors de combat* for whatever reason, humane treatment, without any unfavorable distinctions. In particular, international humanitarian law prohibits attempts against the life and personal integrity of those mentioned above, at any place and time.

208. Although the Court lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, it can observe that certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3.

209. Indeed, there is a similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention and other international instruments regarding non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman or degrading treatment). This Court has already indicated in the *Las Palmeras Case (2000)* [See **Case No. 246**, Inter-American Court of Human Rights, *The Las Palmeras Case*, paras 32-34] that the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention.
210. Based on Article 1(1) of the American Convention, the Court considers that Guatemala is obliged to respect the rights and freedoms recognized in it and to organize the public sector so as to guarantee persons within its jurisdiction the free and full exercise of human rights. This is essential, independently of whether those responsible for the violations of these rights are agents of the public sector, individuals or groups of individuals, because, according to the rules of international human rights law, the act or omission of any public authority constitutes an action that may be attributed to the State and involve its responsibility, in the terms set out in the Convention.
211. The Court has confirmed that there existed and still exists in Guatemala, a situation of impunity with regard to the facts of the instant case (*supra* 134, 187 and 190), because, despite the State's obligation to prevent and investigate, it did not do so.. The Court understands impunity to be
- the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human right violations, and total defenselessness of victims and their relatives.
212. This Court has clearly indicated that the obligation to investigate must be fulfilled
- in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the Government.
213. The violations of the right to personal safety and liberty, to life, to physical, mental and moral integrity, to judicial guarantees and protection, which have been established in this judgment, are attributable to Guatemala, which had the obligation to respect these rights and guarantee them. Consequently, Guatemala is responsible for the non-observance of Article 1(1) of the Convention, in relation to violations established in Articles 4, 5, 7, 8 and 25 of the Convention.
214. In view of the foregoing, the Court concludes that the State violated Article 1(1) of the Convention, in relation to its Articles 4, 5, 7, 8 and 25.

[...]

**DISCUSSION**

1. (*Paras 121(b)*) How does the Inter-American Court of Human Rights (the Court) qualify the situation in Guatemala at the time of the events? Does IHL apply to the situation? Does the Court apply IHL? Would it have jurisdiction to do so? (GC I-IV, Art. 3; P II, Art. 1)
2.
  - a. During non-international armed conflicts, which body of law (IHL or human rights law (HRL)) should regulate the detention of fighters? Would your answer be different if there were an international armed conflict instead of a non-international one? Why? Did the Inter-American Commission on Human Rights apply IHL in the *Coard* case, which also dealt with detention during armed conflict? Do you think that the Commission would have reached a similar conclusion if the conflict between the United States and Grenada had been a non-international one? [See **Case No. 157**, Inter-American Commission on Human Rights, *Coard v. United States*, paras 48-61]
  - b. Does the IHL of non-international armed conflict provide rules as to the grounds for detention and conditions under which a person may be interned? When the rules provided by the IHL of non-international armed conflict – if any – are insufficient, which provisions should be applied to regulate a situation? Should the rules of the IHL of international armed conflict apply by analogy, or should human rights law apply instead? Should one follow the principle of *lex specialis*? What would this principle imply? Do the answers to these questions matter in the present case? [See **Case No. 62**, ICJ, *Nuclear Weapons Advisory Opinion*, para. 25; **Case No. 123**, ICJ/Israel, *Separation Wall/Security Fence in the Occupied Palestinian Territory*, para. 106]
  - c. If *Bámaca-Velasquez* had been killed by the Army during combat, would IHL have applied instead of HRL? Why could the conduct of hostilities, during a non-international armed conflict, be governed by a body of law other than that regulating the detention of persons captured during combat? [See **Case No. 245**, Human Rights Committee, *Guerrero v. Colombia*]
3.
  - a. Does HRL also protect members of armed groups? Should not the latter rather be protected by IHL? Is the regime of the two branches of law governing the present case different in that regard?
  - b. In times of non-international armed conflict, do the rights laid down in HRL have to be read in the light of IHL? Or should rather the IHL of non-international armed conflict be read in the light of HRL? Does this matter in the present case?
  - c. (*Paras 203-214*) Why does the Court refer to common Article 3? Why does it need to use common Article 3 to apply other provisions of the American Convention on Human Rights?
4. Does IHL provide any rule on enforced disappearances? What are the obligations of States when a person goes missing as a result of an armed conflict? Does the IHL of non-international armed conflict provide rules on missing persons? (P I, Arts 32-34; CIHL, Rule 117)

**Case No. 155, Canada, Ramirez v. Canada**

[Source: *Ramirez v. Canada (Minister of Employment and Immigration)* [1992] Federal Court of Appeal No 109, footnotes omitted; to facilitate comprehension, the order of paragraphs has been modified.]

**Federal Court of Canada – Court of Appeal  
Stone, MacGuigan and Linden JJ. [...]**

1. This is an appeal [...] of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board [...], dated March 14, 1990, in which the Refugee Division determined that the appellant was not a Convention refugee.
35. [...] Initially motivated by revenge for the murder of one sister and her husband by the guerrillas, and the rape of another [...], the appellant enlisted voluntarily in the Salvadoran Army for two years as of February 1, 1985, and was such an effective soldier that he was promoted to corporal and then to sub-sergeant. During this period he was involved in between 130 and 160 instances of combat [...]. Two months before his term was up he was wounded in an ambush in foot, leg, and head. During his recuperation he signed up for two more years of service so that his hospitalization and convalescence would be paid for and his salary would continue [...].
2. [...] [T]he Refugee Division found that the claimant had established that he had a well-founded fear of persecution by reason of his political opinion, but nevertheless excluded him from protection by virtue of section F of Article 1 of the United Nations Convention Relating to the Status of Refugees (the “Convention”) [...].

[N.B.: This provision reads as follows: “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes” (The text of the Convention is available on <http://www.unhcr.org>)]

In the case at bar the crime in question is either a war crime or a crime against humanity. It is certainly not a crime against peace, and would normally be included in crimes against humanity [...]. However, since we are, on the facts under consideration, concerned with crimes committed in the course of what is either a civil war or a civil insurrection, and nothing hangs on whether one category or the other is the more relevant, I have chosen to employ the term “international crimes” to refer indifferently to both classes of crime. [...]

4. There is a dearth of authority with respect to the interpretation of the Convention. The introductory clause contains the ambiguous phrase “serious reasons for considering” [...].
5. The words “serious reasons for considering” also, I believe, must be taken, as was contended by the respondent, to establish a lower standard of proof than the balance of probabilities. [...]

7. Therefore, although the appellant relied on several international authorities which emphasize that the interpretation of the exclusion clause must be restrictive [...], it would nevertheless appear that, in the aftermath of Second World War atrocities, the signatory states to this 1951 Convention intended to preserve for themselves a wide power of exclusion from refugee status where perpetrators of international crimes are concerned. [...]
11. In the case at bar the most controversial legal issue has to do with the extent to which accomplices [...], as well as principal actors, in international crimes should be subject to exclusion, since the Refugee Division held in part that the appellant was guilty "in aiding and abetting in the commission of such crimes" [...], and it is on this finding that, as will become apparent, the respondent's case must rest.
12. The Convention provision refers to "the international instruments drawn up to make provisions in respect of such crimes One of these instruments is the London Charter of the International Military Tribunal, Article 6 of which provides in part [...]:

"Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

I believe this evidence is decisive of the inclusion of accomplices as well as principal actors, but leaves to be answered the very large question as to the extent of participation required for inclusion as an "accomplice". [...]

15. [...] From the premise that a *mens rea* interpretation is required, I find that the standard of "some personal activity involving persecution," understood as implying a mental element or knowledge, is a useful specification of *mens rea* in this context. Clearly no one can "commit" international crimes without personal and knowing participation.
16. What degree of complicity, then, is required to be an accomplice or abettor? A first conclusion I come to is that mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status. Indeed, this is in accord with the intention of the signatory states, as is apparent from the post-war International Military Tribunal already referred to. [...]

It seems apparent, however, that where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts.

17. Similarly, mere presence at the scene of an offence is not enough to qualify as personal and knowing participation [...], though, again, presence coupled with additional facts may well lead to a conclusion of such involvement. In my view, mere on-looking, such as occurs at public executions, where the on-lookers are simply bystanders with no intrinsic connection with the persecuting group, can never amount to personal involvement, however humanly repugnant it might be. However,



someone who is an associate of the principal offenders can never, in my view, be said to be a mere on-looker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts.

18. At bottom, complicity rests in such cases, I believe, on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it. Such a principle reflects domestic law [...], and I believe is the best interpretation of international law. [...]
20. In my view, [a precedent referred to by the court] was correctly decided on its facts, but it relied in good part on the definition of parties to an offence contained in section 21 of the Canadian Criminal Code, [Article 21 of the Canadian Criminal Code provides: "(1) Every one is a party to an offence who: (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; (c) abets any person in committing it. (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence."] **an approach which is not sufficient in the case at bar where what has to be interpreted is an international document of essentially a non-criminal character. [...]**
21. [...] In fact, in my view there is no liability on those who watch unless they can themselves be said to be knowing participants.
22. One must be particularly careful not to condemn automatically everyone engaged in conflict under conditions of war. Probably most combatants in most wars in human history have seen acts performed by their own side which they would normally find reprehensible but which they felt utterly powerless to stop, at least without serious risk to themselves. While the law may require a choice on the part of those ordered actually to perform international crimes, it does not demand the immediate benevolent intervention, at their own risk, of all those present at the site. Usually, law does not function at the level of heroism.
23. In my view, it is undesirable to go beyond the criterion of personal and knowing participation in persecutorial acts in establishing a general principle. The rest should be decided in relation to the particular facts. [...]
24. [...] This reservation as to his credibility in respect to the torture and killing of civilians is subsequently explained [by the Refugee Division] as follows [...]: "By his own admission, the claimant participated in what the panel would term "atrocities" against the civilian population. That such atrocities by the military against non-combatants occur is well documented throughout the exhibits filed in evidence in this matter. [...]"
25. [...] Throughout his testimony, the claimant described his personal participation in combat. In the first instance, claimant stated the following:  
  
"Q: Okay now, tell us about your term of service.

A: Once I got there they started training me as a soldier. In the beginning I liked this. It was attractive to me. It sort of matured me from another lesson to man and I also knew that the army needed young people, [...] because otherwise they would lack soldiers, they would have no soldiers and who was going to fight for the fatherland [*sic*].

Then I started doing more and more training and progressing in the military ranks. That is how I was doing my service for almost two years. I fought, I did a lot of things that maybe people would think are bad things. I had to kill and the time went on, but these things went on too.

Q: Are you talking about ordinary combat?

A: Yes, I'm talking about ordinary combat. I'm also talking about getting people unarmed, torturing them and killing them. [...]"

26. The key phrase in this passage, the word which led the Refugee Division to disbelieve his subsequent denials of not being a principal actor in torture scenes, was obviously "I did a lot of things that maybe people would think are bad things".
27. With the advantage of a better translation of the original Spanish, we now know that what the appellant actually said in this passage was not "I did," but "I saw." [...]
30. The first finding of the Refugee Division, relating to the appellant's participation as a principal actor, cannot therefore be upheld, since there is no evidence that could sustain it.
31. Hence it is necessary to proceed to their second finding, relating to his participation as an accomplice [...].
32. From this passage it is unclear what legal test was applied by the Refugee Division in determining that the appellant was an accomplice. It has recourse to the common-law phrase "aiding and abetting," which is a term of art in that tradition, and therefore an insufficient approach by itself to the interpretation of the international Convention. But the reference is so general and the standard actually applied so elusive, that I believe it must be said that the Refugee Division has erred in law, and its decision must be set aside and the matter remitted to it for redetermination unless, on the basis of the correct approach, no properly instructed tribunal could have come to a different conclusion [...].
33. The Refugee Division rested its finding on the appellant's "being present and serving as a guard." It would also have been open to it on the evidence to find that his activities in rounding up suspected guerillas constituted personal involvement in the commission of the offences against them which followed, but the Refugee Division must have accepted his explanation, that on the two occasions on which he admitted that his role in rounding up had led to mistreatment he had thought the prisoners were to be handed over to the Red Cross [...].
34. With respect to the appellant's serving as a guard, I find it impossible to say that no properly instructed tribunal could fail to draw a conclusion as to personal participation. The appellant testified: [...]

“We would just take watch, we’d make watch in the area or then we would just witness what was going on, but we never did the actual killing.”

The words “in the area” may merely imply a “making” or “taking watch” in the usual military sense of serving as a guard for the encampment, without any particular reference to what was happening to the prisoners. The Refugee Division interpreted it as in the sense of guarding the prisoners or protecting the malefactors. Given the ambiguity, I cannot see this as the only interpretation possible for a properly instructed tribunal.

35. What remains is, therefore, the appellant’s admitted presence at many instances of torture and killings committed by other soldiers, under orders from their common superiors. In speaking in a summary way of his experiences the appellant testified as to what he saw [...]:

“Yes, I’m talking about ordinary combat. I’m also talking about getting people unarmed, torturing them and then killing them.” [...]

36. At that time he testified that his conscience was bothering him because of what he had been part of [...].
37. [...] I find it clear from these and other passages in the appellant’s testimony, as well as from the documentary evidence, that the torture and killing of captives had become a military way of life in El Salvador. It is to the appellant’s credit that his conscience was greatly troubled by this, so much so that during his second term of enlistment, after three times unsuccessfully requesting a discharge [...], he eventually deserted in November, 1987 [...], in considerable part at least because of his bad conscience. I have also to say, however, that I think it is not to his credit that he continued to participate in military operations leading to such results over such a lengthy period of time. He was an active part of the military forces committing such atrocities, he was fully aware of what was happening, and he could not succeed in disengaging himself merely by ensuring that he was never the one to inflict the pain or pull the trigger.
38. On a standard of “serious reasons for considering that [...] he has committed a crime against peace, a war crime, or a crime against humanity,” I cannot see the appellant’s case as even a borderline one. He was aware of a very large number of interrogations carried out by the military, on what may have been as much as a twice-weekly basis (following some 130-160 military engagements) during his 20 months of active service. He could never be classed as a simple on-looker, but was on all occasions a participating and knowing member of a military force, one of whose common objectives was the torture of prisoners to extract information. This was one of the things his army did, regularly and repeatedly, as he admitted. He was a part of the operation, even if he personally was in no sense a “cheering section.” In other words, his presence at this number of incidents of persecution, coupled with his sharing in the common purpose of the military forces, clearly constitutes complicity. We need not define, for purposes of this case, the moment at which complicity may be said to have been established, because this case is not to my mind near the borderline. The appellant was no innocent by-stander:

he was an integral, albeit reluctant, part of the military enterprise that produced those terrible moments of collectively deliberate inhumanity.

39. To convict the appellant of criminal liability for his actions would, of course, require an entirely different level of proof, but on the basis of the lower-than-civil-law standard established by the nations of the world, and by Canadian law for the admission of refugees, where there is a question of international crimes, I have no doubt that no properly instructed tribunal could fail to come to the conclusion that the appellant had been personally and knowingly involved in persecutorial acts.
40. The appellant did not argue the defence of superior orders, and his arguments as to duress and remorse are insufficient for exoneration. [...]

I could find that the duress under which the appellant found himself might be sufficient to justify participation in lesser offences, but I would have to conclude that the harm to which he would have exposed himself by some form of dissent or non-participation was clearly less than the harm actually inflicted on the victims. The appellant himself testified as follows as to the punishment for desertion [...]:

“A: Well, the punishment is starting with very, very hard training exercises and then after that they will throw you in jail for five to ten years.”

This is admittedly harsh enough punishment, but much less than the torture and death facing the victims of the military forces to which he adhered.

41. As for the remorse he no doubt now genuinely feels, it cannot undo his persistent and participatory presence.
42. The appeal must therefore be dismissed.

## DISCUSSION

1. a. Should the Court have determined the type of conflict prevailing in El Salvador? What effect would this determination have had on the decision rendered? Was the Court right not to specify the legal classification of the “crime in question”?
- b. How would you have characterized the situation in El Salvador? (GC I-IV, Art. 3(1); P II, Art. 1(1))
- c. Are the acts the appellant is charged with crimes against humanity, war crimes or both? Does the difference between these two categories of crime lie in the classification of the conflict? Can there be a war crime in a non-international armed conflict? (GC I-IV, Art. 3(1) and Arts 50/51/130/147 respectively; P II, Art. 4(2); ICC Statute, Arts 7 and 8; [See **Case No. 23**, The International Criminal Court])
2. Did the Salvadoran armed forces violate IHL? (GC I-IV, Art. 3(1); P II, Art. 4(2)(a); CIHL, Rules 87 and 90)
3. Are there serious reasons to think that the appellant committed international crimes? Because of the simple fact that he belonged to the Salvadoran armed forces? The fact that he took prisoners who were subsequently tortured? What ought he to have done so as not to make himself criminally responsible? (ICC Statute, Art. 25(3)(d))

4.
  - a. For the appellant to be found criminally responsible for acts of torture and executions, would the prosecutor's burden of proof concerning the said facts have been greater, or would it have been necessary to provide evidence of a major implication in the crimes? According to the Court? In your opinion?
  - b. For what reasons was the appellant an accomplice in the offences of which the Salvadoran armed forces were accused? Was the fact that he knew about them and nevertheless remained a member of those forces sufficient to find him to be an accomplice? (ICC Statute, Arts 8(2)(c)(i) and 25(3)(d))
  - c. How could mere membership in an armed force result in criminal responsibility for acts committed by the group? Is a soldier who commits hostile acts that are not violations of IHL, but who knows that his comrades are violating IHL, criminally responsible for their illegal acts?
  - d. Is it appropriate to apply a provision such as Art. 21(2) of Canada's Criminal Code to members of armed forces?
5. Do you agree with the following statement of the Court: "no one can 'commit' international crimes without personal and knowing participation."? (P I, Art. 86(2); ICC Statute, Art. 28; CIHL, Rule 153)
6. What grounds for excluding criminal responsibility did the appellant rely on? Why was he unsuccessful? (ICC Statute, Art. 31(1)(d))
7. Should Canada have prosecuted the appellant rather than denying him refugee status? What grounds could justify not prosecuting but nevertheless denying refugee status? (GC I-IV, Arts 49/50/129/146 respectively)
8.
  - a. Does Canada have the right to deny the appellant refugee status on the grounds that he may have committed war crimes or crimes against humanity? Even if he risks persecution in El Salvador?
  - b. Since the appellant committed war crimes or crimes against humanity, can he be sent back to El Salvador, even if he risks persecution there?

**Case No. 156, Switzerland, Qualification of the Conflict in El Salvador**

[Source: *Annuaire Suisse de Droit International*, 1987, pp. 185-187; original in French, unofficial translation.]

**Law of Armed Conflicts: Conditions Governing the Application  
of Protocol II Additional to the 1949 Geneva Conventions  
(case of El Salvador)**

Below we reproduce a note which was drawn up by the Directorate for Public International Law and which relates to the applicability to El Salvador of the Protocol II additional to the Geneva Conventions of August 12, 1949 concerning the protection of victims of war, of June 8, 1977, and that relating to the protection of victims of non-international armed conflicts.

[Translation:]

1. El Salvador ratified the four 1949 Geneva Conventions on June 17, 1953. It did likewise with respect to the two Additional Protocols on November 23, 1978.
2. The question of whether Additional Protocol II relating to the protection of victims of non-international armed conflicts applies to the conflict between regular Salvadorian troops and the *Frente Farabundo Martí Liberación Nacional* (FMLN) must be answered in the affirmative. That answer is based on the following factors:
  - a) Article 1 of Additional Protocol II defines the field of application of the Protocol as follows:
    - [1.] This Protocol ... shall apply to all armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
    - [2.] This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Thus, the material field of application of the Protocol is defined by using purely objective criteria. As is the case with the Geneva Conventions, both with regard to international armed conflicts and non-international armed conflicts such as those referred to in Article 3 common to the four Conventions, where the objective conditions laid down are satisfied application of the Protocol is triggered automatically – the parties to the conflict do not have to carry out an assessment of the situation as it is in the territory of the State in which they are in conflict. A type of criterion of effectiveness applicable to the dissidents – a criterion which will be dealt with below – in particular features among those objective conditions in question.

First, the guerilla movement in El Salvador has a military wing which is composed essentially of five groups (*Frente Popular de Liberación Farabundo Martí* (FPL), *Ejército Revolucionario Popular* (ERP), *Fuerzas Armadas de la Resistencia Nacional* (FARN), and *Partido Revolucionario de Trabajadores Centro-Americanos* (PRTC)) which are joined together in a grouping known as *Frente Farabundo Martí Liberación Nacional* (FMLN). It also has a political wing (*Frente Democrático Revolucionario*, FDR). [...] The various groups are coordinated by bodies of military and political management which ensure collaboration between them. However, it is not possible to talk of the concerted conduct of operations in the sense of the joint preparation and execution of military actions. Nonetheless, it is not necessary to attain such an advanced degree of integration in terms of organisation. The term control exercised over a part of a territory is not easy to apply. In general, it will be noted that the hold of the Salvadorian guerilla movement has weakened over recent years, first because the Salvadorian army has been able to increase its mobility and effectiveness [...], and second on account of political changes. At present the FMLN exercises, over the inhabited rural parts [...] a degree of control which enables it to successfully counter the operations launched by government forces. On the other hand, its own operations carried out with forces equivalent to a company and launched outside those regions, as was still the case a few years ago, have become fewer in number on account of the increased effectiveness of the government forces. Furthermore, in certain regions the FMLN maintains a level of civil control comparable to that exercised by a State administration (police, schools, the collection of taxes). In conclusion, it may be stated that although the FMLN has been weakened, it continues to control, more or less permanently, just under one quarter of the territory of the country and that control prevents the Salvadorian army entering it without running the risk of being attacked. From a military point of view, it is now possible to talk of a balanced situation.

Furthermore, Article 1 of Protocol II requires that the insurgents be able to implement this Protocol. Therefore, it is necessary to establish, having regard to the actual situation, whether the dissidents are able to implement that instrument. The question of whether or not they do so effectively is of little importance. In the light of the circumstances described above and having regard to the particular characteristics of a war waged by means of guerilla warfare, that question must also be answered in the affirmative because the guerilla movement exercises a level of control over certain parts of the territory which enable it to take care of the sick and wounded, treat prisoners humanely and also comply with the other provisions contained in Article 4 of the Protocol (such as the prohibition on torture, collective punishments, the taking of hostages, acts of terrorism against third parties, and rape). Finally, the parties to that non-international conflict are, on the one hand, the armed forces of El Salvador and, on the other, organised armed forces which have never belonged to the army.

It follows from the foregoing that at present the conditions set out in Article 1 are objectively satisfied. Thus, the FMLN meets the above-mentioned criterion of effectiveness with the result that Additional Protocol II is applicable. That conclusion is borne out by the following factors:

- b) The General Assembly, the Economic and Social Council and the United Nations Commission on Human Rights have, on several occasions, been concerned at the situation in El Salvador and specifically called for compliance with the Geneva Conventions and the two Additional Protocols [...].
- c) In 1978 El Salvador was among the first countries to ratify the Additional Protocols at a time when the armed conflict was already under way in its territory. That demonstrates that the Salvadorian Government, for its part, envisaged the application of Protocol II to that conflict.
- d) It is known that in 1984 two meetings took place between the Government and the FMLN in the presence of representatives of other States (including Switzerland) who were to guarantee the security of those meetings. The involvement of representatives of third countries is further evidence in support of the applicability to the conflict of Article 1.
- e) Finally, mention should be made of the activities of the International Committee of the Red Cross (ICRC). Unlike the situation in other States of Central America, the Committee has easy access to the two parties and can work without any great hindrance.

Note of the Directorate for Public International Law of the Federal Department of Foreign Affairs of January 20, 1986.

*Unpublished document.*

## DISCUSSION

1. Would you qualify the situation in El Salvador as falling within the ambit of Protocol II?
2.
  - a. Which criteria need to be fulfilled in order to qualify a conflict *as non-international*? Which additional criteria must be met for a non-international armed conflict to fall within the ambit of Protocol II?
  - b. What are the objective criteria mentioned in Art. 1 of Protocol II, and do they apply to the situation of El Salvador?
  - c. Does the note correctly state that for Protocol II to be applicable, it is sufficient that the insurgents could apply it but need not necessarily actually respect it?
3. Do you accept the conclusion drawn above that the objective criteria have been met?
4. Do you agree that ratification by El Salvador of Protocol II in 1978, an international presence at meetings between the parties, and the possibility for the ICRC to work freely in El Salvador indicate that Protocol II is applicable? What are the risks of referring to such criteria?
5. Does Switzerland interfere in the internal affairs of El Salvador by qualifying the conflict in that country? Has Switzerland a legitimate interest in doing so?



**Case No. 157, Inter-American Commission on Human Rights,  
Coard v. United States**

[Source: IACHR, *Coard et al. v. United States*, Report No. 109/99 Case 10.951 September 29, 1999, *Annual Report 1999*; available on <http://www.cidh.org>. Footnotes partially reproduced.]

**I. SUMMARY****A. The Petition**

1. The petition on behalf of the seventeen claimants was filed before the Commission on July 25, 1991, and processed in accordance with its Regulations. As a general matter, the petitioners alleged that the military action led by the armed forces of the United States of America (hereinafter “United States” or “State”) in Grenada in October of 1983 violated a series of international norms regulating the use of force by states. With regard to their specific situation, they alleged having been detained by United States forces in the first days of the military operation, held incommunicado for many days, and mistreated. They contended that the United States corrupted the Grenadian judicial system by influencing the selection of judicial personnel prior to their trial, financing the judiciary during their trial, and turning over testimonial and documentary evidence to Grenadian authorities, thereby depriving them of their right to a fair trial by an independent and impartial tribunal previously established by law. The petitioners claimed that the United States violated its obligations under the American Declaration of the Rights and Duties of Man, specifically: Article I, the right to life, liberty and personal security; Article II, the right to equality before the law; Article XXV, the right to protection from arbitrary arrest; Article XVII, the right to recognition of juridical personality and civil rights; Article XVIII, the right to a fair trial; and Article XXVI, the right to due process of law.

**B. Background**

2. On October 19, 1983, the Prime Minister of Grenada, Maurice Bishop, and a number of associates were murdered pursuant to a power struggle within the New Jewel Movement, the ruling political party since 1979. Following the violent overthrow of the Bishop administration, the rival faction within the New Jewel Movement established a Revolutionary Military Council. On October 25, 1983, United States and Caribbean armed forces invaded Grenada, deposing the revolutionary government.
3. During the first days of the military operation, a number of individuals, including the seventeen petitioners [...] were arrested and detained by United States forces. [...]

**C. Overview of Proceedings**

5. The State contested the admissibility of the case before the Commission, asserting that the petitioners’ factual allegations were incorrect and/or unsupported, that it

was not the proper respondent, and that the Commission lacked the competence to examine the legal validity of its military actions in Grenada as this fell beyond the scope of its mandate, particularly with regard to a non-party to the American Convention.

6. The Commission adopted admissibility Report 14/94 on February 7, 1994, finding the claims concerning the arrest and detention of the petitioners admissible, and the other claims inadmissible. [...]

### **III. POSITION OF THE PARTIES**

#### **A. The Position of the Petitioners**

17. In their initial complaint, the petitioners claimed that: United States forces arrested them during the period in which it consolidated control over Grenada; that they were held incommunicado for many days; and that months passed before they were taken before a magistrate, or allowed to consult with counsel. "During this period petitioners were threatened, interrogated, beaten, deprived of sleep and food and constantly harassed."
18. The petitioners alleged that their whereabouts were kept secret, and that requests by lawyers and others to meet with them were rejected. They alleged that, more than a week after the invasion, the commanding officer for United States armed forces in Grenada, Admiral Joseph Metcalf, III, denied knowledge of the whereabouts of petitioners Hudson Austin and Bernard Coard to a group of United States Congressmen, when in fact the two men were confined aboard a ship under his command.
19. The petitioners alleged that United States forces subjected them to threats and physical abuse. The supplemental petition of August 4, 1991 indicated that petitioner Leon Cornwall had attested at trial, before the High Court of Grenada, that United States officials had attempted to obtain his testimony through the use of threats and physical coercion. [...] The petitioners alleged that, even after they were turned over to the custody of Grenadian and Caribbean Peacekeeping Force (hereinafter "CPF") authorities at Richmond Hill Prison, on or about November 5, 1983, United States forces continued to play a role in their detention, interrogation and mistreatment.
20. The petition alleged that the United States had no legal justification for the actions taken against the petitioners, and is thus responsible for violations of their "human rights to liberty, freedom from arbitrary arrest, notification of charges, physical and mental integrity, freedom from cruel, inhuman and degrading punishment and punishment only after conviction in violation of Articles I, II, XVII, XVIII, XXV and XXVI of the American Declaration.

#### **B. The Position of the State**

21. In its initial response, the State indicated that "[t]he treatment by US armed forces of all Grenadian or other nationals who were either temporarily detained

or arrested for security or other lawful reasons” accorded fully with “applicable international rules concerning the law of armed conflict, including the rules governing the treatment of civilian detainees and military prisoners.” In view of its position that the case was inadmissible, it declined at that time to address the international legal validity of claims concerning United States military actions in Grenada.

22. Pursuant to the Commission’s adoption of Report 14/94, the State submitted information with respect to the arrest and detention of the petitioners. It fully acknowledged “that during the initial stage of the US military operation in Grenada, the petitioners and other Grenadian nationals were arrested, detained by US military forces for several days and interrogated while the United States suppressed further armed resistance to its military operation.” Citing contemporaneous records, the State asserted that all of the petitioners were detained in United States custody for a period of less than three weeks. The State maintained that the period of the petitioners’ detention “coincided with ... the ‘hostilities phase’ of the operation (i.e., from 25 October to 2 November) when the US military was engaged in putting down armed resistance from enemy forces.” Although the petitioners were not prisoners of war, they were “detained and accorded protection equivalent to that given prisoners of war,” and were “thus were accorded the highest protections [available] under the laws of armed conflict.” [...]
24. The United States reported that by November 5, 1983, all of the petitioners had been transferred from United States custody to the CPF and Grenadian authorities. The State asserted that “in view of their relatively brief periods of detention in US military custody from on/about October 25 to November 5, at the latest, petitioners’ claim that the United States subjected them to prolonged detention is patently exaggerated and unconvincing.” [...]
26. The State denied allegations that, during their detention at the hands of its forces, the petitioners were “threatened, interrogated, beaten, deprived of sleep and food and constantly harassed.” [...] Citing another document, the State reported that “personnel were interrogated for the purpose of securing tactical information essential to the effective conduct of ongoing military operations and the security of US forces’ personnel.” The State asserted that interrogation “of POW’s for tactical and security purposes during hostilities is a right clearly recognized and provided for in Article 17” of the Geneva Convention Relative to the Treatment of Prisoners of War.
27. The United States submitted that the treatment accorded to petitioners accorded fully with the standards of the American Declaration and applicable International Humanitarian Law. [...]

#### **IV. PROCESSING OF REPORT NO. 13/95 PREPARED PURSUANT TO ARTICLE [43] OF THE REGULATIONS OF THE COMMISSION**

28. On September 21, 1995, the Commission adopted Report 13/95 pursuant to Article 53 [*sic*, read 43] of its Regulations, setting forth its analysis of the record, findings, and recommendations to the State designed to repair violations of Articles I, XVII and XXV the American Declaration related to the deprivation of the petitioners' liberty by United States forces. The Commission found that the detention of the petitioners had been carried out under conditions which did not ensure the full observance of the minimum safeguards required under the American Declaration. Most pertinently, the Commission found that the petitioners had no access to any form of review of the legality of their detention at the hands of United States forces. [...]

The Commission recommended that the State conduct a further investigation to attribute responsibility for the violations, and take the measures necessary to repair the consequences thereof. [...]

29. By means of a note dated December 27, 1995, the United States submitted a response to Report 13/95, in which it requested that the Commission reconsider and rescind that report pursuant to the procedure [...] [which] provides that, where either party "invokes new facts or legal arguments" within the deadline established in a report, the Commission shall decide during its next session whether to maintain or modify its decision. This procedure may only be invoked once.
30. [...] [T]he Commission decided to review the information presented during its next period of sessions. The Commission determined that the State had raised two issues that required additional clarification. The first issue concerned the legal status of the petitioners. In the December 27, 1995 submission, the State indicated that: "the petitioners' detention and treatment were justified under the 1949 Geneva Convention III, Relative to the Treatment of Prisoners of War ... as in furtherance of lawful military objectives." At the same time, the State contended that the "[p]etitioners could also be considered civilian detainees whose detention and treatment were fully in accord with governing standards under the Fourth Geneva Convention" [Relative to the Protection of Civilians in Time of War]. In its October 19, 1994 response, the State had indicated that the petitioners were accorded protections equivalent to those given to POW's "even though they were not themselves POWs." The second issue concerned the claim that the petitioners had been held incommunicado, the State having reported for the first time in its December 27, 1995 submission that the petitioners had enjoyed a right of access to the International Committee of the Red Cross.
31. Because the classifications of civilian and prisoner of war are mutually exclusive and carry legal consequences, the Commission found it necessary to request that the State clarify its position on this issue. [...] [T]he Commission asked the State to provide information as to which of the petitioners had been accorded status as prisoners of war, and which had been deemed civilians, as well as the basis for those determinations. The Commission also requested information as to whether,

and if so, on what dates, ICRC representatives had been present in the locations where the petitioners were held. [...]

32. The State's response, [...] indicated that the petitioners "were civilian detainees held briefly for reasons of military necessity," and "were treated *de facto* to the highest legally available standard of protection." The information provided as to the presence of the ICRC indicated only that, at the time of the military operation, the United States had supplied that organization with a list of names of those detained, and that ICRC representatives "had the normal rights of access to those individuals in detention." The Government indicated that it had been unable to locate any reports of such ICRC visits, although it had confirmed by telephone that visits to detainees – whom the ICRC did not identify – had been carried out during the period in question. The Government further affirmed that the petitioners had been permitted to communicate with their next-of-kin, in writing, within seven days of their detention, as required by Article 70 of the Fourth [*sic*, read Third] Geneva Convention.
33. Having received the request for reconsideration, and having attempted to clarify certain inconsistencies in the position of the State with respect to the status of the petitioners at the time they were detained, the Commission reviewed the findings and recommendations issued in Report 13/95 and made certain modifications. The Commission adopted final Report 82/99 on May 7, 1999.

## V. ANALYSIS

34. In its decision to admit Case 10.951, the Commission determined that a sufficient causal nexus through which to assess possible violations had been established only as to the claims concerning the petitioners' arrest, and presumed detention incommunicado. Such claims were found, at the threshold level, to implicate Article I, the right to life, liberty and personal security; Article XVII, the right to recognition of juridical personality and civil rights; and Article XXV, the right of protection from arbitrary arrest.
35. The factual predicate before the Commission, which is undisputed, is that on or about October 25, 1983, members of the armed forces of the United States arrested the 17 petitioners while participating in the military operation then being conducted in Grenada. The petitioners were detained for periods of 9 to 12 days, and were then turned over to Grenadian authorities. What is in dispute is the legal characterization of the treatment accorded to the petitioners once arrested and detained. The petitioners alleged that their arrest and detention violated, *inter alia*, Articles I, XVIII [*sic*, read XVII] and XXV of the American Declaration. The State maintained that the matter was wholly and exclusively governed by the law of international armed conflict, which the Commission has no mandate to apply, and that the conduct in question was, in any case, fully justified as a matter of law and fact.

### A. Jurisdictional Considerations and Applicable Law [...]

38. In terms of the law applicable to the present case, the petitioners invoked the provisions of the American Declaration as governing their claims. The United

States argued that the situation denounced was governed wholly by International Humanitarian Law, a body of law which the Commission lacks the jurisdiction or specialized expertise to apply. In accordance with the normative framework of the system, when examining individual cases concerning non-parties to the American Convention, the Commission looks to the American Declaration as the primary source of international obligation and applicable law. This does not mean, as the United States argued, that the Commission may not make reference to other sources of law in effectuating its mandate, including International Humanitarian Law.

39. First, while International Humanitarian Law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a “common nucleus of non-derogable rights and a common purpose of protecting human life and dignity,” [...] [See Case No. 192, Inter-American Commission on Human Rights, Tablada [Para. 158]], and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict, and this is reflected, *inter alia*, in the designation of certain protections pertaining to the person as peremptory norms (*jus cogens*) and obligations *erga omnes*, in a vast body of treaty law, in principles of customary international law, and in the doctrine and practice of international human rights bodies such as this Commission. Both normative systems may be thus be applicable to the situation under study.
40. Second, it would be inconsistent with general principles of law for the Commission to construe and exercise its Charter-based mandate without taking into account other international obligations of member states which may be relevant. [...]
41. Third, the State’s assertion that the application of humanitarian law would wholly displace the application of the Declaration is also inconsistent with the doctrine and practice of the system. The Commission has encountered situations requiring reference to Article XXVIII of the Declaration, which specifies that “[t]he rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy” since the inception of its case system. The Declaration was not designed to apply in absolute terms or in a vacuum, and the Commission has necessarily monitored the observance of its terms with reference to its doctrine on permissible and non-permissible limitations, and to other relevant obligations which bear on that question, including humanitarian law.
42. Fourth, in a situation of armed conflict, the test for assessing the observance of a particular right, such as the right to liberty, may, under given circumstances, be distinct from that applicable in a time of peace. For that reason, the standard to be applied must be deduced by reference to the applicable *lex specialis*. The American Declaration is drawn in general terms, and does not include specific provisions relating to its applicability in conflict situations. As will be seen in the analysis which follows, the Commission determined that the analysis of the petitioners’ claims under the Declaration within their factual and legal context requires reference to

International Humanitarian Law, which is a source of authoritative guidance and provides the specific normative standards which apply to conflict situations. In the present case, the standards of humanitarian law help to define whether the detention of the petitioners was “arbitrary” or not under the terms of Articles I and XXV of the American Declaration. As a general matter, while the Commission may find it necessary to look to the applicable rules of International Humanitarian Law when interpreting and applying the norms of the inter-American human rights system, where those bodies of law provide levels of protection which are distinct, the Commission is bound by its Charter-based mandate to give effect to the normative standard which best safeguards the rights of the individual. [...]

44. The parties do not dispute that the situation under study originated in the context of an international armed conflict as defined in common Article 2 of the Geneva Conventions. The information in the case file and the public record is consistent with that conclusion.

## **B. The Legality of the Arrest and Detention of the Petitioners**

45. Article I of the American Declaration sets forth that every human being has the right to liberty. Article XXV provides that no person may be deprived of that right, except in accordance with the norms and procedures established by pre-existing law. This Article specifies, in pertinent part, that any person deprived of liberty “has the right to have the legality of his detention ascertained without delay by a court [and] the right to humane treatment during the time he is in custody.” The text of Article XXV thus specifies three fundamental requirements: first, preventive detention, for any reason of public security, must be based on the grounds and procedures set forth in law; second, it may not be arbitrary; and third, supervisory judicial control must be available without delay. Consequently, in the present case the Commission must establish the basis in law for the detentions, ascertain that they were neither illegal nor arbitrary, and assess the safeguards and verify the existence of judicial control without delay.
46. The United States has invoked several legal bases for the detention of the petitioners. In its October 19, 1994 submission, the State indicated that the petitioners had been detained for security and tactical reasons, and so that they could be turned over to Grenadian authorities to stand trial for the murder of Maurice Bishop and others. Although the United States did not consider the petitioners prisoners of war, the State indicated they had been accorded the protections corresponding to that status. Pursuant to receipt of Commission Report 13/95, the State indicated that, [...] the detention of the petitioners had been justified under the Third Geneva Convention Relative to the Treatment of Prisoners of War. They could “also be considered civilian detainees” under the terms of the Fourth Geneva Convention. [...] “Whether as POWs or civilian detainees” the United States invoked the Geneva Conventions of 1949 as the legal basis for detaining the petitioners.
47. The State is party to the Geneva Conventions of 1949, which are, as one of its submissions indicates, “part of the supreme law of the land.” The Geneva

Conventions – which provide a wider range of justifications for the deprivation of liberty than does the American Declaration – do authorize deprivation of liberty under certain circumstances. Determining which provisions apply requires determining the status of the petitioners under that body of law.

48. The parties' submissions are equivocal with respect to whether the petitioners were civilians entitled to protection under the Third [*sic*, read Fourth] Geneva Convention, or prisoners of war entitled to status under the Fourth Geneva Convention. The petitioners identified some of their number as "civilians," although without further identification or explanation. As noted, having referred to the petitioners as both civilians and POW's, the State indicated as its final position that the petitioners "were civilian detainees held briefly for reasons of military necessity," and were "accorded the rights and privileges of those who might have held the status of prisoners of war because that standard ensures a higher degree of protection." The State asserted that, "as a technical matter, whether they were being held as civilian detainees or as prisoners of war does not matter for purposes of deciding this petition. They were treated *de facto* to the highest legally available standard of protection that can be accorded to persons in such status."
49. As a factual matter, reports issued at the time of the events under study indicate that certain petitioners were then members of an entity known as the Revolutionary Military Council (hereinafter "RMC"), and had previously been officers in the People's Revolutionary Army. [...]
50. [...] However, neither party briefed whether that armed force met the requisites to fall within the coverage of the Third Geneva Convention or not. As neither party has provided information on this point, the Commission decided to proceed with its analysis based primarily on the situation of the petitioners who were definitively not members of any armed force and fell under the terms of the Fourth Geneva Convention in any case. (While most or all of these held political positions, there is no information on record indicating that they took part in hostilities.) The analysis is based only secondarily on the extent to which the others had the status of civilians, as the United States has sustained and the petitioners have not contested. [...]
52. Under exceptional circumstances, International Humanitarian Law provides for the internment of civilians as a protective measure. It may only be undertaken pursuant to specific provisions, and may be authorized when: security concerns require it; less restrictive measure could not accomplish the objective sought; and the action is taken in compliance with the grounds and procedures established in pre-existing law. [...]
53. The applicable provisions of the Fourth Geneva Convention provide the authorities substantial discretion in making the initial determination, on a case by case basis, that a protected person poses a threat to its security, and the record provides no basis to controvert the security rationale asserted in this case. However, the record does not disclose to what extent the decision to detain each petitioner was made pursuant to a "regular procedure." Government submissions have indicated



that the petitioners were detained for security reasons, but have provided little information as to the specific procedures followed by the United States forces who initiated and maintained custody.

54. As set forth, the applicable rules of International Humanitarian Law relative to the detention of civilians provide that the “regular procedure” by which such decisions are taken shall include the right of the detainee to be heard and to appeal the decision. [...]
55. The requirement that detention not be left to the sole discretion of the state agent(s) responsible for carrying it out is so fundamental that it cannot be overlooked in any context. The terms of the American Declaration and of applicable humanitarian law are largely in accord in this regard. [...] This is an essential rationale of the right to *habeas corpus*, a protection which is not susceptible to abrogation.
56. In the instant case, on the basis of the record before it, the Commission is unable to identify the existence of safeguards in effect to ensure that the detention of the petitioners was not left to the sole discretion of the United States forces responsible for carrying it out. [...]
57. [...] The petitioners were held in United States custody for a total of nine to twelve days prior to being transferred to Grenadian and CPF custody, which means they were held for six to nine days after the cessation of hostilities without access to any review of the legality of their detention. This delay, which is not attributable to a situation of active hostilities or explained by other information on the record, was incompatible with the terms of the American Declaration of the Rights and Duties of Man as understood with reference to Article 78 of the Fourth Geneva Convention.
58. The United States has argued that it would have been impracticable to present the petitioners before the Grenadian courts. Regardless of whether it was practicable or not (the United States offered no evidence to sustain its argument), the review at issue need not have required access to the Grenadian court system. Rather, pursuant to the terms of the Fourth Geneva Convention and the American Declaration, it could have been accomplished through the establishment of an expeditious judicial or board (quasi-judicial) review process carried out by United States agents with the power to order the production of the person concerned, and release in the event the detention contravened applicable norms or was otherwise unjustified. [...]
59. [...] While international human rights and humanitarian law allow for some balancing between public security and individual liberty interests, this equilibrium does not permit that control over a detention rests exclusively with the agents charged with carrying it out.

## VI. CONCLUSIONS

60. Internment of civilians for imperative reasons of security may be permissible where the required basis is established in the particular case, and the Commission has found nothing in the record to refute the security justification presented by

the United States. However, the same rules which authorize this as an exceptional security measure require that it be implemented pursuant to a regular procedure which enables the detainee to be heard and to appeal the decision “with the least possible delay.” That regular procedure ensures that the decision to maintain a person in detention does not rest with the agents who effectuated the deprivation of liberty, and ensures a minimal level of oversight by an entity with the authority to order release if warranted. This is a fundamental safeguard against arbitrary or abusive detention, and the relevant provisions of the American Declaration and Fourth Geneva Convention analyzed above establish that this protection is to be afforded with the least possible delay. Taking into account that the petitioners were, according to the foregoing analysis, civilians detained for security reasons, and that they were held in the custody of United States forces for approximately nine to twelve days, including six to nine days after the effective cessation of fighting, the Commission observes that the petitioners were not afforded access to a review of the legality of their detention with the least possible delay.

61. Accordingly, the Commission finds that the deprivation of the petitioners’ liberty effectuated by United States forces did not comply with the terms of Articles I, XVII and XXV of the American Declaration of the Rights and Duties of Man. [...]

## **DISCUSSION**

### **I. Qualification of the conflict**

1. a. Was there an international armed conflict between the United States and Grenada? Even if the Revolutionary Military Council took power in violation of Grenada’s constitutional law? If the United States were called upon to intervene by representatives of the former government after the Revolutionary Military Council gained control of Grenada? (GC I-IV, Art. 2)
- b. Was Grenada a State occupied by the United States? What does the Commission think? What do you think?

### **II. Detention**

2. What elements are missing to be able to determine whether the petitioners were prisoners of war or protected civilians? Can a person in the hands of the enemy during an international armed conflict be neither a prisoner of war nor a protected civilian? Is there presumption in favour of the one or the other status? (GC III, Arts 4 and 5; GC IV, Art. 4)
3. a. Were the petitioners who were part of the “People’s Revolutionary Army” prisoners of war? Even if they represented a government of Grenada that the United States did not recognize? What requirements of IHL could make the Commission doubt whether they were prisoners of war? (GC III, Art. 4)
- b. If the petitioners had been prisoners of war, would their detention have been in accordance with IHL? With the American Declaration on the Rights and Duties of Man (available on <http://www.cidh.org>)? More specifically, what about their detention in the absence of judicial control? Is IHL a sufficient legal basis to justify the detention of a prisoner of war? For how long? Without judicial review? Does IHL not provide for judicial guarantees in favour of prisoners of

war? Can a prisoner of war not claim the right of *habeas corpus*? (GC III, Arts 13, 17, 21, 85, 99-108 and 118)

- c. May a prisoner of war be questioned for tactical and security purposes? (GC III, Art. 17)
4. a. Under what circumstances may a civilian be held by the enemy during an international armed conflict? (GC IV, Arts 64, 66, 67, 76 and 78)
- b. Were there reasons that could justify the detention of the petitioners? Who decides if the reasons are sufficient? (GC IV, Art. 78)
- c. Does a civilian detained for imperative reasons of security have “the right to have the legality of his detention ascertained” without delay by a court? According to IHL? According to international human rights law? (GC IV, Art. 78)
- d. Must the procedure described by Article 78 of Convention IV be deferred to an independent and impartial tribunal and respect the judicial guarantees foreseen by human rights law? Following a possible appeal, may the authority to rule on the detention be set up by the United States? (GC IV, Art. 78)
- e. Does Convention IV constitute a sufficient legal basis that may, under international human rights law, justify the detention of an interned civilian if the procedural guarantees of Article 78 are respected? (GC IV, Art. 78)
- f. Which provisions of Convention IV does the Commission believe were breached with regard to the petitioners?
5. a. What are the rights of prisoners of war and detained civilians to inform their families of their situation? Are there other provisions that allow them to communicate with their families? (GC III, Arts 70, 71, 122(2), (4) and (7) and 123; GC IV, Arts 106, 107, 136(2), 138 and 140)
- b. Can an individual notified to the ICRC be considered as held *incommunicado*? If he is visited by the ICRC? If he cannot communicate with his family? (GC III, Arts 122(4) and 123; GC IV, Arts 138 and 140)

### III. IHL and Human Rights Law

6. a. Why does the Inter-American Commission apply IHL? Does it have jurisdiction to do so? May it find and condemn a violation of IHL? [See also **Case No. 192**, Inter-American Commission on Human Rights, *Tablada*, and **Case No. 246**, Inter-American Court of Human Rights, *The Las Palmeras Case*]
- b. Is the American Declaration on the Rights and Duties of Man, and more generally human rights law, applicable in times of armed conflict? In the same way as in times of peace? Does human rights law also protect combatants? Prisoners of war?
- c. In times of conflict, do the right to life, the right to protection against arbitrary arrest and the judicial guarantees foreseen by human rights have to be read in the light of IHL? What are the consequences for the right to individual liberty? In what respects must IHL be read in the light of these human rights?
- d. In this case, which of the violations of IHL committed against the petitioners is also a breach of the American Declaration? Which right provided for by the Declaration was violated vis-à-vis each petitioner?

**Case No. 158, United States, United States v. Noriega****A. Jurisdiction**

[Source: United States District Court for the Southern District of Florida, 746 F. Supp. 1506 (1990); footnotes omitted.]

**UNITED STATES OF AMERICA, Plaintiff**  
**v.**  
**MANUEL ANTONIO NORIEGA, et al.**

**OPINION: OMNIBUS ORDER, WILLIAM M. HOEVELER, UNITED STATES**  
**DISTRICT JUDGE**  
**No. 88-79-CR**  
**June 8, 1990**

THIS CAUSE comes before the Court on the several motions of Defendants General Manuel Antonio Noriega and Lt. Col. Luis Del Cid to dismiss for lack of jurisdiction the indictment which charges them with various narcotics-related offenses.

The case at bar presents the Court with a drama of international proportions, considering the status of the principal defendant and the difficult circumstances under which he was brought before this Court. The pertinent facts are as follows:

On February 14, 1988, a federal grand jury sitting in Miami, Florida returned a twelve-count indictment charging General Manuel Antonio Noriega with participating in an international conspiracy to import cocaine and materials used in producing cocaine into and out of the United States. Noriega is alleged to have exploited his official position as head of the intelligence branch of the Panamanian National Guard, and then as Commander-in-Chief of the Panamanian Defense Forces, to receive payoffs in return for assisting and protecting international drug traffickers [...] Defendant Del Cid, in addition to being an officer in the Panamanian Defense Forces, was General Noriega's personal secretary. He is charged with acting as liaison, courier, and emissary for Noriega in his transactions with Cartel members and other drug traffickers.

[...] Subsequent to the indictment, the Court granted General Noriega's motion to allow special appearance of counsel, despite the fact that Noriega was a fugitive and not before the Court at that time. Noriega's counsel then moved to dismiss the indictment on the ground that United States laws could not be applied to a foreign leader whose alleged illegal activities all occurred outside the territorial bounds of the United States. Counsel further argued that Noriega was immune from prosecution as a head of state and diplomat, and that his alleged narcotics offenses constituted acts of state not properly reviewable by this Court.

Upon hearing arguments of counsel, and after due consideration of the memoranda filed, the Court denied Defendant's motion, for reasons fully set forth below. At that time, the Court noted that this case was fraught with political overtones, but that it was nonetheless unlikely that General Noriega would ever be brought to the United States to answer the charges against him. [...] In the interval between the time the indictment was issued and Defendants were arrested, relations between the United States and General Noriega deteriorated considerably. Shortly after charges against Noriega were brought, the General delivered a widely publicized speech in which he brought a machete crashing down on a podium while denouncing the United States. On December 15, 1989, Noriega declared that a "state of war" existed between Panama and the United States. Tensions between the two countries further increased the next day, when U.S. military forces in Panama were put on alert after Panamanian troops shot and killed an American soldier, wounded another, and beat a Navy couple. Three days later, on December 20, 1989, President Bush ordered U.S. troops into combat in Panama City on a mission whose stated goals were to safeguard American lives, restore democracy, preserve the Panama Canal treaties, and seize General Noriega to face federal drug charges in the United States. Before U.S. troops were engaged, American officials arranged a ceremony in which Guillermo Endara was sworn in as president and recognized by the United States as the legitimate head of the government of Panama. Endara was reported to have won the Panamanian presidential election held several months earlier, the results of which were nullified and disregarded by General Noriega.

Not long after the invasion commenced, Defendant Del Cid, the commander of about two thousand Panamanian troops located in the Chiriqui Province, surrendered to American forces. He was then transferred into the custody of agents from the United States Drug Enforcement Agency, who thereupon arrested Del Cid for the offenses for which he is under indictment in this Court. The apprehension of General Noriega was not quite so easy. He successfully eluded American forces for several days, prompting the United States government to offer a one million dollar bounty for his capture. Eventually, the General took sanctuary in the Papal Nunciature in Panama City, where he apparently hoped to be granted political asylum. Noriega's presence in the Papal Nunciature touched off a diplomatic impasse [...] After an eleven-day standoff, Noriega finally surrendered to American forces, apparently under pressure from the papal nuncio and influenced by a threatening crowd of about 15,000 angry Panamanian citizens who had gathered outside the residence. On January 3, 1990, two weeks after the invasion began, Noriega walked out of the Papal Nunciature and surrendered himself to U.S. military officials waiting outside. He was flown by helicopter to Howard Air Force Base, where he was ushered into a plane bound for Florida and formally arrested by agents of the Drug Enforcement Agency. [...] As is evident from the unusual factual background underlying this case, the Court is presented with several issues of first impression. This is the first time that a leader or *de facto* leader of a sovereign nation has been forcibly brought to the United States to face criminal charges. The fact that General Noriega's apprehension occurred in the course of a military action only further underscores the complexity of the issues involved. In addition to Defendant Noriega's motion to dismiss based on lack of jurisdiction over the offense and sovereign immunity, Defendants Noriega and Del Cid argue that

they are prisoners of war pursuant to the Geneva Convention. This status, Defendants maintain, deprives the Court of jurisdiction to proceed with the case. Additionally, Noriega contends that the military action which brought about his arrest is “shocking to the conscience”, and that due process considerations require the Court to divest itself of jurisdiction over his person. Noriega also asserts that the invasion occurred in violation of international law. Finally, Noriega argues that, even in the absence of constitutional or treaty violations, the Court should dismiss the indictment pursuant to its supervisory powers so as to prevent the judicial system from being party to and tainted by the government’s alleged misconduct in arresting Noriega. [...] The Court examines each of these issues, in turn, below.

## **I. JURISDICTION OVER THE OFFENSE**

The first issue confronting the Court is whether the United States may exercise jurisdiction over Noriega’s alleged criminal activities. [...] In sum, because Noriega’s conduct in Panama is alleged to have resulted in a direct effect within the United States, the Court concludes that extraterritorial jurisdiction is appropriate as a matter of international law. [...] Jurisdiction over Defendant’s extraterritorial conduct is therefore appropriate both as a matter of international law and statutory construction.

## **II. SOVEREIGN IMMUNITY**

The Court next turns to Noriega’s assertion that he is immune from prosecution based on head of state immunity, the act of state doctrine, and diplomatic immunity. [...]

## **III. DEFENDANTS’ PRISONER OF WAR STATUS**

Defendants Noriega and Del Cid contend that they are prisoners of war (“POW”) within the meaning of the Geneva Convention Relative to the Treatment of Prisoners of War, (Geneva III), a status, Defendants maintain, which divests this Court of jurisdiction to proceed with this case. For the purposes of the motion at bar, the Government does not maintain that Defendants are not prisoners of war, but rather argues that even were Defendants POWs, the Geneva Convention would not divest this Court of jurisdiction. Thus, the Court is not presented with the task of determining whether or not Defendants are POWs under Geneva III, but proceeds with the motion at bar as if Defendants were entitled to the full protection afforded by the Convention. Defendants’ arguments under the Geneva Convention are grounded in Articles 82, 84, 85, 87, and 99, and 22, each of which is examined, in turn, below.

*Article 82 “A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offense committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed. If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable,*

*whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only."*

As is evident from its face, Article 82 pertains to disciplinary and penal procedures against POWs for offenses committed after becoming POWs, allowing for prosecutions against POWs only for acts which would be prosecutable against a member of the detaining forces. Thus, Article 82 is clearly inapplicable to the instant case because Noriega and Del Cid are being prosecuted not for offenses committed after their capture but for offenses committed well before they became prisoners of war.

*Article 84 "A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect to the particular offence alleged to have been committed by the prisoner of war.*

*In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105."*

Under 18 U.S.C. at 3231, federal district courts have concurrent jurisdiction with military courts over all violations of the laws of the United States committed by military personnel. The indictment charges Defendants with various violations of federal law, including narcotics trafficking [...] These are allegations of criminal misconduct for which any member of the United States Armed Forces could be prosecuted. Consequently, the prohibition embodied in Article 84, paragraph 1 does not divest this Court of jurisdiction. It has not been argued by Defense Counsel that the district court does not offer the essential guarantees of independence and impartiality "as generally recognized..." Neither do Defendants contend that they will not be afforded the full measure of rights provided for in Article 105. Those rights include representation of counsel and prior notification of charges. [...] Indeed, Defendants will enjoy the benefit of all constitutional guarantees afforded any person accused of a federal crime.

*Article 85 "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."*

Rather than supporting Defendants' overall position pressed under the Geneva Convention, this Article appears to recognize the right to prosecute asserted by the Government. The Article refers to "prisoners ... prosecuted under the laws of the Detaining Power" (i.e., the United States) and for acts "committed prior to capture." Further, the benefits of the Convention shall be afforded the POW "even if convicted." The indictment charges the Defendants with violations of the laws of the United States allegedly committed between December 1982 and March 1986 – well before the military action and apprehension by surrender.



*Article 87 “Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of said Power who have committed the same acts... .”*

Article 82 reflects the principle of “equivalency” embodied in other Articles of the Convention. That principle provides that, in general, prisoners of war may be prosecuted for criminal violations only if a member of the armed forces of the detaining country would be subject to like prosecution for the same conduct. The specific application of the ‘equivalency principle’ in Article 87 prevents prisoners of war from being subject to penalties not imposed on the detaining power’s soldiers for the same acts. Assuming Defendants are convicted of one or more of the crimes with which they are charged, they face criminal sentences no greater nor less than would apply to an American soldier convicted of the same crime. The instant prosecution is therefore consistent with the provisions of Article 87.

*Article 99 “No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at time the said act was committed. No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused. No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.”*

Article 99 proscribes the prosecution of prisoners of war under *ex post facto* laws, and prohibits coerced confessions. This Article further codifies other fundamental rights secured to any criminal defendant under the Constitution of the United States of America. All accused defendants, “prisoner of war” status notwithstanding, are guaranteed these basic protections.

The Defense has not contended, and of course cannot contend, that the narcotics offenses with which Defendants are charged were permitted under U.S. law at the time the acts were allegedly committed. Neither has there been any assertion that Defendants were coerced into admitting guilt or that any effort was made in that direction. Defendants are represented by competent counsel and are being afforded all rights to which they are entitled under the law. Article 99 thus does not operate to divest the Court of jurisdiction.

*Article 22 “Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries. [...] The Detaining Power shall assemble prisoners of war in camps or camp compounds according to their nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.”*

Defendants maintain that Article 22 deprives the Court of personal jurisdiction by requiring that they be returned to Panama and detained along with other Panamanian prisoners of the armed conflict. The Court perceives no such requirement in Article 22,



which relates to the general conditions, and not the location, of internment. The provision upon which Defendants rely states that prisoners shall not be interned with persons of different nationality, language, and customs, and "shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture." [...] According to Defendants' interpretation, Article 22 would require that all prisoners of war from the same armed forces be interned together in a single prisoner of war facility. Yet this clearly cannot be Article 22's intent, since internment under those conditions would likely violate its overall concern for healthy and comfortable conditions of internment. Indeed, Defendant Noriega undercuts his own argument by suggesting that he be detained in an agreeable third country, an action which would certainly separate him from members of Panama's armed forces being detained in Panama. The more obvious interpretation of the provision that it prevents prisoners belonging to the armed forces of one nation from being forcibly interned with prisoners from the armed forces of another nation. Such is not the case here.

Moreover, nothing in Article 22 or elsewhere prohibits the detaining power from temporarily transferring a prisoner to a facility other than an internment camp in connection with legal proceedings. Because the Convention contemplates that prisoners of war may be prosecuted in civilian courts, it necessarily permits them to be transferred to a location that is consistent with the orderly conduct of those proceedings. It is inconceivable that the Convention would permit criminal prosecutions of prisoners of war and yet require that they be confined to internment camps thousands of miles from the courthouse and, quite possibly, defense counsel.

The remaining provisions of the Convention cited by Defendant Noriega lend little, if any, support to his argument regarding jurisdiction. Article 12 of the Convention, which Noriega contends mandates his removal to a third country, in fact limits the ability of the United States to effect such a transfer: Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in custody. [...]

Finally, Noriega cites Article 118 of the Convention, which requires prisoners of war to be released and repatriated "without delay after the cessation of active hostilities." [...] That provision is, however, limited by Article 119, which provides that prisoners of war "against whom criminal proceedings for an indictable offense are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment." [...] Since criminal proceedings are pending against Noriega, Article 119 permits his detention in the United States notwithstanding the cessation of hostilities.

### **Extradition Treaty Between Panama and the United States**

Defendants argue that Geneva III operates to divest this Court of jurisdiction over Defendants because they could not have been extradited from Panama to the United States for the crimes with which they are charged. The genesis of Defendants

argument is not in the language of the Convention, but rather is found in the Red Cross Commentary on Geneva III (the “Commentary”) which, in discussing Article 85, states that: In general, acts not connected with the state of war may give rise to penal proceedings only if they are punishable under the laws of both the Detaining Power and the Power of origin. As a parallel, reference may be had to extradition agreements or to the customary rules concerning extradition. An act in respect of which there could be no extradition should not be punished by the Detaining Power. One may also examine whether prosecution would have been possible in the country of origin. If the answer is in the negative, the prisoner of war should not be tried by the Detaining Power. III International Committee of the Red Cross, *Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War*, 419, J. Pictet (Ed. 1960).

First, it must be underscored that the Red Cross Commentary is merely a discussion suggesting what the author believes should or should not be done as a matter of policy; the Commentary is not part of the treaty. Nowhere does the text of Geneva III purport to limit the jurisdiction of domestic courts to extraditable offenses. Defendants would infer this limitation from Commentary on the Geneva Convention. The Supreme Court has, however, held that in order for an international treaty to divest domestic courts of jurisdiction, the treaty must expressly provide for such limitation. [...]

Moreover, the Commentary itself does not support Defendants’ position. The Commentary suggests that extradition treaties in existence may serve as a guiding “reference” in determining what acts should be punishable by the Detaining Party. Defendants entire argument is premised on the observation that the act of narcotics trafficking is not one of the thirteen crimes listed in the extradition treaty between Panama and the United States. Defendants overlook, however, the fact that the narcotics offenses with which Defendants are charged not only constitute the kinds of offenses which could be the subject of extradition under customary international law, but are specifically contemplated by subsequent treaties between the United States and Panama. [...] As is evident from its text and construed as a whole, the essential purpose of the Geneva Convention Relative to the Treatment of Prisoners of War is to protect prisoners of war from prosecution for conduct which is customary in armed conflict. The Geneva Convention was never intended, and should not be construed, to provide immunity against prosecution for common crimes committed against the detaining power before the outbreak of military hostilities. It therefore has no application to the prosecution of Defendants for alleged violations of this country’s narcotics laws. Indeed, the Court has not been presented with any provision of the Convention which suggests or directs that this proceeding is one which, in deference to the Convention, should be terminated.

The humanitarian character of the Geneva Convention cannot be overemphasized, and weighs heavily against Defendants’ applications to the Court. The Third Geneva Convention was enacted for the express purpose of protecting prisoners of war from abuse after capture by a detaining power. The essential principle of *tendance libérale*, pervasive throughout the Convention, promotes lenient treatment of prisoners of war on the basis that, not being a national of the detaining power, they are not bound to it by any duty of allegiance. Hence, the “honorable motives” which may have

prompted his offending act must be recognized. That such motives are consistent with the conduct and laws of war is implicit in the principle. Here, the Government seeks to prosecute Defendants for alleged narcotics trafficking and other drug-related offenses – activities which have no bearing on the conduct of battle or the defense of country. The fact that such alleged conduct is by nature wholly devoid of “honorable motives” renders *tendance libérale* inapposite to the case at bar.

#### IV. ILLEGAL ARREST

Noriega also moves to dismiss the indictment on the ground that the manner in which he was brought before this Court – as a result of the United States government’s invasion of Panama – is “shocking to the conscience and in violation of the laws and norms of humanity.” He argues that the Court should therefore divest itself of jurisdiction over his person. In support of this claim, Noriega alleges that the invasion of Panama violated the Due Process Clause of the Fifth Amendment of the United States Constitution, as well as international law. Alternatively, he argues that even in the absence of constitutional or treaty violations, this Court should nevertheless exercise its supervisory authority and dismiss the indictment so as to prevent the Court from becoming a party to the government’s alleged misconduct in bringing Noriega to trial. [...]

#### B. Violations of International Law

In addition to his due process claim, Noriega asserts that the invasion of Panama violated international treaties and principles of customary international law – specifically, Article 2(4) of the United Nations Charter, Article 20[17] of the Organization of American States Charter, Articles 23(b) and 25 of the Hague Convention, Article 3 of Geneva Convention I, and Article 6 of the Nuremberg Charter.

Initially, it is important to note that individuals lack standing to assert violations of international treaties in the absence of a protest from the offended government. [...] [V]iolations of international law alone do not deprive a court of jurisdiction over a defendant in the absence of specific treaty language to that effect. [...] To defeat the Court’s personal jurisdiction, Noriega must therefore establish that the treaty in question is self-executing in the sense that it confers individual rights upon citizens of the signatory nations, and that it by its terms expresses “a self-imposed limitation on the jurisdiction of the United States and hence on its courts.” [...] No such rights are created in the sections of the U.N. Charter, O.A.S. Charter, and Hague Convention cited by Noriega. Rather, those provisions set forth broad general principles governing the conduct of nations toward each other and do not by their terms speak to individual or private rights. [...] It can perhaps be argued that reliance on the above body of law, under the unusual circumstances of this case, is a form of legal bootstrapping. Noriega, it can be asserted, is the government of Panama or at least its *de facto* head of state, and as such he is the appropriate person to protest alleged treaty violations; to permit removal of him and his associates from power and reject his complaint because a new and friendly government is installed, he can further urge, turns the doctrine of sovereign standing on its head. This argument is not without force, yet there are more

persuasive answers in response. First, as stated earlier, the United States has consistently refused to recognize the Noriega regime as Panama's legitimate government, a fact which considerably undermines Noriega's position. Second, Noriega nullified the results of the Panamanian presidential election held shortly before the alleged treaty violations occurred. The suggestion that his removal from power somehow robs the true government of the opportunity to object under the applicable treaties is therefore weak indeed. Finally, there is no provision or suggestion in the treaties cited which would permit the Court to ignore the absence of complaint or demand from the present duly constituted government of Panama. The current government of the Republic of Panama led by Guillermo Endara is therefore the appropriate entity to object to treaty violations. In light of Noriega's lack of standing to object, this Court therefore does not reach the question of whether these treaties were violated by the United States military action in Panama.

Article 3 of Geneva Convention I, which provides for the humane treatment of civilians and other non-participants of war, applies to armed conflicts "not of an international character," i.e., internal or civil wars of a purely domestic nature. [...] Accordingly, Article 3 does not apply to the United States' military invasion of Panama.

Finally, Defendant cites Article 6 of the Nuremberg Charter, which proscribes war crimes, crimes against peace, and crimes against humanity. The Nuremberg Charter sets forth the procedures by which the Nuremberg Tribunal, established by the Allied powers after the Second World War, conducted the trials and punishment of major war criminals of the European Axis. The Government maintains that the principles laid down at Nuremberg were developed solely for the prosecution of World War II war criminals, and have no application to the conduct of U.S. military forces in Panama. The Court cannot agree. As Justice Robert H. Jackson, the United States Chief of Counsel at Nuremberg, stated: "If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us." Nonetheless, Defendant fails to establish how the Nuremberg Charter or its possible violation, assuming any, has any application to the instant prosecution. [...] Defendant has not cited any language in the Nuremberg Charter, nor in any of the above treaties, which limits the authority of the United States to arrest foreign nationals or to assume jurisdiction over their crimes. The reason is apparent; the Nuremberg Charter, as is the case with the other treaties, is addressed to the conduct of war and international aggression. It has no effect on the ability of sovereign states to enforce their laws, and thus has no application to the prosecution of Defendant for alleged narcotics violations. "The violation of international law, if any, may be redressed by other remedies, and does not depend upon the granting of what amounts to an effective immunity from criminal prosecution to safeguard individuals against police or armed forces misconduct." [...] The Court therefore refrains from reaching the merits of Defendant's claim under the Nuremberg Charter.

### **C. Supervisory Authority**

Noriega does not, and legally cannot, allege that President Bush exceeded his powers as Commander-in-Chief in ordering the invasion of Panama. Rather, he asks this Court to find that the deaths of innocent civilians and destruction of private property is “shocking to the conscience and in violation of the laws and norms of humanity.” At bottom, then, Noriega’s complaint is a challenge to the very morality of war itself. This is a political question in its most paradigmatic and pristine form. It raises the specter of judicial management and control of foreign policy and challenges in a most sweeping fashion the wisdom, propriety, and morality of sending armed forces into combat – a decision which is constitutionally committed to the executive and legislative branches and hence beyond judicial review. [...]

Defense counsel condemn the military action and the “atrocities” which followed and, having established this argumentative premise, then suggest that such conduct should not be sanctioned by the Court nor should the fruits, i.e., the arrests, of such conduct be permitted. It is further urged that to permit this case to proceed is to give judicial approval to the military action defense counsel condemn. [...]

Finally, it is worth noting that even if we assume the Court has any authority to declare the invasion of Panama shocking to the conscience, its use of supervisory powers in this context would have no application to the instant prosecution for the reasons stated. Since the Court would in effect be condemning a military invasion rather than a law enforcement effort, any ‘remedy’ would necessarily be directed at the consequences and effects of armed conflict rather than at the prosecution of Defendant Noriega for alleged narcotics violations. The Defendant’s assumption that judicial condemnation of the invasion must result in dismissal of drug charges pending against him is therefore misplaced.

In view of the above findings and observations, it is the Order of this Court that the several motions presented by Defendants relating to this Court’s jurisdiction as well as that suggesting dismissal under supervisory authority be and each is DENIED. [...]

### **B. Place of Detention**

[Source: United States District Court for the Southern District of Florida, 808 F. Supp. 791 (1992); footnotes partially omitted.]

**UNITED STATES OF AMERICA, Plaintiff,**  
**v.**  
**MANUEL ANTONIO NORIEGA, Defendant,**

**UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF FLORIDA**

**OPINION BY: WILLIAM M. HOEVELER:  
RECOMMENDATION  
December 8, 1992**

THIS CAUSE comes before the Court again with another unique question, this time incident to sentencing. Ordinarily, the Court can do no more than recommend the place and/or institutional level of confinement for convicted defendants. At sentencing, the question of General Noriega's prisoner of war status as that status relates to confinement was raised, and the parties were afforded time to submit memoranda, which they did. [...] Defendant contends that the Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III") [...] is applicable law that the Court must recognize. Defendant urges further that whether or not the U.S. government classifies General Noriega as a prisoner of war ("POW"), he is one, in fact, and must be afforded all the benefits of that status. Before the Court are several questions, but the ultimate one appears to be whether or not the Geneva Convention prohibits incarceration in a federal penitentiary for a prisoner of war convicted of common crimes against the United States. To resolve this issue the Court must consider three interrelated questions: 1) what authority, if any, does the Court have in this matter; 2) is Geneva III applicable to this case; 3) if so, which of its provisions apply to General Noriega's confinement and what do they require?

**I. AUTHORITY OF THE COURT**

[...] [T]he Court has concluded that it lacks the authority to order the Bureau of Prisons ("BOP") to place General Noriega in any particular facility. However, as with all sentencing proceedings, it is clearly the right – and perhaps the duty – of this Court to make a recommendation that the BOP place Noriega in a facility or type of facility the Court finds most appropriate given the circumstances of the case. The Court takes this responsibility quite seriously, especially in the novel situation presented here where the defendant is both a convicted felon and a prisoner of war. This dual status implicates important and previously unaddressed questions of international law that the Court must explore if it hopes to make a fair and reasoned recommendation on the type of facility in which the General should serve his sentence.

**II. APPLICABILITY OF GENEVA III**

Before examining in detail the various provisions of Geneva III, the Court must address whether the treaty has any application to the case at bar. Geneva III is an international treaty designed to protect prisoners of war from inhumane treatment at the hands of their captors. Regardless of whether it is legally enforceable under the present circumstances, the treaty is undoubtedly a valid international agreement and "the law of the land" in the United States. As such, Geneva III applies to any POW captured and detained by the United States, and the U.S. government has – at minimum – an international obligation to uphold the treaty. In addition, this Court believes Geneva III is self-executing and provides General Noriega with a right of action in a U.S. court for violation of its provisions.

### A. Noriega's Prisoner of War Status

The government has thus far obviated the need for a formal determination of General Noriega's status. On a number of occasions as the case developed, counsel for the government advised that General Noriega was being and would continue to be afforded all of the benefits of the Geneva Convention. At no time was it agreed that he was, in fact, a prisoner of war. The government's position provides no assurances that the government will not at some point in the future decide that Noriega is not a POW, and therefore not entitled to the protections of Geneva III. This would seem to be just the type of situation Geneva III was designed to protect against. Because of the issues presented in connection with the General's further confinement and treatment, it seems appropriate – even necessary – to address the issue of Defendant's status. Articles 2, 4, and 5 of Geneva III establish the standard for determining who is a POW. Must this determination await some kind of formal complaint by Defendant or a lawsuit presented on his behalf? In view of the issues presently raised by Defendant, the Court thinks not.

### Article 2

The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party [...]. [...]

The Convention applies to an incredibly broad spectrum of events. The government has characterized the deployment of U.S. Armed Forces to Panama on December 20, 1989 as the "hostilities" in Panama. Letter from the State Dep't to the Attorney General of the United States, Jan. 31, 1990 at 1. However the government wishes to label it, what occurred in late 1989-early 1990 was clearly an "armed conflict" within the meaning of Article 2. Armed troops intervened in a conflict between two parties to the treaty. While the text of Article 2 itself does not define "armed conflict," the Red Cross *Commentary to the Geneva Conventions of 1949* [footnote 6 reads: 3 International Committee of the Red Cross, *Commentary on the Geneva Conventions*, (J. Pictet, ed., 1960) (hereinafter "Commentary"). [...]. For all of its efforts to downplay the persuasive value of the Commentary when invoked by Noriega, the government itself has cited to the Commentary when favorable to its position.] states that: Any difference arising between two states and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2 [...]. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. *Commentary* at 2 [...]. In addition, the government has professed a policy of liberally interpreting Article 2: The United States is a firm supporter of the four Geneva Conventions of 1949 [...]. As a nation, we have a strong desire to promote respect for the laws of armed conflict and to secure maximum legal protection for captured members of the U.S. Armed Forces. Consequently, the United States has a policy of applying the Geneva Conventions of 1949 whenever armed hostilities occur with regular foreign armed forces, even if arguments could be made that the threshold



standards for the applicability of the Conventions contained in common Article 2 are not met. In this respect, we share the views of the International Committee of the Red Cross that Article 2 of the Conventions should be construed liberally. *Letter from the State Dept. to the Attorney General of the United States*, Jan. 31, 1990 at 1-2.

#### Article 4 A.

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict ...

Geneva III's definition of a POW is easily broad enough to encompass General Noriega. It is not disputed that he was the head of the PDF, and that he has "fallen into the power of the enemy." Subsection 3 of Article 4 states that captured military personnel are POWs even if they "profess allegiance to a government or an authority not recognized by the Detaining Power."

#### Article 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

An important issue raised by the last two words of Article 5 is, of course, what is a "competent tribunal"? Counsel for the government has suggested that, while he does not know what a competent tribunal as called for in Article 5 is, perhaps the answer lies in Article 8, which states in relevant part that "the present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers [footnote 7

reads: Protecting Powers are neutral third parties whose job it is to ensure that a POW's rights under the Convention are respected by the Detaining Power, especially in the absence of appropriate action by the POW's Power of Origin (his home state)] whose duty it is to safeguard the interests of the Parties to the conflict."

Nowhere in this language is there any indication that one of the rights or duties of the Protecting Powers is to make POW status determinations. Rather, it seems clear that their purpose is to facilitate and monitor appropriate treatment of POWs. During the Geneva III drafting process, the phrase "military tribunal" was considered in place of "competent tribunal." The drafters rejected this suggestion, however, feeling that "to bring a person before a military tribunal might have more serious consequences than a decision to deprive him of the benefits afforded by the Convention." *Commentary* at 77 (citing II-B Final Record of the Diplomatic Conference of Geneva of 1949, at 270). Clearly, there was concern on the part of the drafters that whatever entity was to make determinations about POW status would be fair, competent, and impartial.

The Court acknowledges that conducting foreign policy is generally the province of the Executive branch. Whether or not the determination of an individual's status



as a prisoner of war is a political question is a sub-issue which probably calls for an equivocal answer. While the Court believes that the question of prisoner of war status properly presented can be decided by the Court, this conclusion, in the present setting does beg the question of whether the issue is “properly presented” here. Passing for the moment the facts that an appeal has been taken and that to this point, at least, no violation of Geneva III is evident, the Court feels and so determines it has the authority to decide the status issue presented. This is not to say that the Executive branch cannot determine this issue under other circumstances. The Court does suggest that where the Court is properly presented with the problem it is, under the law, a “competent tribunal” which can decide the issue. With that in mind, the Court finds that General Noriega is in fact a prisoner of war as defined by Geneva III, and as such must be afforded the protections established by the treaty, regardless of the type of facility in which the Bureau of Prisons chooses to incarcerate him.

## **B. “Law of the Land”**

The Geneva Convention applies to this case because it has been incorporated into the domestic law of the United States. A treaty becomes the “supreme law of the land” upon ratification by the United States Senate. *U.S. Const.* art. VI, cl. 2. Geneva III was ratified by a unanimous Senate vote on July 6, 1955. [...] The government acknowledges that Geneva III is “the law of the land,” but questions whether that law is binding and enforceable in U.S. courts.

## **C. Enforcement**

If the BOP fails to treat Noriega according to the standard established for prisoners of war in Geneva III, what can he do to force the government to comply with the mandates of the treaty?

### **1. Article 78 Right of Protest**

There are potentially two enforcement avenues available to a POW who feels his rights under the Geneva Convention have been violated. The first is the right to complain about the conditions of confinement to the military authorities of the Detaining Power or to representatives of the Protecting Power or humanitarian organizations. This right is established in Article 78 of Geneva III, and cannot be renounced by the POW or revoked or unnecessarily limited by the Detaining Power. See Articles 5, 7, 78, 85.

#### **Article 78**

Prisoners of war shall have the right to make known to the military authorities in whose power they are, their requests regarding the conditions of captivity to which they are subjected.

They shall also have the unrestricted right to apply to the representatives of the Protesting [*sic*] Powers either through their prisoners’ representative or, if they consider it necessary, direct, in order to draw their attention to any points on which they may have complaints to make regarding their conditions of captivity.

These requests and complaints shall not be limited nor considered to be a part of the correspondence quota referred to in Article 71. They must be transmitted immediately. Even if they are recognized to be unfounded, they may not give rise to any punishment.

Prisoners' representatives may send periodic reports on the situation in the camps and the needs of the prisoners of war to the representatives of the Protecting Powers.

In theory, by calling attention to violations of the Convention the prisoner of war will embarrass the government into rectifying any unacceptable conditions to which he is being subjected. However, the obvious weakness of this complaint procedure is that it has no real teeth. Incentive for the government to comply with the treaty stems from its eagerness to be looked upon favorably by others, and, it is hoped, from its desire simply to do what is proper under the circumstances. However, if we truly believe in the goals of the Convention, a more substantial and dependable method must also be available, if necessary, to protect the POW's rights. Recourse to the courts of the Detaining Power seems an appropriate measure, where available.

## 2. Legal Action a in U.S. Court

A second method of enforcing the Convention would be a legal action in federal court. The government has maintained that if General Noriega feels that the conditions in any facility in which BOP imprisons him do not meet the Geneva III requirements, he can file a *habeas corpus* action [...]. However, the government also argues that Geneva III is not self-executing, and thus does not provide an individual the right to bring an action in a U.S. court. Considered together, these two arguments lead to the conclusion that what the government is offering General Noriega is a hollow right. According to the government's position, Noriega could file a [...] claim, but any attempt to base it on violations of the Geneva Convention would be rejected because the General would not have standing to invoke the treaty.

The doctrine of self-execution has been called "one of the most confounding" issues in treaty law. [...] It is complex and not particularly well understood. A thorough discussion of the doctrine and its application to Geneva III would be both premature and unworkable in the context of this opinion. However, the Court wishes to dispel the notion that it already decided that Geneva III is not self-executing, and would add that given the opportunity to address this issue in the context of a live controversy, the Court would almost certainly hold that the majority of provisions of Geneva III are, in fact, self-executing. [footnote 8 reads: "Some provisions of an international agreement may be self-executing and others non-self-executing." *Restatement (Third) Foreign Relations Law of the United States* at 111 cmt. h (1986). Article 129 of Geneva III is clearly non-self-executing, as it calls for implementing legislation; however, the remainder of the provisions do not expressly or impliedly require any action by Congress, other than ratification by the Senate, to take effect. Article 129 states that "the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention." The "grave breaches" of the Convention are defined in Article 130, and are clearly not relevant to the issue at bar.]

The doctrine of self-execution has been called "one of the most confounding" issues in treaty law. [...] It is complex and not particularly well understood. A thorough discussion of the doctrine and its application to Geneva III would be both premature and unworkable in the context of this opinion. However, the Court wishes to dispel the notion that it already decided that Geneva III is not self-executing, and would add that given the opportunity to address this issue in the context of a live controversy, the Court would almost certainly hold that the majority of provisions of Geneva III are, in fact, self-executing. [footnote 8 reads: "Some provisions of an international agreement may be self-executing and others non-self-executing." *Restatement (Third) Foreign Relations Law of the United States* at 111 cmt. h (1986). Article 129 of Geneva III is clearly non-self-executing, as it calls for implementing legislation; however, the remainder of the provisions do not expressly or impliedly require any action by Congress, other than ratification by the Senate, to take effect. Article 129 states that "the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention." The "grave breaches" of the Convention are defined in Article 130, and are clearly not relevant to the issue at bar.]

Essentially, a self-executing treaty is one that becomes domestic law of the signatory nation without implementing legislation, and provides a private right of action to

individuals alleging a breach of its provisions. [...] Thus, even though Geneva III is undoubtedly “the law of the land,” is not necessarily binding on domestic courts if the treaty requires implementing legislation or does not provide an individual right of action. The most difficult situations arise in relation to treaties like Geneva III which have no U.S. implementing legislation, leaving it for the courts to decide whether the treaty is the type that may function without it.

While the courts have generally presumed treaties to be non-self-executing in the absence of express language to the contrary, the Restatement would find treaties to be self-executing unless the agreement itself explicitly requires special implementing legislation, the Senate requires implementing legislation as a condition to ratification, or implementing legislation is constitutionally required. *Restatement (Third) of Foreign Relations Law of the United States* at 111(4) (1986). Most of the scholarly commentators agree, and make a compelling argument for finding treaties designed to protect individual rights, like Geneva III, to be self-executing. Whether Geneva III is self-executing is a question that has never been squarely confronted by any U.S. court in a case factually similar to this one. [...]

In the case of Geneva III, however, it is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs – not to create some amorphous, unenforceable code of honor among the signatory nations. “It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.” *Commentary* at 23.

The Court can envision numerous situations in which the Article 78 right of protest may not adequately protect a POW who is not being afforded all of the applicable safeguards of Geneva III. If in fact the United States holds Geneva III in the high regard that it claims, it must ensure that its provisions are enforceable by the POW entitled to its protections. Were this Court in a position to decide the matter, it would almost certainly find that Geneva III is self-executing and that General Noriega could invoke its provisions in a federal court action challenging the conditions of his confinement. Even if Geneva III is not self-executing, though, the United States is still obligated to honor its international commitment.

### **III. CONTROLLING PROVISIONS OF GENEVA III**

The Court’s final task is to determine which provisions of Geneva III are relevant to an individual who is both a prisoner of war and a convicted felon. While these characteristics are not mutually exclusive, the combination of the two in one person creates a novel and somewhat complicated situation with respect to the application of Geneva III.

The essential dispute between Noriega and the government is whether to rely on Articles 21 and 22 or on Article 108 in determining where to place the General. The defense argues that Articles 21 and 22, which explicitly prohibit placing POWs in penitentiaries, apply to General Noriega. The government contends that Article

108 controls, and allows the BOP to incarcerate a POW serving a criminal sentence anywhere U.S. military personnel convicted of similar offenses could be confined, including penitentiaries.

Some concern has been expressed about the potential inconsistency between these provisions. However, a careful reading of the various Articles in their proper context proves that no inconsistency exists. Simply stated, Articles 21 and 22 do not apply to POWs convicted of common crimes against the Detaining Power. The Convention clearly sets POWs convicted of crimes apart from other prisoners of war, making special provision for them in Articles 82-108 on “penal and disciplinary sanctions.”

### **A. Articles 21 and 22**

#### **Article 21 [para. 1:]**

The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary. [...]

#### **Article 22 [para. 1:]**

Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries. [...]

Articles 21 and 22 appear at the beginning of Chapter I – “General Observations” of Section II – “Internment of Prisoners of War.” This chapter of Geneva III deals with the internment of POWs who have not been convicted of crimes, and is thus inapplicable to General Noriega. Defendant’s reliance on these Articles is misplaced; if anything, they make clear that POWs convicted of crimes are subject to a different set of rules than other prisoners of war. Article 22’s general prohibition against internment of POWs in penitentiaries is limited by Article 21’s acknowledgement that all general requirements regarding the treatment of POWs are “subject to the provisions of the present Convention relative to penal and disciplinary sanctions.” This reference to Articles 82-108 shows that the Articles in Section II, Chapter I do not apply to POWs serving judicial sentences.

Further support for this argument is the use of the term “internment” throughout Section II, Chapter I, as opposed to the terms “detention,” “confinement,” or “imprisonment” used in the penal sanctions Articles. The Commentary elaborates on this point: The concept of internment should not be confused with that of detention. Internment involves the obligation not to leave the town, village, or piece of land, whether or not fenced in, on which the camp installations are situated, but it does

not necessarily mean that a prisoner of war may be confined to a cell or room. Such confinement may only be imposed in execution of penal or disciplinary sanctions, for which express provision is made in Section VI, Chapter III. *Commentary* at 178. Thus, Article 22 prohibits internment – but not imprisonment – of POWs in penitentiaries.

For these reasons, it is the opinion of this Court that Articles 21 and 22 do not apply to General Noriega.

## **B. Article 108**

The government has argued that the Geneva Convention “explicitly and unambiguously” authorizes the BOP to incarcerate Noriega in a penitentiary, so long as he is not treated more harshly than would be a member of the U.S. armed forces convicted of a similar offense.

Pursuant to 18 U.S.C. at 3231, federal district courts have concurrent jurisdiction with military courts over all violations of the laws of the United States committed by military personnel. [...] U.S.C. at 814 and 32 CFR at 503.2(a) instruct the military authorities to deliver the alleged offender to the civil authorities for trial just like any other individual accused of a crime. Once that individual is convicted and sentenced by a civil court, he or she is also incarcerated in a civil facility, including a federal penitentiary, just like any other convicted criminal.

Paragraph one of Article 1108 [*sic*] reads:

Sentences announced on prisoners of war after a conviction has become duly enforceable, shall be served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power. These conditions shall in all cases conform to the requirements of health and humanity.

Pursuant, then, to paragraph one it appears that General Noriega could technically be incarcerated in a federal penitentiary without violating the Geneva Convention. However, this should not be the end of the inquiry. The real issue is whether federal penitentiaries in general or any particular federal penitentiary can afford a prisoner of war the various protections due him under the Geneva Convention. Article 108 requires that the conditions in any facility in which a POW serves his sentence “shall in all cases conform to the requirements of health and humanity.” Interpreting the language of these provisions is not always easy. The *Commentary* to Article 108 says reference should be made to Articles 25 and 29, which lay down minimum standards of accommodation for POWs. *Commentary* at 502.

In addition, Article 108 dictates that the POW must be allowed to “receive and despatch [*sic* – British spelling] correspondence, to receive at least one relief parcel monthly, to take regular exercise in the open air, to have the medical care required by [his] state of health, and the spiritual assistance [he] may desire.” Many of these terms are vague. For example, what is “regular” exercise? Reasonable people may differ on what these provisions require. However, given the United States’ asserted commitment to protecting POWs and promoting respect for the laws of armed conflict through liberal

interpretation of the Geneva Conventions, vague or ambiguous terms should always be construed in the light most favorable to the prisoner of war.

### C. Other Applicable Articles

Paragraph three of Article 108 states:

In any case, prisoners of war sentenced to a penalty depriving them of their liberty shall retain the benefit of the provisions of Articles 78 and 126 of the present Convention. ... Penalties to which they may be subjected shall be in accordance with the provisions of Article 87, third paragraph. [...] Again, some of these terms are vague, but because of the U.S. commitment to construing the Geneva Conventions liberally, and because it is imperative that the United States set a good example in its treatment of POWs, ambiguous terms must be construed in the light most favorable to the POW.

Article 126 creates an almost unrestricted grant of authority for representatives of the Protecting Power and international humanitarian organizations to supervise the treatment of POWs wherever and in whatever type of facility they may be held.

The government argues that Article 108's reference to Articles 78, 87, and 126 is an express limitation on Noriega's rights – that these are the only Articles that apply to POWs incarcerated for common crimes. Defendant counters that 108 is just a floor, so while POWs may not be treated worse than U.S. soldiers convicted of similar crimes, frequently they must be treated better. Noriega asserts that Article 108 must be read in conjunction with Article 85 which states that "prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention" [...]

The Commentary supports Noriega's position that he continues to be entitled to the Convention's general protections: The Convention affords important safeguards to prisoners of war confined following a judicial sentence. Some of these safeguards result from general provisions applicable to all the conditions relating to internment, such as Article 13 (humane treatment), Article 14 (respect for the person of prisoners [...]), Article 16 (equality of treatment). Other provisions refer expressly to the execution of penalties and specifically prohibit cruelty, any attack on a prisoner's honour (Article 87), and discriminatory treatment (Article 88)... . Confinement does not involve any suppression of the principal safeguards afforded to prisoners of war by the present Convention, and the number of provisions rendered inapplicable by the fact of [...] confinement is therefore small... . In fact, these articles [78, 87, 126] are among the provisions which are not rendered inapplicable by confinement. Because of their greater importance, however, [...] special reference was made to them. *Commentary* at 501-03 (emphasis added). It thus appears that a convicted POW is entitled to the basic protections of Geneva III for as long as he remains in the custody of the Detaining Power. Throughout the Commentary to Article 108, reference is made to Articles other than the three specifically named in the text. *Commentary* at 500-08. The logical conclusion is that judicial confinement serves to abrogate only those protections fundamentally inconsistent with incarceration.

This Court finds that, at a minimum, all of the Articles contained in Section I, General Provisions, should apply to General Noriega, as well as any provisions relating to health. By their own terms, Articles 82-88 (the General Provisions section of the Penal and Disciplinary Sanctions chapter) and 99-108 (Judicial Proceedings subsection) apply.

In addition, the Court would once again note that the stated U.S. Policy is to err to the benefit of the POW. In order to set the proper example and avoid diminishing the trust and respect of other nations, the U.S. government must honor its policy by placing General Noriega in a facility that can provide the full panoply of protections to which he is entitled under the Convention.

#### **IV. CONCLUSION**

Considerable space has been taken to set forth conclusions which could have been stated in one or two pages. That is because of the potential importance of the question to so many and the precedentially uncharted course it spawned. The Defendant Noriega is plainly a prisoner of war under the Geneva Convention III. He is, and will be, entitled to the full range of rights under the treaty, which has been incorporated into U.S. law. Nonetheless, he can serve his sentence in a civilian prison to be designated by the Attorney General or the Bureau of Prisons (this is a pre-guidelines case) so long as he is afforded the full benefits of the Convention.

Whether or not those rights can be fully provided in a maximum security penitentiary setting is open to serious question. For the time being, however, that question must be answered by those who will determine Defendant's place and type of confinement. In this determination, those charged with that responsibility must keep in mind the importance to our own troops of faithful and, indeed, liberal adherence to the mandates of Geneva III. Regardless of how the government views the Defendant as a person, the implications of a failure to adhere to the Convention are too great to justify departures.

In the turbulent course of international events – the violence, deceit, and tragedies which capture the news, the relatively obscure issues in this case may seem unimportant. They are not. The implications of a less-than-strict adherence to Geneva III are serious and must temper any consideration of the questions presented.

DONE and ORDERED in chambers in Miami,

Florida this 8<sup>th</sup> day of December, 1992.

WILLIAM M. HOEVELER

UNITED STATES DISTRICT JUDGE

## C. Extradition

[Source: United States District Court for the Southern District of Florida, CASE NO: 88-0079-CR-HOEVELER, August 24, 2007; footnotes partially omitted.]

**UNITED STATES OF AMERICA, Plaintiff,  
Vs.  
MANUEL ANTONIO NORIEGA, Defendant,**

**ORDER DENYING DEFENDANT’S PETITION FOR  
WRITS OF *HABEAS CORPUS*,  
MANDAMUS, AND PROHIBITION  
August, 24, 2007**

THIS CAUSE comes before the Court on the Defendant’s Petition for Writs of *Habeas Corpus*, *Mandamus*, and Prohibition, filed July 23, 2007. This Court heard argument from counsel on August 13, 2007.

When this Court determined fifteen years ago that Defendant was a “prisoner of war” (POW), according to the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, [...] [See Part B of this case, Place of Detention], it did so primarily in the context of Defendant’s concerns about the care he would receive while in custody. It would have been impossible to predict the full course of events which have brought the parties back before this Court, but some of those circumstances are far from surprising. For example, Defendant’s allegedly illegal activities were never understood by this Court to be limited to the United States, nor to Panama, and, thus, it was conceivable that an extradition request might be made at some future time. Indeed, the charges which form the basis of the extradition proceedings currently pending against Defendant, [...] relate to alleged money laundering activities which occurred in France from 1988-89, and it may be that other countries will be interested in bringing charges against the Defendant.

Despite the context of the Court’s initial consideration of the POW claims, once the status of POW attaches, it protects the individual POW until “final release and repatriation.” Article 5, Convention. Defendant’s status as a POW, however, does not change the fact that Defendant presently is incarcerated according to a valid sentence imposed by this Court. The Court’s authority at this time, therefore, is properly directed toward the validity of the sentence being served, which may be challenged by reference to 28 U.S.C. § 2255,4 or the execution of that sentence, which may be challenged by reference to 28 U.S.C. § 2241.

[...]

Defendant asserts that his POW status under the Convention shields him from extradition at this time, citing Article 118 of the Convention, which provides that POWs “shall be released and repatriated without delay after the cessation of active hostilities.” In response, the United States argues that extradition to France on the



announced charges is consistent with the Convention because of Article 82, which subjects Defendant, as a POW, to the “laws, regulations and orders” of the United States. The United States also relies on Article 12 of the Convention, regarding the transfer of POWs, as supporting the principle that repatriation is not automatic, but rather that transfer is permitted under certain circumstances.

While the Convention at issue is silent as to extradition, it is notable that one of the other conventions adopted on that same date specifically provides that its protections for civilians (as compared to the Convention’s protections for POWs) do not constitute an obstacle “to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.” Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War art. 45, 12 August 1949. [...]

Moreover, the oft-cited Commentary notes that the term “transfer” as used in this Article may mean “internment in the territory of another Power, repatriation, the returning of protected persons to their country of residence **or their extradition.**” International Committee of the Red Cross, *Commentary on the Geneva Conventions* (J. Pictet, ed., 1960) (“*Commentary*”) (emphasis added). While the purposes of the Fourth Convention are different from those of the Third, it is nevertheless compelling that the convening parties expressed an understanding of the term “transfer” which included extradition. [footnote 11 reads: The Court does not find compelling the argument that extradition of POWs is prohibited because there is no mention of extradition in the Convention, particularly when the Commentary to the Fourth Convention indicates clearly that extradition is included within the definition of “transfer.” In other words, the maxim of statutory interpretation, *expressio unius est exclusio alterius*, need not compel a different result. Indeed, it would be absurd to suggest that a civilian facing the identical criminal charges, i.e., money laundering in connection with drug trafficking, would be subject to extradition when a POW would not – particularly when the charges have no relation whatsoever to the POW’s status as a member of the armed forces of his or her home country.]

Article 45 of the convention protecting civilians parallels Article 12 of the convention protecting POWs, and it is not unreasonable to include that Article 12 embodies the same principles – i.e., that transfer of either POWs or “protected persons” is permitted, but that it should only take place between parties to the Conventions to guarantee that the principles embraced in the Conventions will be respected.

This Court previously determined that Article 118 of the Convention is limited by Article 119. Article 119 provides that POWs “against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment.” That provision also applies to POWs “already convicted for an indictable offence.” Article 119, Convention. As previously noted by this Court, “[s]ince criminal proceedings are pending against Noriega, Article 119 permits his detainment in the United States notwithstanding the cessation of hostilities.” [...] [See Part A of this case, Jurisdiction]

Clearly, the facts surrounding this particular Defendant’s status as a POW are far different from those expressly considered by the parties to the Convention in 1949.

Defendant is seeking repatriation for a multitude of reasons, not the least of which appears to be that he will be shielded constitutionally from extradition to France once

he returns to Panama. According to the United States' prior filings in this case: it is our understanding that Article 24 of the Panamanian Political Constitution of 1983 (like Article 23 of the predecessor Political Constitution of 1972) as well as Panamanian statutory law (Article 2508(1) of the Panamanian Criminal Procedure Code; Article 30(1) of Law No. 23 of December 20, 1986, governing the extradition of persons charged with drug-related offenses) do not permit the use of the extradition process to surrender Panamanian nationals to foreign countries. [...]

The Court previously noted the clear conclusion that Article 12 "limits the ability of the United States to effect such a transfer" by requiring that the receiving country be a party to the Convention and willing to apply the Convention. [See Part A of this case, Jurisdiction] No other restrictions are provided. Defendant has offered no evidence suggesting that France will fail to abide by the Convention in its treatment of Defendant. According to the United States, Defendant already has been convicted in France on criminal charges, and nothing in the Convention suggests that honoring a treaty between parties to the Convention concerning extradition for a criminal offense is prohibited. As consistently stated by the Eleventh Circuit, "extradition is a function of the Executive." This Court has a constitutional mandate to follow treaties. The United States has elected to pursue the extradition of Defendant to France, rather than his repatriation to Panama, despite a pending claim from Panama for the return of Defendant. It is unclear whether Panama is actively seeking Defendant's return, but in any event, any competing claims for Defendant's extradition are matters for the Secretary of State to resolve.

[...]

In conclusion, the Court notes again that "[i]n order to set the proper example and avoid diminishing the trust and respect of other nations," the United States must honor fully its obligations according to the Convention. Respect is earned by being fair and just in the administration of the law. The Defendant, who, according to the United States, is 69 years old, a grandfather, and apparently far removed from his prior criminal activities, was convicted as to a number of extremely serious crimes in this country and has been charged elsewhere with serious crimes. Thus, his present appearances notwithstanding, a strict adherence to the terms of the Convention, both as to the letter and the spirit of the Convention, does not mandate immediate repatriation but rather supports a decision that Defendant must face those charges which are legitimately brought against him by other parties to the Convention, so long as our international obligations under the Convention are being met. Based upon the circumstances and arguments presented by the parties, it appears that in this specific instance examined today as to this very unique Defendant, the United States is doing so. [footnote 21 reads: The decision today is also consistent with Articles 5 and 85 of the Convention, as the United States has represented that Defendant will retain his rights as a POW while in France's custody, i.e., presumably through final repatriation.]

This Court never intended for the proclamation of Defendant as a POW to shield him from all future prosecutions for serious crimes he is alleged to have committed. That being said, even the most vile offender is entitled to the same protections as those owed to a law-abiding soldier once they have been declared a POW. It appears that the extradition proceedings should proceed uninterrupted.

Based upon the above, it is

ORDERED AND ADJUDGED that the Defendant's Petition is denied, without prejudice to renew as appropriate in relation to the extradition proceedings themselves.

DONE AND ORDERED in chambers in Miami, Florida, this 24<sup>th</sup> day of August, 2007.

WILLIAM M. HOEVELER

Senior United States District Judge

## **D. Interim Order on POW Treatment by France**

[Source: United States District Court for the Southern District of Florida, CASE NO: 88-0079-CR-HOEVELER, September, 5, 2007.]

**UNITED STATES OF AMERICA, Plaintiff,  
Vs.  
MANUEL ANTONIO NORIEGA, Defendant.**

### **ORDER GRANTING. IN PART. DEFENDANT'S EMERGENCY MOTION FOR STAY OF EXTRADITION**

THIS CAUSE comes before the Court on the Defendant's Emergency Motion for Stay of Extradition, filed on this date. The Court has reviewed the motion. Based upon the representations of defense counsel that the Defendant is scheduled to be released tomorrow, i.e., earlier than the originally announced date of September 9, 2007, and based upon the allegations made in the Defendant's Petition for Writ of *Habeas Corpus* filed today which have, as of this moment, not yet been responded to specifically by the United States, it is hereby

ORDERED that the Defendant's Emergency Motion for Stay is GRANTED, in part. The United States is directed to preserve the Defendant's status until further ruling from this Court. Further, it is

ORDERED that the Defendant shall produce credible evidence to support the allegations made in his Petition, specifically evidence that demonstrates that France presently does not intend to abide by the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, [...] in its treatment of the Defendant. Defendant shall produce this evidence no later than 9:00 a.m. on September 6, 2007, or provide affidavits attesting to the Defendant's efforts to obtain such evidence in the event that Defendant is unable to meet that deadline.

In addition, the United States is directed to respond to the Defendant's pending Petition, including any evidence submitted by Defendant, no later than 12:00 p.m. on September 6, 2007. To the extent that the United States is unable to confirm current compliance with Article 12 of the Convention, this Court will require that the confidential communications between France and the United States, upon which the

United States relies for its assertions that it “has satisfied itself of the willingness and ability of [France] to apply the Convention,” be produced. To preserve the confidential and diplomatic nature of such communications, this Court simply will review the communications privately, and will return them immediately to the Assistant United States Attorney – who may deliver them personally to the Court. The documents will not be made available to the public, nor to the Defendant, absent the agreement of the United States.

DONE AND ORDERED in chambers in Miami, Florida, this 5<sup>th</sup> day of September, 2007.

WILLIAM M. HOEVELER

Senior United States District Judge

## E. Final Order on POW Treatment by France

[Source: United States District Court for the Southern District of Florida, CASE NO: 88-0079-CR-HOEVELER, September, 7, 2007; footnotes omitted.]

**UNITED STATES OF AMERICA, Plaintiff,**

**Vs.**

**MANUEL ANTONIO NORIEGA, Defendant.**

### **ORDER DISMISSING DEFENDANT’S “PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241” AND ORDER LIFTING STAY OF EXTRADITION**

THIS CAUSE comes before the Court on the Defendant’s Petition for Writ of *Habeas Corpus* Pursuant to 28 U.S.C. § 2241, filed September 5, 2007. The United States has responded in opposition. On September 5, 2007, this Court partially granted Defendant’s Emergency Motion for Stay based upon allegations – which were proven to be untrue – that Defendant was to be released early from serving the sentence imposed by this Court. It now appears that Defendant filed his motion for stay, as well as his petition for *habeas*, in an attempt to have this Court reconsider its prior conclusion that the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, [...] does not include a ban on extradition of prisoners of war (“POWs”).

[...]

This Court appears to lack jurisdiction according to 28 U.S.C. § 2241 to decide Defendant’s claims regarding potential future circumstances involving his treatment in France. Defendant has not demonstrated any problems with the current conditions under which he is serving the sentence imposed by this Court.

Even if this Court had jurisdiction over Defendant’s petition, the Court would not find error in the issuance of the Certification of Extraditability based upon the arguments presented by Defendant as of this date. Article 12 of the Convention requires that

the United States satisfy itself “of the willingness and ability of [France] to apply the Convention,” and the Convention requires respect for a POW’s status. While the United States’ assertions are somewhat peculiar, it is nevertheless the case that the United States “has satisfied itself ... [that Defendant] will be afforded the same benefits that he has enjoyed for the past fifteen years in accordance with this Court’s 1992 order declaring him a prisoner of war.” [...]

It is important to note that the United States did not ask the Republic of France to declare that defendant is a prisoner of war. Instead of running the risk that the Republic of France might interpret the Geneva Conventions differently than the United States, the United States sought and obtained from the Republic of France specific information regarding all of the rights that the defendant will be guaranteed by France upon his extradition. [The] United States has confirmed through its communications with France that France will afford the defendant the same benefits he has enjoyed during his confinement in the United States that were mandated by this Court’s Order of December 8, 1992.

The Court’s reading of the assertions of the Assistant United States Attorney, supported by the Declaration of Clifton M. Johnson, the head of the Office of the Legal Adviser of the United States Department of State, indicates that Defendant retains all of his rights under the Convention. “France does indeed intend to afford [Defendant] all the same rights that he was afforded during his incarceration in the United States;” these specific rights are those “to which Noriega was entitled under this Court’s ruling *and* as specified in Geneva III.” (emphasis added). Regardless of the unique nature of this Defendant, his POW status attached at least as early as December 1992 and he retains that status “until [his] repatriation,” Convention, art. 5; to consider this Defendant as anything less than a POW would not constitute compliance with the Geneva Convention. This Court notes the United States’ assertions that the Convention is being followed, and anticipates full compliance with the Convention based upon those assertions.

Further, it bears observation that Defendant’s submitted “evidence” of France’s alleged unwillingness to apply the Convention consists of hearsay, and is based entirely upon news reports – many of which lack any evidence of certified translations to English from the language in which they first appeared – rather than direct information from official sources. Defendant certainly had the ability to contact the alleged speaker, the French ambassador to Panama, directly and request a sworn statement; however, no such statement was provided. Further, the most inconsistent statement, i.e., that Defendant “will not enjoy the privileges [of his POW status],” purportedly made by the Ambassador on July 26, 2007, was prior to this Court’s Order of August 24. The Defendant’s own submission, again relying solely on news reports, admits that the “French Foreign Ministry ... stated that General Noriega will receive the same privileges he received in the United States.”

Defendant has suggested that this Court did not consider certain arguments raised in his earlier unsuccessful petition for *habeas* before this Court. Defendant asserts that Article 12 “was intended to apply to transfers between allied Powers during war” and argues that its only purpose is for such transfers. This Court disagrees, and already considered this argument fully, particularly in the context of the criminal charges

pending against this Defendant. A POW's responsibility for criminal charges, including those unrelated to the conflict, clearly is envisioned in Articles 85 and 119 of the Convention. Moreover, Defendant's argument is not consistent with the statements in the Commentary, International Committee of the Red Cross, *Commentary on the Geneva Conventions* (J. Pictet, ed., 1960), upon which he relies. Indeed, the Commentary reveals that Article 12 was "largely based" on the experience of the United States and France in accommodating United States-captured German POWs in France where there was a shortage of food. The United States responded to concerns of the International Committee of the Red Cross by providing food and clothing to France for distribution to its own POW camps such that the German POWs would have their needs met. *Commentary*, art. 12. There is no statement in the Commentary that suggests that the United States' obligation at that time would have been any different if the German POWs were interned in a POW camp in a nation which was not a co-belligerent of the United States. The reference at the beginning of the Commentary to Article 12 to "the special case of the transfer of prisoners from one belligerent Power to another" does not suggest that Article 12 itself only applies to such transfers; nor does it suggest that Article 12 prohibits otherwise valid extraditions. In summary, nothing from the Defendant compels this Court to change its prior conclusion that the Convention does not prohibit legitimate extraditions conducted in compliance with Article 12.

As there is no basis for continuing the stay imposed by this Court, that stay is lifted as of 5:00 p.m. today, with the understanding that Defendant will complete the term of his previously imposed sentence and not be released until September 9, 2007.

DONE AND ORDERED in chambers in Miami, Florida, this 7<sup>th</sup> day of September, 2007.

WILLIAM M. HOEVELER

Senior United States District Judge

[N.B.: On April, 8<sup>th</sup>, 2009, the US Court of Appeals for the Eleventh Circuit found that General Noriega's claim was precluded by § 5 of the Military Commission Act of 2006 [See **Case No. 265**, United States, Military Commissions], which the Government argued "codifie[d] the principle that the Geneva Conventions [a]re not judicially enforceable by private parties" (available on: <http://www.ca11.uscourts.gov/opinions/ops/200811021.pdf>). On January, 25<sup>th</sup>, 2010, the US Supreme Court declined to hear an appeal brought by Manuel Noriega challenging the ruling denying his *habeas corpus* petition and authorizing his extradition to France. The court provided no reasoning for its decision not to hear General Noriega's appeal. Justices Clarence Thomas and Antonin Scalia dissented from the denial of *certiorari*, arguing that the Court should use the opportunity to resolve confusion over its decision in *Boumediene v. Bush* [See **Case No. 266**, United States, Habeas Corpus for Guantanamo detainees] granting federal courts the power to review *habeas* petitions brought by "enemy combatants." (available on: <http://www.supremecourt.gov/opinions/09pdf/09-35.pdf>). On February, 19<sup>th</sup>, 2010, General Noriega's lawyers filed a petition to ask the Supreme Court to reconsider blocking his extradition to France, relying on the dissenting opinion by Justices Clarence Thomas and Antonin Scalia in the court's January decision. On March, 22<sup>nd</sup>, 2010, the Supreme Court declined to reconsider the appeal, and Manuel Noriega was eventually extradited to France on April, 27<sup>th</sup>, 2010. On April 29<sup>th</sup>, 2010, the spokesperson of the French Ministry of Justice declared that Manuel Noriega was not considered a POW in France but that he would benefit POW conditions of detention, in accordance with the Geneva Conventions. On July, 7<sup>th</sup>, 2010, he was convicted of money laundering and sentenced by the 11<sup>th</sup> Chamber of the Tribunal Correctionnel de Paris to seven years in prison.]

## DISCUSSION

### A. Jurisdiction

1.
  - a. Was the US intervention in Panama an international armed conflict? Even if Noriega was not, according to the Panamanian Constitution, the lawful leader of Panama? Even if the freely elected leader of Panama, Endara, called for the intervention of US troops? (GC III, Art. 2)
  - b. Was Noriega a prisoner of war? Although he belonged to armed forces not depending on (and not accepting orders from) the freely elected leader of Panama, Endara? (HR, Arts 1-3; GC III, Art. 4(A)(3); P I, Arts 43-44)
  - c. Has the Court sentencing Noriega necessarily the competence to determine his POW status? Has it an obligation to determine that status? (GC III, Arts 5, 82, 84, 85, 87 and 99)
  - d. Did Noriega remain a POW even if he is sentenced in the US for drug-related offences? (GC III, Art. 85; P I, Art. 44(2))
  - e. Was the deportation of Noriega to and his internment in the US lawful under IHL? Even if the US invasion in Panama violated international law? (GC III, Art. 22)
2.
  - a. Is a POW subject to the penal legislation of the Detaining Power for acts committed prior to capture? Even for acts committed in his own country? Even for acts unrelated to the armed conflict? (GC III, Arts 82, 85, 87 and 99)
  - b. What limits would you suggest from the point of view of IHL to the application of extraterritorial legislation of the Detaining Power to acts committed by a POW prior to capture? May a Detaining Power apply legislation protecting its security and territorial integrity to POWs for acts committed in the service of their own country before capture? (GC III, Arts 82, 85, 87 and 99(1); P I, Art. 75(4)(c))
3. May civil courts of the Detaining Power sentence a POW? Does the POW status divest civil courts of jurisdiction over the defendant? (GC III, Arts 84 and 102)

### B. Place of detention

4. May a POW be detained in a penitentiary? While in pre-trial detention? Once sentenced? Must a POW, once sentenced and held in a penitentiary, be treated in conformity with the prison regulations or with Convention III? (GC III, Arts 22(1), 95, 97, 98(1), 103(3) and 108)
5. Are the provisions of Convention III on the conditions of confinement self-executing? If not, what methods are there of enforcing compliance with the Conventions if they are violated, e.g., with regard to the conditions of captivity? Do such methods suggest anything about the strength or weakness of IHL?
6. Does IHL state whether it is lawful to wage a war to capture a drug trafficker who could not be extradited? Does IHL apply to such a war? Is it the purpose of Convention III to protect drug traffickers? Why was it important for IHL and for the US that the Court qualified Noriega as a POW?

### C. Extradition

7.
  - a. How long do POWs retain their status? Does IHL say anything about the status of POWs after they have served their sentence in the Detaining Power's territory? (GC III, Arts 118 and 119)
  - b. Do you think that, if extradited to France, Noriega should retain POW status? From an IHL point of view, what are the arguments in favour of his retaining POW status? The arguments against it? (GC III, Arts 118-119)



- c. According to IHL, does France have an obligation to grant Noriega POW status? (GC III, Arts 2, 4 and 12)
  - d. According to IHL, does the US have an obligation not to extradite Noriega to France if France is not willing to grant him POW status? (GC III, Art. 12)
  - e. Since active hostilities have ceased and Noriega has served his time in jail, does GC III require his immediate repatriation? Is repatriation automatic once the sentence has been served? (GC III, Arts 118, 119)
8. a. Does the Convention on extradition between France and the US prevail over GC III's provisions? (GC III, Art. 6(1))
- b. In your opinion, does POW status shield Noriega from extradition? If not, can a POW be extradited to be tried for acts committed prior to the armed conflict and not related to it? Does the fact that GC III does not mention extradition of POWs mean that it is prohibited? (GC III, Arts 12, 82, 85, 118, 119)
  - c. Do you agree with the reasoning of the Court on filling the silence of GC III with provisions of GC IV? Can Art. 45 of GC IV apply by analogy to the transfer of POWs?
  - d. Do you agree with the Court that the term "transfer" was intended to include "extradition" in the mind of the States concluding the Geneva Conventions? Can the definition provided for a term in GC IV apply to the same term in GC III?
  - e. Do you agree with the Court that it would be absurd that a civilian facing criminal charges would be subject to extradition when a POW facing identical criminal charges would not, particularly when the charges have no relation whatsoever to the latter's POW status?
  - f. Are Art. 45 of GC IV and Art. 12 of GC III parallel provisions?
9. a. Does Art. 12 of GC III only apply to transfers between allied powers during war? Or does it also apply once the armed conflict is over, as in the present case? (GC III, Arts 85, 119)
- b. How must the conditions of Art. 12 of GC III ("*...the Detaining Power [must satisfy] itself of the willingness and ability of such transferee Power to apply the Convention*") be interpreted? Are they considered to be a formal obligation?
  - c. What are the consequences for the US of GC III, Art. 12? Does it have the duty to reject extradition if France does not grant Noriega POW status? If it denies him POW status but grants him POW treatment? If it rejects POW treatment for him? Does it make a difference for Noriega whether he is considered as a POW or only treated as a POW?
10. a. What is the Court's reasoning in favour of authorizing the extradition? Would it give the same order if France did not grant him the rights guaranteed in GC III?
- b. What are Noriega's advantages in retaining the privileges of POW status in France?
  - c. Does his status change anything in his relations with the ICRC? If Noriega is extradited to France, will the ICRC have a right to visit him? If yes, on which basis? If Noriega is still considered as a POW by France? If he is not considered as a POW? (GC III, Art. 126)
  - d. Is the US obliged to inform the ICRC about the extradition procedure? What would the consequences be if it did not do so? (GC III, Art. 104)
  - e. If Noriega is extradited to France, will the US retain any responsibility as to his treatment by the French authorities? Does the US, as the Detaining Power, retain responsibility until his final repatriation to Panama, or does US responsibility end with his extradition? Does your answer change according to whether Noriega is still considered as a POW after his extradition to France? (GC III, Art. 12(3))



- f. (*Decision of September 7, 2007*) Do you agree with the Court that it lacks jurisdiction to decide the defendant's claims regarding potential future circumstances involving his treatment in France? Who should have jurisdiction over such a claim? Can Art. 45(4) of GC IV apply by analogy when there is fear of persecution?

**Case No. 159, Ethiopia/Somalia, Prisoners of War of the Ogaden Conflict**

[Source: ICRC Annual Report, 1988, pp. 25-26]

**ETHIOPIA/SOMALIA****Activities in connection with the consequences of the Ogaden conflict**

Almost 4,000 people, most of whom had been detained in Ethiopia and Somalia for almost 11 years, were released and repatriated in 1988. On 3 April Ethiopia and Somalia signed an agreement normalizing their relations and providing for the repatriation of all prisoners of war and civilian internees.

The ICRC had been trying for years to persuade the two governments to repatriate all prisoners of war, with priority being given to the seriously wounded and sick, in accordance with Articles 109, 110 and 118 of the Third Convention. In a *note verbale* dated 14 March 1988 and addressed to both governments the ICRC again requested them to do so. After hearing that an agreement had been signed on 3 April, the ICRC renewed its offer of services to organize the repatriation operation. The offer was accepted by both parties and the ICRC was authorized to visit the places of detention to interview each of the detainees, register them and check that they wanted to be repatriated. The actual repatriation took place in August.

**Visit to Somali prisoners of war**

Since the series of visits to 238 Somali prisoners of war carried out between 28 October and 4 November 1987 the ICRC had not been allowed to see these prisoners again in accordance with its customary criteria as defined in Article 126 of the Third Convention. On the other hand, it was able to continue providing them with food and material assistance. Between January and August 1988 ICRC delegates visited the three places of detention on several occasions [...] to hand over a total of 66 tonnes of relief supplies.

On 18 August the Ethiopian authorities agreed to allow the ICRC to arrange for the repatriation of these prisoners of war and at the same time authorized the ICRC to interview them individually to check that they wanted to be repatriated. During the last visit, which was to Dire Dawa two days before the actual repatriation operation began, a further 16 prisoners of war who had never previously been visited were registered.

**Visits to Ethiopian prisoners of war and civilian internees**

Despite repeated representations since 1984, the ICRC was unable to visit Ethiopian prisoners of war in accordance with the criteria set out in the Geneva Conventions; it could only make visits every two months to provide aid. The delegates regularly went to three places of detention [...], bringing fresh fruit and vegetables, and at times recreational items and toiletries, for a total of 266 Ethiopian prisoners of war and one Cuban; they were however unable to interview the prisoners without witnesses. When

the Somali/Ethiopian agreement of 3 April was announced, the Somali authorities accepted the ICRC's offer to arrange for the repatriation and allowed its delegates to go to all the places of detention. There they registered all the people being detained, both civilian and military, and interviewed them without witnesses to ensure that they wished to return to Ethiopia.

Once the arrangements had been finalized, an ICRC team went to Somalia at the end of June and visits to four places of detention took place throughout the month of July; more than 3,500 people were visited. In Laanta Bur, the delegates once again saw the Cuban prisoner of war, who had been known to the ICRC since 1982 [...]. In Hawa, at a camp with hitherto had never been visited, the ICRC delegates visited and registered 2,659 internees; for most of these people the visit was their first contact with the outside world for eleven years. The visits were supplemented by a medical and food aid programme: the ICRC doctor examined and began treating the sick, medicines were distributed and a food programme was set up. During July, 23 tonnes of food were distributed at the four places of detention, together with soap and other articles of hygiene.

Thanks to the registrations 300 families, whose members had been separated on capture and placed in different camps, were reunited in July.

These ICRC visits were also the subject of written reports and talks with the authorities, quite apart from the preparations for repatriation.

### **Repatriation of prisoners of war and civilian internees**

Between August 23, and September 1, an aircraft chartered by the ICRC made 20 flights between Mogadishu and Dire Sawa, in Ethiopia, to transport a total of 3,543 Ethiopian prisoners of war and civilian internees (including 530 children and adolescents) and one Cuban prisoner of war from Somalia to Ethiopia and 246 Somali prisoners of war from Ethiopia to Somalia.

Because of the large number of people to be repatriated from Somalia to Ethiopia, a transit camp had to be set up near Merka, to the south of Mogadishu; groups of 150 to 180 people were taken there as the operation progressed. This camp was run in conjunction with the authorities and the Somali Red Crescent Society.

In Ethiopia, the repatriated people were received and given shelter by the Ethiopian Red Cross in hospitals and their premises in Harar until their return home.

In both countries, the National Societies helped to trace the families of repatriated people, just as they had helped to distribute family messages until the end of June [...].

In October, the Somali authorities decided to amnesty Ethiopian prisoners who had not benefited from prisoner-of-war status, and the ICRC arranged for their repatriation. After delegates had visited and registered them, an ICRC chartered aircraft took [...] 24 people back to Ethiopia.

**DISCUSSION**

1.
  - a. What is the distinction between a POW and a civilian internee? How does the status alter the protection each receives under IHL? May a civilian internee be treated like a POW? (GC III, Art. 4; GC IV, Arts 43, 78 and 79)
  - b. When do POWs have to be repatriated according to IHL? When must civilian internees be released? (GC III, Art. 118; GC IV, Arts 43, 78 and 132-134; CIHL, Rule 128)
  - c. Was it lawful under IHL that some POWs and civil internees had been detained for up to eleven years? Did the POWs have to be repatriated only once Ethiopia and Somalia “normalized their relations”? Or only once they signed an agreement to repatriate POWs? (GC III, Art. 118; GC IV, Arts 43, 78 and 123-134; CIHL, Rule 128)
  - d. How could the Cuban national in Somalia be a POW? If he was a member of the Cuban armed forces? If he was a member of the Ethiopian armed forces? Where does he have to be repatriated to? (GC III, Arts 1, 4 and 118)
2. On which authority does the ICRC offer its services to assist the repatriation of POWs and civilian internees? (GC III, Arts 9, 118 and 126; GC IV, Arts 10, 132-134 and 143)
3. Does Art. 118 of Convention III oblige a Detaining Power to repatriate POWs who refuse to be repatriated? What arguments could a Detaining Power invoke to justify the non-repatriation of POWs who oppose their repatriation? Why do ICRC delegates check with each POW whether he/she wants to be repatriated?
4.
  - a. Does the ICRC have a right to visit POWs? Why are ICRC visits important? Are they even more important when the POWs are about to be repatriated? (GC III, Art. 126; CIHL, Rule 124)
  - b. Can you imagine why Ethiopia and Somalia at times impeded ICRC visits to POWs?
  - c. Why does the ICRC insist on visiting prisoners and interviewing them without witnesses? Does the ICRC have a right to insist on the latter condition? (GC III, Art. 126)
5.
  - a. By which means does IHL ensure that a family is informed about the capture and detention of a POW? May POWs renounce some or all of those means used to inform their families? What reasons could they have for doing so? (GC III, Arts 70, 122 and 123)
  - b. Who must enable POWs to fill in capture cards? Can capture cards be filled in even when the ICRC is impeded from visiting prisoners of war? Does the ICRC have a right to register POWs? Why is the registration of prisoners of war important to the ICRC? (GC III, Arts 70, 122, 123 and 126; CIHL, Rule 123)
6. Why is the ICRC providing aid to the POWs? Is it not the State’s responsibility to care for the POWs? (GC III, Arts 9, 73 and 125(3)) What if the State is really incapable of adequately caring for the POWs? Should the ICRC step in or must the State release and repatriate the POWs as it cannot detain them in conformity with Convention III? (P I, Art. 41(3))
7. The article mentions that the ICRC visits were the subject of written reports and talks with the authorities. What do you believe was mentioned in those reports? What was the purpose of those reports?

**Case No. 160, Eritrea/Ethiopia, Partial Award on POWs****A. Prisoners of War, Ethiopia's Claim 4**

[Source: Eritrea-Ethiopia Claims Commission, Partial Award, Prisoners of War, Ethiopia's Claim 4, between the Federal Democratic Republic of Ethiopia and the State of Eritrea. The Hague, July 1, 2003. The Permanent Court of Arbitration, the Hague. Footnotes partially reproduced. Full Awards available on [http://www.pca-cpa.org/showpage.asp?pag\\_id=1151](http://www.pca-cpa.org/showpage.asp?pag_id=1151)]

**PARTIAL AWARD  
Prisoners of War  
Ethiopia's Claim 4  
Between The Federal Democratic Republic of Ethiopia  
and the State of Eritrea**

**I. INTRODUCTION****A. Summary of the Positions of the Parties**

1. This Claim ("Ethiopia's Claim 4," "ET04") has been brought to the Commission by the Claimant, the Federal Democratic Republic of Ethiopia ("Ethiopia"), pursuant to Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of December 12, 2000 ("the Agreement"). The Claim seeks a finding of the liability of the Respondent, the State of Eritrea ("Eritrea"), for loss, damage and injury suffered by the Claimant as a result of the Respondent's alleged unlawful treatment of its Prisoners of War ("POWs") who were nationals of the Claimant. In its Statement of Claim, the Claimant requested monetary compensation, and in its Memorial, it proposed that compensation be determined by a mass claims process based upon the five permanent camps in which those POWs were held.
2. The Respondent asserts that it fully complied with international law in its treatment of POWs.

**B. The Eritrean POW Camps**

3. Eritrea interned a total of approximately 1,100 Ethiopian POWs, virtually all male, between the start of the conflict in May 1998 and August 2002, when the remaining Ethiopian POWs registered by the International Committee of the Red Cross ("ICRC") were released.
4. Eritrea utilized five permanent camps, some only briefly: Barentu, Embakala, Digidigta, Afabet and Nakfa (also known as Sahel). Eritrea utilized these camps one after the other and, with the exception of Barentu, closed each camp upon transfer of the POWs to the next camp.

5. Eritrea used facilities at Badme, Asmara, Tesseney and Barentu as transit camps during evacuation of the Ethiopian POWs from the various fronts. POWs were typically held in the transit camps for several days or weeks. [...]

### **C. General Comment**

12. As the findings in this Award and in the related Award in Eritrea's Claim 17 describe, there were significant difficulties in both Parties' performance of important legal obligations for the protection of prisoners of war. Nevertheless, the Commission must record an important preliminary point that provides essential context for what follows. Based on the extensive evidence adduced during these proceedings, the Commission believes that both Parties had a commitment to the most fundamental principles bearing on prisoners of war. Both parties conducted organized, official training programs to instruct their troops on procedures to be followed when POWs are taken. In contrast to many other contemporary armed conflicts, both Eritrea and Ethiopia regularly and consistently took POWs. Enemy personnel who were *hors de combat* were moved away from the battlefield to conditions of greater safety. Further, although these cases involve two of the poorest countries in the world, both made significant efforts to provide for the sustenance and care of the POWs in their custody.
13. There were deficiencies of performance on both sides, sometimes significant occasionally grave. Nevertheless, the evidence in these cases shows that both Eritrea and Ethiopia endeavored to observe their fundamental humanitarian obligations to collect and protect enemy soldiers unable to resist on the battlefield. The Awards in these cases, and the difficulties that they identify, must be read against this background. [...]

## **IV. THE MERITS**

### **A. Applicable law**

22. Article 5, paragraph 13, of the Agreement provides that "in considering claims, the Commission shall apply relevant rules of international law." Article 19 of the Commission's Rules of Procedure is modelled on the familiar language of Article 38, paragraph 1, of the Statute of the International Court of Justice. It directs the Commission to look to:
  1. International conventions, whether general or particular, establishing rules expressly recognized by the parties;
  2. International custom, as evidence of a general practice accepted as law;
  3. The general principles of law recognized by civilized nations;
  4. Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

23. The most obviously relevant source of law for the present Award is Geneva Convention III. Both Parties refer extensively to that Convention in their pleadings, and the evidence demonstrates that both Parties relied upon it for the instruction of their armed forces and for the rules of the camps in which they held POWs. The Parties agree that the Convention was applicable from August 14, 2000, the date of Eritrea's accession, but they disagree as to its applicability prior to that date.
24. Ethiopia signed the four Geneva Conventions in 1949 and ratified them in 1969. Consequently, they were in force in Ethiopia in 1993 when Eritrea became an independent State. Successor States often seek to maintain stability of treaty relationships after emerging from within the borders of another State by announcing their succession to some or all of the treaties applicable prior to their independence. Indeed, treaty succession [...] may happen automatically for certain types of treaties. However, the Commission has not been shown evidence that would permit it to find that such circumstances here, desirable though such succession would be as a general matter. From the time of its independence from Ethiopia in 1993, senior Eritrean officials made clear that Eritrea did not consider itself bound by the Geneva Conventions.
25. During the period of the armed conflict and prior to these proceedings, Ethiopia likewise consistently maintained that Eritrea was not a party to the Geneva Conventions. The ICRC, which has a special interest and responsibility for promoting compliance with the Geneva Conventions, likewise did not at that time regard Eritrea as a party to the Conventions.
26. Thus, it is evident that when Eritrea separated from Ethiopia in 1993 it has a clear opportunity to make a statement of its succession to the Conventions, but in evidence shows that it refused to do so. It consistently refused to do so subsequently, and in 2000, when it decided to become a party to the Conventions, it did so by accession, not by succession. While it may be that continuity of treaty relationships often can be presumed, absent facts to the contrary, no such presumption could properly be made in the present case in view of these facts. These unusual circumstances render the present situation very different from that addressed in the Judgement by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Celebici Case* [footnote 6: *Celebici Case (The Prosecutor v. Delalic et al.)*, 2001, ICTY Appeals Chamber Judgement Case No. IT-96-21-A (Feb. 20).] It is clear here that neither Eritrea, Ethiopia nor the depository of the Conventions, the Swiss Federal Council, considered Eritrea party to the Conventions until it acceded to them on August 14, 2000. Thus, from the outbreak of the conflict in May 1998 until August 14, 2000, Eritrea was not a party to Geneva Convention III. Ethiopia's argument to the contrary, in reliance upon Article 34 of the Vienna Convention on Succession of States in Respect of Treaties, cannot prevail over these facts.
27. Although Eritrea was not a party to the Geneva Conventions prior to its accession to them, the Conventions might still have been applicable during the armed

conflict with Ethiopia, pursuant to the final provision of Article 2 common to all four Conventions, which states:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

28. However, the evidence referred to above clearly demonstrates that, prior to its accession, Eritrea had not accepted the Conventions. This non-acceptance was also demonstrated by Eritrea's refusal to allow the representatives of the ICRC to visit the POWs it held until after its accession to the Conventions.
29. Consequently, the Commission holds that, with respect to matters prior to August 14, 2000, the law applicable to the armed conflict between Eritrea and Ethiopia is customary international law. In its pleadings, Eritrea recognizes that, for most purposes, "the distinction between customary law regarding POWs and the Geneva Convention III is not significant." It does, however, offer as examples of the more technical and detailed provisions of the Convention that it considers not applicable as customary law the right of the ICRC to visit POWs, the permission of the use of tobacco in Article 26, and the requirement of canteens in Article 28. It also suggests that payment of POWs for labor and certain burial requirements for deceased POWs should not be considered part of customary international law. Eritrea cites the *von Leeb* decision of the Allied Military Tribunal in 1949 as supportive of its position on this question [footnote 10: *U.S. v. Wilhelm von Leeb et al.*, in TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW, No 10, Volume XI, p. 462 (United States Government Printing Office, Washington D.C. 1950).]
30. Given the nearly universal acceptance of the four Geneva Conventions of 1949, the question of the extent to which their provisions have become part of customary international law arises today only rarely. The Commission notes that the *von Leeb* case (which found that numerous provisions at the core of the 1929 Convention had acquired customary status) addressed the extent to which the Provisions of a convention concluded in 1929 had become part of the customary international law during the Second World War, that is, a conflict that occurred ten to sixteen years later. In the present case, the Commission faces the question of the extent to which the provisions of a convention concluded in 1949 and since adhered to by almost all States had become part of customary international law during a conflict that occurred fifty years later. Moreover, treaties, like the Geneva Conventions of 1949, that develop international humanitarian law are, by their nature, legal documents that build upon the foundation laid by earlier treaties and by customary international law. These treaties are concluded for the purpose of creating a treaty law for the parties to the convention and for the related purpose of codifying and developing customary international law that is applicable to all nations. The Geneva Conventions of 1949 successfully accomplished both purposes.



31. Certainly, there are important, modern authorities for the proposition that the Geneva Conventions of 1949 have largely become expressions of customary international law, and both Parties to this case agree. The mere fact that they have obtained nearly universal acceptance supports this conclusion. There are also similar authorities for the proposition that rules that commend themselves to the international community in general, such as rules of international humanitarian law, can more quickly become part of customary international law than other types of rules found in treaties. The Commission agrees.
32. Consequently, the Commission holds that the law applicable to this Claim is customary international law, including customary international humanitarian law as exemplified by the relevant parts of the four Geneva Conventions of 1949. The frequent invocation of provisions of Geneva Convention III by both Parties in support of their claims and defenses is fully consistent with this holding. Whenever either Party asserts that a particular relevant provision of these Conventions should not be considered part of customary international law at the relevant time, the Commission will decide that question, and the burden of proof will be on the asserting Party. [...]

## **B. Evidentiary Issues**

### **1. Quantum of Proof Required [...]**

38. The Commission does not accept any suggestion that, because some claims may involve allegations of potentially criminal individual conduct, it should apply an even higher standard of proof corresponding to that in individual criminal proceedings. The Commission is not a criminal tribunal assessing individual criminal responsibility. It must instead decide whether there have been breaches of international law based on normal principles of state responsibility. [...]

### **2. Proof of Facts**

39. Ethiopia presented a large volume of documentation in support of its claims. [...] Ethiopia also presented three types of documents recording in differing ways information regarding the experiences of individual prisoners. It submitted thirty formal written declarations from former POWs signed by the declarants and containing affirmations of the accuracy of the translation and solemn representations that the declaration was truthful. During the hearing, counsel for Ethiopia indicated that it relied primarily on these declarations. Similar signed declarations also provided the heart of the evidence for Eritrea's claims.
40. Ethiopia also submitted multiple volumes of what were in fact forms for collecting claims. These were lengthy documents filled in by a former POW or a person writing for him, responding at varying length to detailed questions regarding conditions and experiences in each of Eritrea's POW camps. Ethiopia also filed four volumes containing typewritten distillations of the very brief answers some former prisoners gave to the claims questionnaires (generally involving pages containing only "yes" or "no" answers).

41. Eritrea objected to the second and third types of documents, arguing that the phrasing of the questions, the collection methodology and other factors inevitably resulted in inflated, inaccurate and unreliable responses. The Commission agrees that these documents are of uncertain probative value. It has not used them in arriving at the factual judgments that follow: instead it has relied on the formal signed declarations submitted by each Party, as supplemented by the testimony at the hearing and other documents in the record. [...]

### **3. Evidence under the Control of the ICRC**

45. Throughout the conflict, representatives of the ICRC visited Ethiopia's camps. Beginning late in August 2000, the ICRC also began visiting Eritrea's Nakfa camp. Both Parties indicated that they possess ICRC reports regarding these camp visits, as well as other relevant ICRC communications.
46. The Commission hoped to benefit from the ICRC's experienced and objective assessment of conditions in both Parties' camps. It asked the Parties to include the ICRC reports on camp visits in their written submissions or to explain their inability to do so. Both responded that they wished to do so but that the ICRC opposed allowing the Commission access to these materials. The ICRC maintained that they could not be provided without ICRC consent, which would not be given. [...]
48. The ICRC made available to the Commission and the Parties copies of all relevant public documents, but it concluded that it could not permit access to other information. That decision reflected the ICRC's deeply held belief that its ability to perform its mission requires strong assurances of confidentiality. The Commission has great respect for the ICRC and understands the concerns underlying its general policies of confidentiality and non-disclosure. Nevertheless, the Commission believes that, in the unique situation here, where both parties to the armed conflict agreed that these documents should be provided to the Commission, the ICRC should not have forbidden them from doing so. Both the Commission and the ICRC share an interest in the proper and informed application of international humanitarian law. Accordingly, the Commission must record its disappointment that the ICRC was not prepared to allow it access to these materials.

## **C. Violations of the Law**

### **1. Organizational Comment**

49. Ethiopia alleged extensive violations of applicable legal obligations in Eritrea's POW camps. Its legal claims were arranged in eleven separate categories, several with multiple subsidiary elements. Ethiopia alleged violations of all or almost all of the following eleven categories with respect to each of Eritrea's five camps:
- Capture of POWs and their evacuation to the camps;
  - Physical and mental abuse in the camps;

- Lack of adequate medical care;
  - Unhealthy camp conditions;
  - Failure to maintain POWs well being;
  - Impermissible forced labor;
  - Improper handling of deaths;
  - Lack of complaint procedures;
  - Prohibiting communication with the exterior;
  - Failure to post camp regulations; and
  - Inhumane conditions during transfer from the camps.
50. In its written and oral presentations, Ethiopia clearly explained the factors leading it to structure its claims this way. However, the result is a matrix of over fifty issues, many with several subsidiary elements, for assessment and decision. Of greater concern, the Commission found that this complex and fragmented structure served to conflate very serious matters with others of much less gravity. Moreover, given the level of evidence presented and the limited time available for the Commission to complete its work on all claims, it is clear that the Commission must focus its attention on the substantive core of the claims.
51. Accordingly, the Commission has grouped several of Ethiopia's claims together or has otherwise re-aligned their elements in order to give greater weight to and clearer focus on those matters it sees as being of greatest concern.
52. As commentators frequently have observed, Geneva Convention III, with its 143 Articles and five Annexes, is an extremely detailed and comprehensive code for the treatment of POWs. Given its length and complexity, the Convention mixes together, sometimes in a single paragraph, obligations of very different character and importance. Some obligations, such as Article 13's requirement of humane treatment, are absolutely fundamental to the protection of POWs' life and health. Other provisions address matters of procedure or detail that may help ease their burdens, but are not necessary to ensure their life and health.
53. Under customary international law, as reflected in Geneva Convention III, the requirement of treatment of POWs as human beings is the bedrock upon which all other obligations of the Detaining Power rest. At the core of the Convention regime are the legal obligations to keep POWs alive and in good health. The holdings made in this section are organized to emphasize these core legal obligations.
54. It should also be stated at the outset that the Commission does not see its task to be the determination of liability of a Party for each individual incident of illegality suggested by the evidence. Rather, it is to determine liability for serious violations of the law by the Parties, which are usually illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers

of victims. These parameters are dictated by the limit of what is feasible for the two Parties to brief and argue and for the Commission to determine in light of the time and resources made available by the Parties.

## **2. Eritrea's Refusal to Permit the ICRC to Visit POWs**

55. From the outset of the armed conflict in 1998, the ICRC was permitted by Ethiopia to visit the Eritrean POWs and the camps in which they were held. It was also permitted to provide relief to them and to assist them in corresponding with their families in Eritrea, although there is evidence that Eritrea refused to permit communications from those POWs to be passed on to their families. In Eritrea, the ICRC had a limited role in the 1998 repatriation of seventy sick or wounded POWs, but all efforts by the ICRC to visit the Ethiopian POWs held by Eritrea were refused by Eritrea until August 2000, just after Eritrea acceded to the 1949 Geneva Conventions. The Commission must decide whether, as alleged by Ethiopia, such refusal by Eritrea constituted a violation of its legal obligations under the applicable law.
56. Eritrea argues that the right of access by the ICRC to POWs is a treaty-based right and that the provision of Geneva Convention III granting such access to the ICRC should not be considered provisions that express customary international law. While recognizing that most of the provisions of the Conventions have become customary law, Eritrea asserts that the provisions dealing with the access of the ICRC are among the detailed or procedural provisions that have not attained such status.
57. That the ICRC did not agree with Eritrea is demonstrated by a press statement it issued on May 7, 1999, in which it recounted its visits to POWs and interned civilians held by Ethiopia and said: "In Eritrea, meanwhile, the ICRC is pursuing its efforts to gain access as required by the Third Geneva Convention, to Ethiopian POWs captured since the conflict erupted last year".
58. The ICRC is assigned significant responsibilities in a number of articles of the Convention. These provisions make clear that the ICRC may function in at least two different capacities – as a humanitarian organization providing relief and as an organization providing necessary and vital external scrutiny of the treatment of POWs, either supplementary to a Protecting Power or as a substitute when there is no Protecting Power. There is not evidence before the Commission that Protecting Powers were proposed by either Ethiopia or Eritrea, and it seems evident that none was appointed. Nevertheless, the Convention clearly requires external scrutiny of the treatment of POWs and, in article 10, where there is no Protecting Power or other functioning oversight body, it requires Detaining Powers to "accept the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention." In that event, Article 10 also provides that all mention of Protecting Powers in the Convention applies to such substitute organizations.

59. The right of the ICRC to have access to POWs is not limited to a situation covered by Article 10 in which it serves as a substitute for a Protecting Power. Article 126 specifies clear and critical rights of Protecting Powers with respect to access to camps and to POWs, including the right to interview POWs without witnesses, and it states that the delegates of the ICRC “shall enjoy the same prerogatives.” Ethiopia relies primarily on Article 126 in its allegation that Eritrea violated its legal obligations by refusing the ICRC access to its POWs.
60. Professor Levie points out in his monumental study of the treatment of POWs in international armed conflicts that the ICRC “has played an indispensable humanitarian role in every armed conflict for more than a century.” [...]
61. The Commission cannot agree with Eritrea’s argument that provisions of the Convention requiring external scrutiny of the treatment of POWs and access to POWs by the ICRC are mere details or simply implementing procedural provisions that have not, in half a century, become part of customary international law. These provisions are an essential part of the regime for protecting POWs that has developed in international practise, as reflected in Geneva Convention III. These requirements are, indeed, “treaty-based” in the sense that they are articulated in the Convention; but, as such, they incorporate past practices that had standing of their own in customary law, and they are of such importance for the prospects of compliance with the law that it would be irresponsible for the Commission to consider them inapplicable as customary international law, [...] [a]s the International Court of Justice said in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. [...] [See Case No. 62, ICJ, Nuclear Weapons Advisory Opinion, para. 79]
62. For the above reasons, the Commission holds that Eritrea violated customary international law from May 1998 until August 2000 by refusing to permit the ICRC to send its delegates to visit all places where Ethiopian POWs were detained, to register these POWs, to interview them without witnesses, and to provide them with the customary relief and services. Consequently, Eritrea is liable for the suffering caused by that refusal.

### **3. Mistreatment of POWs at Capture and its Immediate Aftermath**

63. Of the thirty Ethiopian POW declarants, at least twenty were already wounded at capture and nearly all testified to treatment of the sick or wounded by Eritrean forces upon capture at the front and during evacuation. Consequently, in addition to the customary international law standards reflected in Geneva Convention III, the Commission also applies the standards reflected in the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field on August 12, 1949 (“Geneva Convention I”). For a wounded or sick POW, the provisions of Geneva Convention I apply along with Geneva Convention III. Among other provisions, Article 12 of Geneva Convention I demands respect and protection of wounded or sick members of the armed forces in “all circumstances”.

64. A State's obligation to ensure humane treatment of enemy soldiers can be severely tested in the heated and confused moments immediately following capture or surrender and during evacuation from the battlefield to the rear. Nevertheless, customary international law as reflected in Geneva Conventions I and III absolutely prohibits the killing of POWs, requires the wounded and sick to be collected and cared for, the dead to be collected, and demands prompt and humane evacuation of POWs.

**a. Abusive Treatment**

65. Ethiopia alleged that Eritrean troops regularly beat and frequently killed Ethiopians upon capture and its immediate aftermath. Ethiopia presented a *prima facie* case, through clear and convincing evidence, to support this allegation.
66. One-third of the Ethiopian POW declarations contain accounts of Eritrean soldiers deliberately killing Ethiopian POWs, most wounded, at capture or evacuation. Particularly troubling are accounts in three declarations of Eritrean officers ordering troops to kill Ethiopian POWs or beating them for not doing so. More than half of the Ethiopian POW declarants described repeated and brutal beatings, both at the front and during evacuation, including blows purposefully inflicted on wounds. Fortunately, these accounts were countered to a degree by several other accounts from Ethiopian declarants of Eritrean officers and soldiers intervening to curtail physical abuse and prevent killings.
67. In rebuttal, Eritrea offered detailed and persuasive evidence that Eritrean troops and officers had received extensive instruction during their basic training, both on the basic requirements of the Geneva Conventions on the taking of POWs and on the policies and practices of the Eritrean People's Liberation Front ("EPLF") in the war against the prior Ethiopian government, the Derg, for independence, which had emphasized the importance of humane treatment of prisoners. What is lacking in the record, however, is evidence of what steps Eritrea took, if any, to ensure that its forces actually put this extensive training to use in the field. There is no evidence that Eritrea conducted inquiries into incidents of physical abuse or pursued disciplinary measures under Article 121 of Geneva Convention III.
68. The Commission concludes that Eritrea has not rebutted the *prima facie* case presented by Ethiopia and, consequently, holds that Eritrea failed to comply with the fundamental obligation of customary international law that POWs, even when wounded, must be protected and may not, under any circumstances, be killed. Consequently, Eritrea is liable for failing to protect Ethiopian POWs from being killed at capture or its immediate aftermath, and for permitting beatings and other physical abuse of Ethiopian POWs at capture or its immediate aftermath.

**b. Medical Care Immediately Following Capture**

69. Ethiopia alleges that Eritrea failed to provide necessary medical attention to Ethiopian POWs after capture and during evacuation, as required under customary international law reflected in Geneva Conventions I (Article 12) and III

(Articles 20 and 15). Many Ethiopian declarants testified that their wounds were not cleaned and bandaged at or shortly after capture, leading to infection and other complications. Eritrea presented rebuttal evidence that its troops provided rudimentary first aid as soon as possible, including in transit camps.

70. The Commission believes that the requirement to provide POWs with medical care during the initial period after capture must be assessed in light of the harsh conditions on the battlefield and the limited extent of medical training and equipment available to front line troops. On balance, and recognizing the logistical and resource limitations faced by both Parties to the conflict, the Commission finds that Eritrea is not liable for failing to provide medical care to Ethiopian POWs at the front and during evacuation.

**c. *Evacuation Conditions***

71. Ethiopia also alleges that, in addition to poor medical care, Eritrea failed to ensure humane evacuation conditions. As reflected in Articles 19 and 20 of Geneva Convention III, the Detaining Power is obliged to evacuate prisoners humanely, safely and as soon as possible from combat zones; only if there is a greater risk in evacuation may the wounded or sick be temporarily kept in the combat zone, and they must not be unnecessarily exposed to danger. The measure of a humane evacuation is that, as set out in Article 20, POWs should be evacuated “in conditions similar to those for the forces of the Detaining Power.”
72. Turning first to the timing of evacuation, Eritrea submitted clear and convincing evidence that, given the reality of battle, the great majority of Ethiopians POWs were evacuated from the various fronts in a timely manner. Despite one disquieting incident in which a wounded Ethiopian POW allegedly was forced to spend a night on top of a trench while artillery exchanges occurred and his Eritrean captors took refuge in the trench, the Commission concludes that Eritrea generally took the necessary measures to evacuate its prisoners promptly.
73. Timing aside, the Ethiopian POW declarants described extremely onerous conditions of evacuation. The POWs were forced to walk from the front for hours or days over rough terrain, often in pain from their own wounds, often carrying wounded comrades and Eritrean supplies, often in harsh weather, and often with little or no food and water. Eritrea offered rebuttal evidence that its soldiers faced nearly the same unavoidably difficult conditions, particularly given the lack of paved roads in Eritrea.
74. Subject to the holding above concerning unlawful physical abuse during evacuation and with one exception, the Commission finds that Eritrean troops satisfied the legal requirements for evacuations from the battlefield under the harsh geographic, military and logistical circumstances. The exception is the Eritrean practice of seizing the footwear of all Ethiopian POWs, testified to by many declarants. Although the harshness of the terrain and weather on the marches to the camps may have been out of Eritrea’s control, to force the POWs to walk barefoot in such conditions unnecessarily compounded their misery. The

Commission finds Eritrea liable for inhumane treatment during evacuations from the battlefield as a result of its forcing Ethiopian POWs to go without footwear during evacuation marches.

**d. Coercive Interrogation**

75. Ethiopia alleges frequent abuse in Eritrea's interrogation of POWs, commencing at capture and evacuation. International law does not prohibit the interrogation of POWs, but it does restrict the information they are obliged to reveal and prohibits torture or other measures of coercion, including threats and "unpleasant or disadvantageous treatment of any kind."
76. Ethiopia presented clear and convincing evidence, unrebutted by Eritrea, that Eritrean interrogators frequently threatened or beat POWs during interrogation, particularly when they were dissatisfied with the prisoner's answers. The Commission must conclude that Eritrea either failed to train its interrogators in the relevant legal restraints or to make it clear that they are imperative. Consequently, Eritrea is liable for permitting such coercive interrogation.

**e. Confiscation of Personal Property**

77. Ethiopia alleges widespread and systematic confiscation by Eritrean soldiers of the personal property of Ethiopian POWs. The declarations of Ethiopian POWs submitted into evidence clearly and convincingly support this claim. Not only were all captured Ethiopian soldiers deprived of their shoes (presumably, to make escape more difficult), but almost all declarants assert that they were searched upon capture and that all of their personal possessions were taken by their captors. The items allegedly taken included cash, watches, family photos, radios, rings and cigarettes, as well as the POWs' identity cards and, occasionally, items of clothing. The declarants also assert that no receipts were given and that none of the confiscated property was returned.
78. Article 18 of Geneva Convention III requires that POWs be allowed to retain their personal property. Cash and valuables may be impounded on order of an officer, subject to detailed registration and other safeguards. If prisoners' property is taken, it must be receipted and safely held for later return. Under Article 17, identity documents can be consulted by the Detaining Power but must be returned to the prisoner. The Commission believes that these obligations reflect customary international law.
79. No rebuttal evidence was submitted by Eritrea with respect to this claim, and the Commission notes that Eritrea's camp procedures for POWs state that "every POW has the duty to hand over property which he had with him when he was captured to the concerned authority". The Commission concludes that Eritrea failed to take the necessary measures to prevent the confiscation of prisoners' personal property. Consequently, given the unrebutted evidence of widespread takings of property and Eritrea's camp procedures, Eritrea failed to comply with



the obligations of Articles 17 and 18 of Geneva Convention III and is liable to Ethiopia for the consequent losses suffered by Ethiopian POWs.

80. Taking of prisoners' valuables and other property is a regrettable but recurring feature of their vulnerable state. The loss of photographs and other similar personal items is an indignity that weighs on prisoners' morale, but the loss of property otherwise seems to have rarely affected the basic requirements for prisoners' survival and well being. Accordingly, while the Commission does not wish to minimize the importance of these violations, they loom less large than other matters considered elsewhere in this Award.

#### **4. Physical and Mental Abuse in POW Camps [...]**

82. The testimony at the hearing of a former POW and the declarations of the other POWs are consistent and persuasive that the Eritrean guards at the various POW camps relied often upon brutal force for the enforcement of rules and as means of punishment. All thirty POW declarations described frequent beatings of POWs by camp guards. Several guards accused of regularly abusing POWs were identified by name in numerous declarations. The evidence indicates that many of the same guards remained in charge as the numbers of POWs increased and as they were moved from one camp to another, and the conclusion is unavoidable that guards who regularly beat POWs were not replaced as a result. Beatings with wooden sticks were common and, on occasion, resulted in broken bones and lack of consciousness. There were multiple, consistent accounts that, at Digdigta, several POWs who had attempted to escape were beaten senseless, with one losing an eye, prior to their disappearance. Being forced to hold heavy objects over one's head for long periods of time, being punched or kicked, being required to roll on stony or thorny ground, to look at the sun, and to undergo periods of confinement in hot metal containers were notable among the other abuses, all of which violated customary international law, as exemplified by Articles 13, 42, 87 and 89 of Geneva Convention III. Regrettably, the evidence also indicates that the camp commanders did little to restrain these abuses and, in some cases, even threatened POWs by telling them that, as there was (prior to the first ICRC visits in August 2000) no list of prisoners, they could do anything they wanted to the POWs and could not be held accountable.
83. In addition to the fear and mental anguish that accompanied these physical abuses, there is clear evidence that some POWs particularly Tigrayans, were treated worse than others and that several POWs were treated as deserters and given favoured treatment. (Those given favoured treatment were not among those who signed the thirty declarations relied on by Ethiopia on this issue.) Such discrimination is, of course, prohibited by Article 16 of Geneva Convention III.
84. The evidence is persuasive that beatings were common at all camps: Barentu, Embakala, Digdigta, Afabet and Nakfa. Solitary confinement of three months or more occurred at least at Digdigta and Afabet. At Nakfa, much of the evidence of beatings and other brutal punishments relates to POWs away from camp working

on labor projects and occurred at least at Digdigta and Afabet. At Nakfa, much of the evidence of beatings and other brutal punishments relates to POWs away from camp working on labor projects and occurred when fatigue slowed their work. After ICRC visits began, there is some evidence that POWs were threatened with physical punishment if they reported abuses to the ICRC. [...]

## **5. Unhealthy Conditions in Camps**

### **a. The Issue**

87. A fundamental principle of Geneva Convention III is that detention of POWs must not seriously endanger the health of those POWs. This principle, which is also a principle of customary international law, is implemented by rules that mandate camp locations where the climate is not injurious; shelter that is adequate, with conditions as favourable as those for the forces of the Detaining Power who are billeted in the area, including protection from dampness and adequate heat and light, bedding and blankets; and sanitary facilities which are hygienic and are properly maintained. Food must be provided in a quantity and quality adequate to keep POWs in good health, and safe drinking water must be adequate. Soap and water must also be sufficient for the personal toilet and laundry of the POWs. [...]

### **b. Analysis of Health-Related Conditions at each of Eritrea's POW Camps**

92. While there certainly is evidence that the camp at Barentu was in violation of standards prescribed by Geneva Convention III, it is insufficient to prove that the health of prisoners there was seriously endangered. This camp was in operation for no more than six weeks, and the period of internment of most of the relatively few prisoners there was for lesser periods.
93. [...] From the evidence, it appears that all the prisoners at Embakala were housed in one small building composed of corrugated metal sheets which was divided into two rooms and became dangerously overcrowded soon after the camp went into operation. The floor of these quarters consisted of dirt, which was over time converted to filthy dust as a result of the crowded living conditions and problems of hygiene. The roof was so low that the inmates could not stand erect. The prisoners were often confined in these quarters during the day with little opportunity to go outside, except when allowed to relieve themselves in an adjacent field (only once each day) and to bathe (no more than once a week). Confined in very close quarters, enduring stifling heat, often stripped to their underwear, the prisoners were also often enjoined to keep silent for long periods of time. Throughout their stay, they were provided with a meagre diet consisting of bread and lentil stew. There were no latrines in the field used for toileting (once a day). Prisoners who suffered from diarrhoea were forced to relieve themselves in the overcrowded quarters. The Commission finds this detailed evidence to be clear and convincing and to constitute a *prima facie* case of serious violations

at Embakala of required health-related conditions, i.e., the provision of healthy accommodation, which seriously endangered the health of prisoners.

94. There is more abundant evidence to justify similar conclusions regarding conditions at Digdigta (nineteen POW declarations), Afabet (twenty POW declarations), and Nakfa (thirty POW declarations). [...]
96. Indeed, provision of adequate water for both drinking and bathing was a serious problem at all three camps. In each, water was brought in by tanker trucks. At Digdigta, the drinking water provided during the day (when housing conditions were stifling) was often too hot to drink in amounts adequate to relieve thirst, as well as insufficient in quantity. At Afabet, drinking water was in short supply and sometimes quite “salty.” At Nakfa, there were often serious water shortages because the tanker trucks failed to appear as scheduled or failed to supply enough to meet the needs of the camp. There is also testimony that the water secured from other sources (rain barrels and nearby “streams”) was dirty and insect-ridden. Water for bathing was also in short supply; prisoners were allowed, at best, to bathe and launder only once a week.
97. Virtually all of the declarants allege that, at all of these camps, the food provided consisted of inedible (e.g., “dirty,” “worm-ridden”) bread and lentil stew. The testimony about food at Nakfa indicates that the diet was frequently insufficient in quantity and quality and that there was often widespread hunger.
98. [...] Nakfa was chosen in May 2000 as the site for a new camp to which all prisoners should be removed. The preparations for reception of prisoners appear to have been inadequate. There is considerable testimony that the first group to arrive at Nakfa was put in underground, windowless, dark, dank and dirty quarters, which were littered with human trash and the dung of donkeys and goats, and thereafter these premises were never properly cleaned. This evidence, coupled with that portraying the problems encountered in providing enough water for the prisoners, suggests a serious failure to meet the basic obligation of Geneva Convention III to provide at the outset “premises... affording every guarantee of hygiene and healthfulness.” [...]
100. Eritrea has failed to rebut the *prima facie* case established by Ethiopia. Eritrea’s rebuttal depended primarily on the declarations of two senior officers who were involved in the administration of the POW camps, who did not testify at the hearing. [...]

## **6. Inadequate Medical Care in Camps**

104. A detaining Power has the obligation to provide in its POW camps the medical assistance on which the POWs depend to heal their battle wounds and to prevent further damage to their health. This duty is particularly crucial in camps with a large population and a greater risk of transmission of contagious diseases.
105. The protections provided by Articles 15, 20, 29, 30, 31, 109 and 110 of Geneva Convention III are unconditional. These rules, which are based on similar rules in

Articles 4, 13, 14, 15 and 68 of the Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929, are part of customary international law.

106. Many of these rules are broadly phrased and do not characterize precisely the quality or extent of medical care necessary for POWs. Article 15 speaks of the “medical attention *required* by their state of health;” Article 30 requires infirmaries to provide prisoners “the attention they *require*” (emphasis added). The lack of definition regarding the quality or extent of care “required” led to difficulties in assessing this claim. Indeed, standards of medical practice vary around the world, and there may be room for varying assessments of what is required in a specific situation. Moreover, the Commission is mindful that it is dealing here with two countries with very limited resources.
107. Nevertheless, the Commission believes certain principles can be applied in assessing the medical care provided to POWs. The Commission began by considering Article 15’s concept of the maintenance of POWs, which it understands to mean that a Detaining Power must do those things required to prevent significant deterioration of a prisoner’s health. Next, the Commission paid particular attention to measures that are specifically required by Geneva Convention III, such as the requirements for segregation of prisoners with infectious diseases and for regular physical examinations.

**a. Ethiopia’s Claims and Evidence [...]**

110. The Commission was, however, sadly impressed by the high number of Ethiopian POWs who died in the Eritrean camps. A significant mortality rate among a group of predominantly young persons is objectively cause for concern. The evidence, although not wholly consistent, clearly indicated an abnormally high rate of deaths among the prisoners in Eritrean camps. In response to questioning from the Commission, the Ethiopian POW witness testified at the hearing that, within his group of fifty-five POWs (with whom he moved from camp to camp), four had died. Several declarations state that, of the total population of some 1,100 Ethiopian POWs, forty-eight died. Ethiopia gave a list of fifty-one POWs who did not survive the camps. (Eritrea estimated that thirty-nine POWs died in captivity.) Significantly, there was substantial and reinforcing evidence that many of these deaths resulted from diarrhoea, tuberculosis and other illnesses that could have been avoided, alleviated or cured by proper medical care.
111. In the Commission’s view, this high death toll, combined with the other specific serious deficiencies discussed below, is clear and convincing evidence that Eritrea did not give the totality of POWs the basic medical care required to keep them in good health as required by Geneva Convention III, and consequently constitutes a *prima facie* case. [...]

**b. Eritrea’s Defence [...]**

115. Eritrea’s evidence did demonstrate that many Ethiopian POWs were provided with medical attention, primarily at the camp clinics with the services of paramedical

personnel. Some POWs with serious diseases or who required special treatment were referred on occasion to a more specialized hospital (e.g., Keren, Afabet, Ghindu, Nakfa). There was evidence that Eritrea provided for dental care either in hospitals or in the camp clinic by having dentists visit. Likewise, there was evidence that Eritrea gave a few POWs extensive medical treatment, including multiple surgical interventions. It occasionally provided drugs and vitamins beyond such few drugs and pain relievers as were available at the clinics.

**c. The Commission's Conclusions**

116. Overall, while the Commission is satisfied from the evidence that Eritrea made efforts to provide medical care and that some care was available at each permanent camp, Eritrea's evidence is inadequate to allow the Commission to form judgements regarding the extent or quality of Health care sufficient to overcome Ethiopia's *prima facie* case.
117. The camp clinic logs (where readable) do show that numerous POWs went to the clinics, but they cannot establish that care was appropriate or that all POWs in need of medical attention were treated in a timely manner over the full course of their captivity. For example, from the records it appears that the clinics did not register patients on a daily basis. Under international humanitarian law, a POW has the right to seek medical attention on his or her own initiative and to receive the continuous medical attention required by his or her state of health – which requires daily access to a clinic.
118. International humanitarian law also requires that POWs be treated at a specialized hospital or facility when required medical care cannot be given in a camp clinic. The hospital records submitted by Eritrea, however, are not sufficient to establish that all POWs in need of specialized treatment were referred to hospitals. Moreover, a quantitative analysis of those records shows that, while a few relate to treatment in the first half of 1999 at Digdigta, nearly one half relate to the period from August to December 2000 and one quarter to 2001 and 2002, i.e., the time period after Eritrea acceded to the Geneva Conventions and ICRC camp visits started. Only a few records relate to treatment between July 1999 and May 2000, when POWs were detained at Afabet, and none relates to the time when Barentu and Embakala were open.
119. Likewise, the medicine supply reports submitted by Eritrea indicate that Eritrea distributed some drugs and vitamins to the POWs, but they do not prove that Eritrea provided adequate drugs to all POWs in the camps. It is striking that, according to the evidence submitted, Eritrea apparently distributed substantially more Vitamin A, B and C and multi-vitamins to POWs after August 2000 than before.
120. Preventive care is a matter of particular concern to the Commission. As evidenced by their prominence in Geneva Convention III, regular medical examinations of all POWs are vital to maintaining good health in a closed environment where diseases are easily spread. The Commission considers monthly examinations of

the camp population to be a preventive measure forming part of the Detaining Power's obligations under international customary law. [...]

123. The evidence also reflects that Eritrea failed to segregate certain infected prisoners. POWs are particularly susceptible to contagious diseases such as tuberculosis, and customary international law (reflecting proper basic health care) requires that infected POWs be isolated from the general POW population. Several Ethiopian POW declarants describe how tuberculosis patients were lodged with the other POW's, evidence which was not effectively rebutted by Eritrea. The camp authorities should have detected contagious diseases as early as possible and organized special wards.
124. Accordingly, the Commission holds that Eritrea violated international law from May 1998 until the last Ethiopian POWs were released and repatriated in August 2002, by failing to provide Ethiopian POWs with the required minimum standard of medical care. Consequently, Eritrea is liable for this violation of customary international law.
125. In closing, the Commission notes its recognition that Eritrea and Ethiopia cannot, at least at present, be required to have the same standards for medical treatment as developed countries. However, scarcity of finances and infrastructure cannot excuse a failure to grant the minimum standard of medical care required by international humanitarian law. The cost of such care is not, in any event, substantial in comparison with the other costs imposed by the armed conflict.

## **7. Unlawful Conditions of Labour**

126. Ethiopia claims that Eritrea forced POWs to work in conditions that violated requirements of Articles 13, 14, 26, 27, 49-55, 62, 65 and 66 of Geneva Convention III.
127. Article 49 of Geneva Convention III does not forbid a Detaining Power to compel POWs who are physically fit to work, but it does forbid compelling officers to work. The declarations by former Ethiopian POWs make clear that, while the most seriously disabled were generally excused from work, other sick or wounded POWs who were not physically fit were not excused and were generally forced to work and that officers were forced to work. [...]
133. Finally, Ethiopia asserted that Eritrea required its POWs to perform work of a military character in breach of Article 50 of Geneva Convention III. However, no sufficient evidence has been submitted for this allegation. To build residence houses and other facilities for the camp and the guards is not work of a military character, but concerns the installation of the camp, and is allowed under Article 50. Similarly, under Article 50, roads are considered works of public utility and therefore work on them is permissible, unless it is proven that they have a military character or purpose. Ethiopia did not submit such evidence. Consequently, the Commission does not find that Eritrea breached Article 50 of Geneva Convention III.

134. In conclusion, the Commission holds that Eritrea has subjected Ethiopian POWs to conditions of labour that violated Articles 13, 27, 49, 51, 53, 54 and 62 of Geneva Convention III. Consequently, Eritrea is liable for these unlawful labour conditions.

## **8. Conditions of Transfer Between Camps**

135. The Commission turns next to Ethiopia's allegations that Eritrea treated POWs inhumanely in the course of transfer between camps. As recited by Ethiopia, Articles 46 and 47 of Geneva Convention III require the Detaining Power to conduct transfers humanely. At a minimum, as with evacuation from the front, the Detaining Power should not subject POWs to transfer conditions less favourable than those to which its own forces are subjected. In all circumstances, the Detaining Power must consider the interests of the prisoners so as not to make repatriation more difficult than necessary, and should provide food, water, shelter and medical attention. The sick and wounded should not be transferred if it endangers their recovery, unless mandated by safety reasons.
136. The Ethiopian POW declarations consistently recount hours and days of travel on overcrowded military trucks or buses, over rough roads, in extremes of heat and cold, with few if any toilet breaks and little if any food and water. In rebuttal, Eritrea presented evidence that its own forces, at least to some extent, endured these same difficult transportation conditions, particularly given the lack of paved roads in Eritrea. The Commission recognizes that drastically limited Eritrean resources and infrastructure made transfer of prisoners in this conflict unavoidably miserable, but, again, only to some extent.
137. However, the evidence also reflects that, to a certain and critical extent, Eritrea did not do all within its ability to make transfer of the POWs as humane as possible. The evidence indicates that transfers were often accompanied by deliberate physical abuse by guards, and that Eritrea provided no effective measures to prevent such misconduct. The Commission is troubled by accounts, fortunately few, of purposefully cruel treatment: one declaration describes Eritrean soldiers pouring fuel on the bed of transport truck before a twelve-hour trip in open sun. Of even greater concern is the clear and convincing evidence presented by Ethiopia that Eritrean soldiers frequently beat POWs during transfer. Particularly serious is repetitive evidence of Eritrean soldiers beating the sick and wounded. In one case, two declarations recounted the death of one sick Ethiopian prisoner who was thrown from a truck on the transfer from Afabet to Nakfa and left to die.
138. In the absence of effective rebuttal by Eritrea, the Commission finds Eritrea liable for permitting unnecessary suffering of POWs during transfer between camps.

## **9. Treatment of the Dead**

139. Ethiopia, unlike Eritrea, brought separate claims for alleged violations of customary international law requirements following the death of a POW. Specifically citing Articles 120 and 121 of Geneva Convention III, Ethiopia alleged



that Eritrea failed to provide medical examination and death certificates for POWs who died in captivity, to investigate potential non-natural causes of death, or to ensure honourable burial with religious rites in marked graves. [...]

**10. Failure to Post Camp Rules and Allow Complaints**

142. As noted previously, Geneva Convention III establishes an extremely detailed regime. Earlier sections of this Award address Ethiopia's claims alleging violations of core elements of this regime involving killings, physical or mental abuse of POWs, or matters vital to POWs' survival, such as food, housing and medical care.
143. This final section addresses Ethiopia's claims involving two sets of obligations of a somewhat different character. Ethiopia claims violations of requirements to (a) post camp regulations and (b) have complaint procedures. These provisions establish administrative or procedural requirements partly aimed at protecting POWs' rights or at remedying deficiencies. The Commission does not mean to minimize their role in the total scheme of protection under the Convention. Nevertheless, these claims loom less large than many others considered previously.

**a. Camp Regulations**

144. Article 41 of Geneva Convention III requires every POW camp to post both the Convention and "regulations, orders, notices and publications of every kind," where prisoners may read them in the prisoners' language. Prior to August 14, 2000, the Geneva Convention was not in force between the Parties; the Commission sees no basis to hold that customary law requires the posting of the Convention before that date. However, the Commission finds that there is a customary obligation to post camp regulations in a clear and accessible location and otherwise to ensure that POWs are aware of their rights and obligations. [...]

**b. Complaint Procedures**

147. Ethiopia also claimed that Eritrea did not provide effective complaint procedures. Article 78 of Geneva Convention III assures POWs the right to "make known" to the military authorities holding them "requests" regarding their conditions. Requests and complaints cannot be limited, cannot be punished, and must be transmitted immediately.
148. Taking account, for instance, of the practice during World War I cited by Ethiopia and the inclusion of this concept in the 1929 Convention, the Commission finds that both customary law and the Convention guarantee POWs right to complain about their conditions of detention free from retribution. Ethiopia's evidence, although not as extensive as on some other more fundamental issues, establishes that this right frequently was not allowed and that complaining prisoners were subjected to severe punishments. [...]



150. Based on clear and convincing evidence, the Commission finds that Eritrea, in violation of its obligations under international law, did not allow Ethiopian POWs held at any of its camps to complain about their conditions and to seek redress. Further, the evidence shows that in all of the camps, but particularly in Nakfa, prisoners who attempted to complain were often subjected to heavy and unlawful sanctions, including segregation from the rest of the camp population and beatings by guards. Consequently, Eritrea is liable for these violations.

## **V. AWARD**

In view of the foregoing, the Commission determines as follows: [...]

### **B. Applicable Law**

1. With respect to matters prior to Eritrea's accession to the Geneva Conventions of 1949, effective August 14, 2000, the international law applicable to this claim is customary international law, including customary international humanitarian law as exemplified by the relevant parts of the four Geneva Conventions of 1949.
2. Whenever either Party asserts that a particular relevant provision of those Conventions was not part of customary international law at the relevant time, the burden of proof will be on the asserting Party.
3. With respect to matters subsequent to August 14, 2000, the international law applicable to this claim is the relevant parts of the four Geneva Conventions of 1949, as well as customary international law. [...]

### **D. Findings of Liability for Violation of International Law**

The respondent is liable to the Claimant for the following violations of international law committed by its military personnel and by other officials of the State of Eritrea:

1. For refusing permission, from May 1998 until August 2000, for the ICRC to send delegates to visit all places where Ethiopian POWs were detained, to register those POWs, to interview them without witnesses, and to provide them with relief and services customarily provided;
2. For failing to protect Ethiopian POWs from being killed at capture or its immediate aftermath;
3. For permitting beatings or other physical abuse of Ethiopian POWs, which occurred frequently at capture or its immediate aftermath;
4. For depriving all Ethiopian POWs of footwear during long walks from the place of capture to the first place of detention;
5. For permitting its personnel to threaten and beat Ethiopian POWs during interrogations, which occurred frequently at capture or its immediate aftermath;
6. For the general confiscation of the personal property of Ethiopian POWs;

7. For permitting pervasive and continuous physical and mental abuse of Ethiopian POWs in its camps from May 1998 until August 2002;
8. For seriously endangering the health of Ethiopian POWs at the Embakala, Digdigta, Afabet and Nakfa camps by failing to provide adequate housing, sanitation, drinking water, bathing opportunities and food;
9. For failing to provide the standard of medical care required for Ethiopian POWs, and for failing to provide required preventive care by segregating prisoners with infectious diseases and conducting regular physical examinations, from May 1998 until August 2002;
10. For subjecting Ethiopian POWs to unlawful conditions of labor;
11. For permitting unnecessary suffering of POWs during transfer between camps; and
12. For failing to allow the Ethiopian POW in its camps to complain about their conditions and to seek redress, and frequently punishing POWs who attempted to complain.

### DISCUSSION

1.
  - a. Was the IHL of international armed conflicts applicable to the conflict between Eritrea and Ethiopia? Even though Eritrea was not a party to the Geneva Conventions? (GC I-IV, Art. 2)
  - b. Was Convention III applicable to that conflict even before 14 August 2000, the date of Eritrea's accession to the Geneva Conventions? Did at least Ethiopia, as a party to the Convention, have to respect it? (GC I-IV, Art. 2)
  - c. Why did Eritrea not succeed to Ethiopia as a party to the Geneva Conventions?
  - d. Are there specific criteria for assessing whether Convention III corresponds to customary international law? Why? Do you agree that the examples offered by Eritrea, mentioned in para. 29 of the Award, do not correspond to customary international law? What requirements of Convention III does the Commission find are not requirements of customary international law?
2.
  - a. What is the legal basis and purpose of the ICRC's right to visit POWs? Does such a right exist even in conflicts where the parties are represented by Protecting Powers? (GC III, Arts 10(3) and 126; CIHL, Rule 124)
  - b. Are procedural rules, mechanisms or institutions for implementation prescribed by treaties particularly unlikely to become part of customary international law? Is the ICRC's right to visit POWs such a procedural rule or mechanism of implementation? Why does it nevertheless correspond to customary international law? Is the Commission's conclusion on this issue based on an analysis of State practice? (GC III, Art. 126; CIHL, Rule 124)
  - c. What impact of ICRC visits upon respect for IHL is shown by the Commission's findings?
3. May persons be protected by both Convention I and III? In which circumstances? (GC I, Art. 14)
4. Is Article 121 of Convention III applicable to the killing of enemy soldiers at the time of capture? Immediately before capture? (GC III, Arts 4 and 13; P I, Art. 41)
5. Must the medical care required for POWs be provided according to one single standard or does the standard vary according to the general health standards and resources of the parties involved? In

this regard, are your thoughts in terms of housing, clothing, food, conditions of evacuation, working conditions or criminal proceedings similar to those in terms of medical care? (GC III, Arts 15, 20, 25, 26, 27, 30, 51, 82, 87, 102 and 105)

6. In which main fields has the Commission found that Eritrea violated IHL? Which of Ethiopia's claims were rejected? For reasons relating to the interpretation of Convention III? For reasons relating to the insufficient severity of the violations? Because the factual basis of those claims could not be established?
7. Is it lawful and appropriate for the Commission not to establish all the violations committed by the parties, but only serious violations? What are the reasons for such a limitation? What do those reasons indicate about Convention III?
8. What are the reasons for the ICRC's refusal to give its consent to the parties to provide the Commission access to its reports? Could the parties have provided those reports to the Commission despite the ICRC's refusal? On what basis do parties to an armed conflict have an obligation to respect the ICRC's confidentiality?

## **B. Prisoners of War, Eritrea's Claim 17**

[Source: Eritrea-Ethiopia Claims Commission, Partial Award, Prisoners of War, Eritrea's Claim 17 between the State of Eritrea and the Federal Democratic Republic of Ethiopia. The Hague, July 1, 2003. The Permanent Court of Arbitration, The Hague. Footnotes omitted. Full Awards available on [http://www.pca-cpa.org/showpage.asp?pag\\_id=1151](http://www.pca-cpa.org/showpage.asp?pag_id=1151)]

**ERITREA ETHIOPIA CLAIMS COMMISSION  
PARTIAL AWARD  
Prisoners of War  
Eritrea's Claim 17  
between  
The State of Eritrea  
and The Federal Democratic Republic of Ethiopia  
The Hague, July 1, 2003**

### **I. INTRODUCTION**

#### **A. Summary of the Positions of the Parties**

1. This Claim ("Eritrea's Claim 17"; "ERI 17") has been brought to the Commission by the Claimant, the State of Eritrea ("Eritrea"), pursuant to Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of December 12, 2000 ("the Agreement"). The Claim seeks a finding of the liability of the Respondent, the Federal Democratic Republic of Ethiopia ("Ethiopia"), for loss, damage and injury suffered by the Claimant as a result of the Respondent's alleged unlawful treatment of its Prisoners of War ("POWs") who were nationals of the Claimant. In its Statement of Claim, the Claimant requested monetary compensation, costs, and such other relief as is just and proper. In its Memorial, the Claimant requests

additional relief in the form of order: (a) that the Respondent cooperate with the International Committee of the Red Cross ("ICRC") in effecting an immediate release of all remaining POWs it holds; (b) that the Respondent return personal property of POWs confiscated by it; and (c) that the Respondent desist from displaying information and photographs of POWs to public view.

2. The Respondent asserts that it fully complied with international law in its treatment of POWs. The Respondent denies that the Commission has jurisdiction over claims relating to the repatriation of POWs and over several claims that it alleges were not filed by December 12, 2001, and consequently were extinguished by virtue of Article 5, paragraph 8, of the Agreement. The Respondent also objects to the Claimant's requests for the additional relief in the form of orders as inappropriate and unnecessary and, with respect to repatriation, as beyond the power of the Commission.

#### **B. Ethiopian POW Camps**

3. Ethiopia interned a total of approximately 2,600 Eritrean POWs between the start of the conflict in May 1998 and November 29, 2002, when all remaining Eritrean POWs registered by the ICRC were released.
4. Ethiopia utilized six permanent camps, some only briefly: Fiche, Bilate, Feres Mai, Mai Chew, Mai Kenetal and Dedessa. Ethiopia closed each camp upon transfer of the POWs to their next camp.

[...]

#### **C. General Comment by the Commission**

11. As the findings in this Award and in the related Award in Ethiopia's Claim 4 describe, there were significant difficulties in both Parties' performance of important legal obligations for the protection of POWs. Nevertheless, the Commission must record an important preliminary point that provides essential context for what follows. Based on the extensive evidence adduced during these proceedings, the Commission believes that both Parties had a commitment for the most fundamental principles bearing on prisoners of war. Both Parties conducted organized, official training programs to instruct their troops on procedures to be followed when POWs are taken. In contrast to many other contemporary armed conflicts, both Eritrea and Ethiopia regularly and consistently took POWs. Enemy personnel who were *hors de combat* were moved away from the battlefield to conditions of greater safety. Further, although these cases involve two of the poorest countries in the world, both made significant efforts to provide for the sustenance and care of the POWs in their custody.
12. There were deficiencies of performance on both sides, sometimes significant, occasionally grave. Nevertheless, the evidence in these cases shows that both Eritrea and Ethiopia endeavored to observe their fundamental humanitarian obligations to collect and protect enemy soldiers unable to resist on the

battlefield. The Awards in these cases, and the difficulties that they identify, must be read against this background. [...]

### III. JURISDICTION

#### A. Jurisdiction over Claims Arising Subsequent to December 12, 2000 [...]

20. It is beyond dispute that all the persons who are the subject of the present claims became POWs during the armed conflict that ended with the conclusion of the Agreement on December 12, 2000. The Commission believes that the timely release and repatriation of POWs is clearly among the types of measures associated with disengaging contending forces and ending the military confrontation between the two Parties that fall within the scope of its Decision No. 1. In that connection, international law and practice recognize the importance of the timely release and return of POWs, as demonstrated by Article 118 of Geneva Convention III which requires that such POWs “be released and repatriated without delay following the cessation of active hostilities.” [...]
22. The Commission finds unconvincing Ethiopia’s further arguments that Article 2 of the Agreement effectively replaced Article 118 of Geneva Convention III as the governing law and that the Commission could not exercise jurisdiction over Eritrea’s claim based on Article 118 without thereby deciding whether Ethiopia was in breach of its obligations under Article 2 of the Agreement. It frequently occurs in international law that a party finds itself subject to cumulative obligations arising independently from multiple sources. Article 2 itself recognizes that the relevant repatriation obligations are obligations “under international humanitarian law, including the 1949 Geneva Conventions....” Article 5 of the Agreement grants the Commission jurisdiction over all claims related to the conflict that result from violations of the 1949 Geneva Conventions or from other violations of international law. The Commission finds no basis in the text of either Article 2 or Article 5 for the conclusion that its jurisdiction over claims covered by Article 5 is repealed or impaired by the provisions of Article 2. Consequently, the Commission finds that it has jurisdiction over Eritrea’s claims concerning the repatriation of POWs. Nevertheless, in dealing with those claims, the Commission shall exercise care to avoid assuming or exercising jurisdiction over any claims concerning compliance with Article 2 of the Agreement.

### IV. THE MERITS

#### A. Applicable Law [...]

41. Consequently, the Commission holds that the law applicable to this Claim is customary international law, including customary international humanitarian law, as exemplified by the relevant parts of the four Geneva Conventions of 1949. The frequent invocation of provisions of Geneva Convention III by both Parties in support of their claims and defences is fully consistent with this holding. Whenever either Party asserts that a particular relevant provision of those

Conventions should not be considered part of customary international law at the relevant time, the Commission will decide that question, and the burden of proof will be on the asserting Party. [...]

### **C. Violations of the Law [...]**

#### **2. Mistreatment of POWs at Capture and its Immediate Aftermath [...]**

##### **a. Abusive Treatment**

59. The forty-eight Eritrean POW declarations recount a few disquieting instances of Ethiopian soldiers deliberately killing POWs following capture. Three declarants gave eyewitness accounts alleging that wounded comrades were shot and abandoned to speed up evacuation.
60. The Commission received no evidence that Ethiopian authorities conducted inquiries into any such battlefield events or pursued discipline as required under Article 121 of Geneva Convention III. However, several Eritrean POW declarants described occasions when Ethiopian soldiers threatened to kill Eritrean POWs at the front or during evacuation, but either restrained themselves or were stopped by their comrades. Ethiopia presented substantial evidence regarding the international humanitarian law training given to its troops. The accounts of capture and its immediate aftermath presented to the Commission in this Claim suggest that this training generally was effective in preventing unlawful killing, even “in the heat of the moment” after capture and surrender.
61. On balance, and without in any way condoning isolated incidents of unlawful killing by Ethiopian soldiers, the Commission finds that there is not sufficient corroborated evidence to find Ethiopia liable for frequent or recurring killing of Eritrean POWs at capture or its aftermath.
62. In contrast, Eritrea did present clear and convincing evidence, in the form of cumulative and reinforcing accounts in the Eritrean POW declarations, of frequent physical abuse of Eritrean POWs by their captors both at the front and during evacuation. A significant number of the declarants reported that Ethiopian troops threatened and beat Eritrean prisoners, sometimes brutally and sometimes inflicting blows directly to wounds. In some cases, Ethiopian soldiers deliberately subjected Eritrean POWs to verbal and physical abuse, including beating and stoning from civilian crowds in the course of transit.
63. This evidence of frequent beatings and other unlawful physical abuse of Eritrean POWs at capture or shortly after capture is clear, convincing and essentially un rebutted. Although the Commission has no evidence that Ethiopia encouraged its soldiers to abuse POWs at capture, the conclusion is unavoidable that, at a minimum, Ethiopia failed to take effective measures, as required by international law, to prevent such abuse. Consequently, Ethiopia is liable for that failure.

**b. Medical Care Immediately After Capture**

64. The Commission turns next to Eritrea's allegations that Ethiopia failed to provide necessary medical attention to Eritrean POWs after capture and during evacuation, as required under customary law as reflected in Geneva Conventions I (Article 12) and III (Articles 20 and 15). Some fourteen of the Eritrean declarants testified that their wounds or their comrades' wounds were not bandaged at the front or cleaned in the first days and weeks after capture, in at least one case apparently leading to death after a transit journey. In rebuttal, Ethiopia offered evidence that its soldiers carried bandages and had been trained to wrap wounds to stop bleeding, but not to wash wounds immediately at the front because of the scarcity of both water and time.
65. The Commission believes that the requirement to provide POWs with medical care during the initial period after capture must be assessed in light of the harsh conditions on the battlefield and the limited extent of medical training and equipment available to front line troops. On balance, and recognizing the logistical and resource limitations on the medical care Ethiopia could provide at the front, the evidence indicates that, on the whole, Ethiopian forces gave wounded Eritrean soldiers basic first aid treatment upon capture. Hence, Ethiopia is not liable for this alleged violation.

**c. Evacuation Conditions [...]**

68. On balance, and with one exception, the Commission finds that Ethiopian troops satisfied the legal requirements for evacuations from the battlefield under the harsh geographic, military and logistical circumstances. The exception is the frequent, but not invariable, Ethiopian practice of seizing footwear, testified to by several declarants. Although the harshness of the terrain and weather on the marches to the camps may have been out of Ethiopia's control, to force the POWs to walk barefoot in such conditions unnecessarily compounded their misery. Although Ethiopia suggested, in the context of transit camps, that it is permissible to restrict shoes to prevent escape, the ICRC Commentary is to the contrary, and Ethiopia has claimed against Eritrea for the same offense. The Commission finds Ethiopia liable for inhumane treatment during evacuations from the battlefield as a result of its forcing Eritrean POWs to go without footwear during evacuation marches. [...]

**d. Coercive Interrogation**

70. Eritrea alleges frequent abuse in Ethiopia's interrogation of POWs, commencing at capture and evacuation. International law does not prohibit the interrogation of POWs, but it does restrict the information they are obliged to reveal and prohibits torture or other measures of coercion, including threats and "unpleasant or disadvantageous treatment of any kind."
71. However, only a very small number of Eritrean declarants testified that they were beaten or seriously threatened during interrogation. Without condoning

any isolated incidents of abuse, the Commission finds that the evidence was insufficient to show a pattern of coercive interrogation of POWs at capture or thereafter.

### **3. Taking of the Personal Property of POWs**

72. Eritrea alleges widespread confiscation by Ethiopian soldiers of POWs' money and other valuables, and of photographs and identity cards, either at the time of capture or thereafter. Eritrea accordingly asked the Commission to "order the return of all irreplaceable personal property to Eritrean POWs that was confiscated by Ethiopia ..., and in particular that Ethiopia return identity documents and personal photographs displayed on the Internet." [...]
76. Weighing the conflicting evidence, the Commission finds that it shows that personal property frequently was taken from Eritrean prisoners by Ethiopian military personnel, without receipts or any hope of return, all contrary to Articles 17 and 18 of Geneva Convention III. Sometimes this occurred at the front soon after capture, where such thefts have been all too common during war as the independent actions of rapacious individuals. However, the Commission is troubled by evidence of taking of personal property at transit facilities and after arrival at permanent camps and by evidence that property for which receipts were given was not returned or was partly or fully "lost." The conflicting evidence obviously cannot be fully reconciled.
77. The Commission concludes that Ethiopia made efforts to protect the rights of POWs to their personal property, but that these efforts fell short in practice of what was necessary to ensure compliance with the relevant requirements of Geneva Convention III. Consequently, Ethiopia is liable to Eritrea for the resulting losses suffered by Eritrean POWs. [...]

### **4. Physical and Mental abuse of POWs in Camps [...]**

81. Even if one were to give full credibility to the evidence submitted by Eritrea, the evidence as a whole indicates that the Ethiopian POW camps were not characterized by a high level of physical abuse by the guards. The evidence does suggest that there were some incidents of beating and that disciplinary punishments were sometimes imposed contrary to Article 96 of Geneva Convention III in that they were decided by Ethiopian guards, rather than by camp commanders or officers to whom appropriate authority had been delegated or that the accused had been denied the benefit of the rights granted by that Article. The disciplinary punishments themselves appear to have been a mixture of clearly legitimate punishments, such as solitary confinement of less than one month and fatigue duties, such as digging, unloading cargo at the camp or carrying water to the camp, along with punishments of questionable legality, such as running, crawling and rolling on the ground. Moreover, there are allegations that some penalties, such as running, crawling or rolling on the ground in the hot sun, even if they could properly be considered fatigue duties,



which seem doubtful, were painful and exceeded the limits permitted by Article 89 of Geneva Convention III. That Article permits fatigue duties not exceeding two hours daily as disciplinary punishments of POWs other than officers, but fatigue duties, as well as the other authorized punishments, become unlawful if they are “inhuman, brutal or dangerous to the health” of the POWs. The Commission lacks sufficient evidence to determine whether the punishments actually imposed upon Eritrean POWs violated that standard. [...]

82. [...] Considering all relevant evidence, the Commission holds that the Claimant has failed to prove by clear and convincing evidence that Ethiopia’s POW camps, despite the likely inconsistencies, noted above, with the requirements of Articles 89 and 96 of the Convention, were administered in such a way as to give rise to liability for frequent or pervasive physical abuse of POWs. [...]
84. Regrettably, the Commission’s finding regarding physical abuse does not apply as well to mental abuse. Ethiopia admits that its camps were organized in a manner that resulted in the segregation of various groups of POWs from each other. It is acknowledged that POWs who had been in the armed forces during the much earlier fighting against the Derg were kept isolated from POWs who began their military service later, and there is some evidence that other groups were also segregated depending upon the years in which the POWs began their military service. Such segregation is contrary to Article 22 of Geneva Convention III, which states that “prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.” Ethiopia argues that this segregation was done to reduce hostility between the groups, but the Commission finds that argument unpersuasive. It seems far more likely that these actions were taken to promote defections of POWs and to break down any sense of internal discipline and cohesion among the POWs.
85. In that connection, the Commission notes that Ethiopia conducted extensive indoctrination programs for the various groups of POWs in Bilate, Mai Chew, Mai Kenetal and Dedessa and encouraged the discussion among groups of POWs of questions raised in these programs, including the responsibility for starting the war and the nature of the Eritrean Government. While Ethiopia asserts that attendance at these indoctrination and discussion sessions was not compulsory, there is considerable evidence that, except for sick or wounded POWs, attendance was effectively made compulsory by Ethiopia, contrary to Article 38 of Geneva Convention III. Moreover, there is substantial evidence that POWs were sometimes put under considerable pressure to engage in self-criticism during the discussion sessions. While there are some allegations that those POWs who made statements that appealed to the Ethiopian authorities were subsequently accorded more favorable treatment than those who refused to make such statements, the Commission does not find sufficient evidence to prove such a violation of the fundamental requirement of Article 16 of Geneva Convention III that all POWs must be treated alike, “without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction

founded on similar criteria.” Nevertheless, the Commission notes with concern the evidence of mental and emotional distress felt by many Eritrean POWs and concludes that such distress was caused in substantial part by these actions by Ethiopia in violation of Articles 22 and 38 of the Convention.

86. Consequently, Ethiopia is liable for the mental and emotional distress caused to Eritrean POWs who were subjected to programs of enforced indoctrination from the date of the first indoctrination sessions at the Bilate camp in July 1998 until the release and repatriation of the last POWs in November 2002. The evidence indicates that this group includes essentially all of the POWs held by Ethiopia at the four named camps, except for those unable to attend the indoctrination sessions due to their medical conditions.

## **5. Unhealthy Conditions in Camps [...]**

### **c. Analysis of Health-Related Conditions at Each of Ethiopia's POW Camps**

92. While there is certainly some disturbing testimony to support Eritrea's claim that Ethiopia's northern, short term POW camps at Feres Mai and Mai Chew were in serious violation of one or more basic health standards, the Commission finds the evidence relating to these camps insufficient to justify a finding that conditions there seriously endangered the health of POWs.
93. Mai Kenetal presents a different picture. Its commander testified in writing that the site for the camp was selected because it was close to an arterial road linking the camp to Mekele and Addis Ababa to the south, and because the location included a number of administrative buildings which had been vacated by the Mai Kenetal wereda government. Despite these advantages, two circumstances combined to impose great difficulties on the camp's administrators: first, Mai Kenetal was put into operation at the onset of the winter season in Northern Ethiopia – a three-month period characterized, at times, by torrential rains, high winds and cold temperatures; second, in May 2000, Ethiopia launched a major offensive which produced, quite rapidly, an unanticipated camp population of around 2,000 POWs – a development which strained the resources of the camp during difficult climatic conditions. [...]
95. Nearly all POWs who were not wounded were housed in tents, of varying size, made up of plastic sheeting propped up by wooden poles. It is undisputed that there was no flooring; that prisoners slept on the damp ground; that prisoners were provided with only one or two blankets; that the plastic tents were inadequate to keep out the rain; that some tents blew down in the high winds; that during much of the time these quarters were quite cold and damp and even muddy; and, that they were seriously overcrowded. [...]
97. At least twenty POWs testified regarding unsanitary toilet conditions. These facilities consisted of holes dug in the ground and covered by sheets of wood with holes cut into them, and sheltered from the rains by plastic tenting. The holes regularly became filled with rain water and mud, and there is also cumulative

testimony that the ground under many of the toilet tents became muddy and contaminated and that these conditions exacerbated the hardships suffered by those POWs who lacked shoes. At least ten POWs testified that flooded toilets affected their conditions of shelter. [...]

99. There is little dispute about the content of the diet offered at Mai Kenetal. It consisted of bread and tea in the morning and bread and lentils for lunch and dinner. Overwhelmingly, the thirty-eight POWs who testified about conditions at Mai Kenetal complained about the inadequacy of this diet. Many say they were in a state of constant hunger. Many assert this diet produced serious malnutrition, which, combined with other conditions, facilitated contagious diseases, notably tuberculosis. Nearly all of the thirty- eight POWs also claim that the medical facilities provided were inadequate in terms of qualified personnel, medical supplies and other resources necessary to treat the many sick or wounded POWs at Mai Kenetal. While complaints regarding food and medical care were regularly levelled at the administration of all camps by POWs from both sides, it does appear from considerable cumulative testimony that there was serious hunger and sickness at Mai Kenetal. For example, at least twenty POWs claimed that they suffered from diarrhea. Many others complained that tuberculosis became widespread and that POWs suffering from this disease were housed in the overcrowded tents rather than isolated in facilities set up for medical care of that disease.
100. Ethiopia made extensive efforts to discredit and rebut this evidence, [...]. [...] They testified that clothing in the form of coveralls, as well as shoes and a mat and two blankets, were issued to each POW. They assert that drinking water was at first piped from the wells at Mai Kenetal village into the camp, but then the new wells were dug at the camp, and that the water from these wells – despite some complaints by POWs – was chlorinated, potable and plentiful. They also assert that showers were available for bathing. Each of these officers further stated that ICRC teams regularly visited the camps and made no serious complaints about its conditions. The Commission notes that this is a specific instance where access to the relevant ICRC reports would have been very helpful.
101. It is clear that these officers were aware of their duties, and the Commission may assume they did their best to maintain the health of the POWs under difficult circumstances. Much of their testimony can be credited if one assumes, as the evidence justifies, that the steps taken to improve the conditions of the POWs came towards the end of the relatively brief period in which the camp was in operation. But the cumulative, reinforcing, detailed testimony of so many POWs persuades the Commission that, despite the efforts of the camp's staff, a combination of serious, sub-standard health conditions did exist at Mai Kenetal for some time, that these conditions seriously and adversely affected the health of some POWs there and endangered the health of others, and that this situation constituted a violation of customary international law. [...]
105. Nearly all of the Eritrean prisoners were ultimately interned at Dedessa. This camp had originally been constructed during the Derg era as a military training

base. It was put into operation as a POW camp in June 1999 and remained so until all prisoners were finally repatriated in November 2002. There are thirty-eight declarations describing health-related conditions at this camp. While some allege serious deficiencies regarding sanitation, shelter and lack of shoes, these complaints are contradicted or mitigated by the testimony of others. Weighing the evidence, the Commission finds insufficient evidence to support a finding that the camp was in serious violation of health-related standards. Evidence regarding the food provided at Dedessa is discussed in the context of Eritrea's general claim regarding the insufficiency of the diet provided to prisoners during their entire captivity.

**d. *Eritrea's General Claim Regarding the Insufficiency of the Food Provided to Eritrean POWs During the Entire Period of their Captivity***

106. In its Statement of Claim and Memorial, Eritrea appears to claim that, throughout their captivity, Eritrean POWs were provided food which was insufficient in "quantity, quality, and variety to keep them in good health and prevent loss of weight." This claim does not require a finding that the food provided by every internment camp was so inadequate in quantity or quality and variety that the health of POWs in each camp was endangered. Rather, the task of the Commission is to determine whether there is clear and convincing evidence that the food provided at all camps was such that, over time, the health of some POWs came to be seriously endangered because of an insufficiency of food in quantity, quality or variety. [...]
114. In conclusion, the Commission holds, first, that the health standards at the POW camp at Mai Kenetal seriously and adversely affected the health of a number of the POWs there and endangered the health of others in violation of applicable international humanitarian law; and second, that the food provided by Ethiopia to POWs at all camps prior to December 2000 was sufficiently deficient in needed nutrition, over time, as to endanger seriously the health of Eritrean POWs in violation of applicable international humanitarian law. Consequently, Ethiopia is liable for the unlawful health standards at Mai Kenetal and, prior to December 2000, for providing food so inadequate in nutrition that, over time, it seriously endangered the health of all Eritrean POWs.

**6. Inadequate Medical Care in Camps [...]**

**c. *The Commission's Conclusions***

128. Despite the substantial amount of evidence and hearing time devoted to medical care in Eritrea's claim, the Commission had difficulty in determining the availability and quality of medical care in the Ethiopian POW camps. Focusing on specifics did not prove necessarily helpful. For example, the evidence of psychological/psychiatric problems does not prove that Ethiopia failed to provide appropriate care; lengthy captivity can be psychologically very disturbing, and psychological care after repatriation is frequently indicated. The discussion of

sympathetic ophthalmia was clearly very narrow. The hospital records submitted by Ethiopia do not establish that all POWs in need of specialized treatment were, in fact, referred to hospitals, but only that some were. Although a few Eritrean declarants complained about insufficient medical staffing, other evidence showed that camp infirmaries were staffed by one or more medical doctors and paramedics; a detained Eritrean doctor was involved in caring for the Eritrean POWs. [...]

130. First, in response to questioning, Ethiopia indicated that, to the best of its knowledge, twenty Eritrean POWs died while in captivity in Ethiopia. The Eritrean POW declarants frequently allege, especially with regard to Mai Kenetal (the seriously inadequate conditions of which the Commission discusses above), that deaths resulted from lack of medical attention. As regrettable as each and every death is, the Commission finds that a death ratio of less than one percent – in a total population of some 2,600 POWs, many seriously wounded – does not in itself indicate substandard medical care.
131. Second, the Commission was struck by the detailed testimony of the Eritrean doctors who examined the Eritrean POWs repatriated after hostilities ended in December 2000. They were of the firm opinion that these wounded and sick POWs could not have received required medical care. They testified that, of the 359 POWs they examined, twenty-two had tuberculosis – a very high ratio. They also testified that the POWs showed signs of malnutrition, which had adversely affected their health, contributed to the development of tuberculosis and scurvy, and left many unready for necessary surgery until they could put on weight. The doctors also found that nearly one-half of the POWs they examined had fractures that had not been properly treated, evidenced by non-union or mal-union of the bones. Although Ethiopia responded that fractures sometimes could not heal properly for reasons beyond its control, for example, because of unavoidable delays in evacuation, the Eritrean doctors countered that many of the post-repatriation orthopedic operations have been successful; if those operations had been done earlier, while the patients were in Ethiopia's custody, they could have been even more successful.
132. Finally, preventive care is a matter of particular concern to the Commission. As evidenced by their prominence in Geneva Convention III, regular medical examinations of all POWs are vital to maintaining good health in a closed environment where diseases are easily spread. The Commission considers monthly examinations of the camp population to be a preventive measure forming part of the Detaining Power's obligations under international customary law.
133. The Commission must conclude that Ethiopia failed to take several important preventive care measures specifically mandated by international law. In assessing this issue, the Commission looked not just to Eritrea but also to Ethiopia, which administered the camps and had the best knowledge of its own practices. [...]

136. In conclusion, on the basis of clear and convincing evidence, including the essentially un rebutted evidence of the prevalence of malnutrition, tuberculosis and improperly treated fractures and the absence of required preventive care, the Commission finds that Ethiopia failed to provide Eritrean POWs with the required minimum standard of medical care prior to December 2000. Consequently, Ethiopia is liable for this violation of customary international law.
137. In comparison, Eritrea has failed to prove that the medical care provided to Eritrean POWs after December 2000 was less than required by applicable law. In response to Eritrea's allegations, Ethiopia submitted considerable rebuttal evidence of the increased medical care it provided at Mai Kenetal and Dedessa from December 2000 through repatriation of the remaining POWs in November 2002. The evidence indicated that approximately forty medical personnel staffed the Mai Kenetal clinic and that some POW patients were taken to a local hospital. The evidence also indicated that POWs with tuberculosis or other contagious diseases were isolated at Mai Kenetal and Dedessa and that, contrary to Eritrea's allegation, medical equipment was sterilized before each use. With respect to medical care at Dedessa, Ethiopia presented medical records rebutting the specific complaints made in a number of the Eritrean declarations.
138. In closing, the Commission notes its recognition that Eritrea and Ethiopia cannot, at least at present, be required to have the same standards for medical treatment as developed countries. However, scarcity of finances and infrastructure cannot excuse a failure to grant the minimum standard of medical care required by international humanitarian law. The cost of such care is not, in any event, substantial in comparison with the other costs imposed by the armed conflict.

## **7. Unlawful Assault on Female POWs**

139. Eritrea brings a discrete claim for the alleged unlawful assault of female POWs, alleging in its Statement of Claim that Ethiopian soldiers raped female POWs and, in one case, raped and killed a female prisoner at Sheshebit on the Western Front. The Parties agree that Article 14 of Geneva Convention III, which provides that POWs are "entitled in all circumstances to respect for their person and their honour" and that women "shall be treated with all the regard due to their sex," prohibits sexual assault of female POWs. [...]
141. The Commission finds that Eritrea has not presented clear and convincing evidence of rape, killing or other assault aimed at female POWs. Given the small number of female Eritrean POWs, the Commission has not looked for systematic or widespread abuse of women. The fact remains, however, that not one of the female Eritrean declarants stated explicitly or – more importantly, given the sensitivities – even implicitly that she was sexually assaulted, or that any other female prisoner she knew was assaulted. Some male Eritrean declarants described occasional or frequent screaming from the women's quarters, but did not (and perhaps could not) observe Ethiopian guards entering or leaving. Several declarants described abuse of women that, although serious in its own right,

was unrelated to their gender. Eritrea failed to submit evidence documenting the one rape and murder alleged in the Statement of Claim. Ethiopia defended these claims, in large part, by presenting detailed evidence that there were separate quarters for women in the camps, which were inspected only by senior camp officials in pairs.

142. Accordingly, and without in any way undermining its recognition of the particular vulnerability of female POWs, the Commission does not find Ethiopia liable for breaching customary international law obligations to protect the person and honour of female Eritrean POWs.

#### **8. Delayed Repatriation of POWs**

143. The Commission has determined in this Award that Eritrea's claims regarding the timely release and repatriation of POWs are within its jurisdiction under the Agreement and Commission Decision No. 1.
144. In its Statement of Claim, Eritrea alleged that Ethiopia failed to release and repatriate POWs without delay after December 12, 2000. In its Memorial, Eritrea asked the Commission to "order Ethiopia to cooperate with the International Committee of the Red Cross in effecting an immediate release and repatriation of all POWs...." However, on November 29, 2002, shortly before the hearing in this claim, Ethiopia released all POWs registered by the ICRC remaining in its custody. While some chose to remain in Ethiopia for family or other reasons, 1,287 returned to Eritrea. During the hearing, counsel for Eritrea expressed Eritrea's great pleasure at this action. The Commission too welcomes this important and positive step by Ethiopia, which rendered moot Eritrea's request for an order regarding repatriation. Nevertheless, Eritrea's claim that Ethiopia failed to repatriate the POWs it held as promptly as required by law remains.
145. As noted above, Eritrea acceded to the four Geneva Conventions of 1949 effective August 14, 2000, so they were in force between the Parties after that date. Article 118 of Geneva Convention III states that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities". The Parties concluded an Agreement on the Cessation of Hostilities on June 18, 2000. However, the Commission received no evidence regarding implementation of that agreement and could not assess whether it marked an end to active hostilities sufficiently definitive for purposes of Article 118.
146. By contrast, Article 1 of the December 12, 2000, Agreement states that "[t]he parties shall permanently terminate military hostilities between themselves." Given the terms of this Agreement and the ensuing evolution of the Parties' relationship, including the establishment and work of this Commission, the Commission concludes that as of December 12, 2000, hostilities ceased and the Article 118 obligation to repatriate "without delay" came into operation.
147. Applying this obligation raises some issues that were not thoroughly addressed during the proceedings, in part because Eritrea focused on the return of POWs still detained, which was mooted on the eve of the hearing, while Ethiopia



consistently relied on the argument that these claims were outside the Commission's jurisdiction, a defense that the Commission has now rejected. Nevertheless, given their everyday meaning and the humanitarian object and purpose of Geneva Convention III, these words indicate that repatriation should occur at an early time and without unreasonable or unjustifiable restrictions or delays. At the same time, repatriation cannot be instantaneous. Preparing and coordinating adequate arrangements for safe and orderly movement and reception, especially of sick or wounded prisoners, may be time-consuming. Further, there must be adequate procedures to ensure that individuals are not repatriated against their will.

148. There is also a fundamental question whether and to what extent each Party's obligation to repatriate depends upon the other's compliance with its repatriation obligations. The language of Article 118 is absolute. Nevertheless, as a practical matter, and as indicated by state practice, any state that has not been totally defeated is unlikely to release all the POWs it holds without assurance that its own personnel held by its enemy will also be released, and it is unreasonable to expect otherwise. At the hearing, distinguished counsel for Eritrea suggested that the obligation to repatriate should be seen as unconditional but acknowledged the difficulty of the question and the contrary arguments under general law.
149. The Commission finds that, given the character of the repatriation obligation and state practice, it is appropriate to consider the behavior of both Parties in assessing whether or when Ethiopia failed to meet its obligations under Article 118. In the Commission's view, Article 118 does not require precisely equivalent behavior by each Party. However, it is proper to expect that each Party's conduct with respect to the repatriation of POWs will be reasonable and broadly commensurate with the conduct of the other. Moreover, both Parties must continue to strive to ensure compliance with the basic objective of Article 118 – the release and repatriation of POWs as promptly as possible following the cessation of active hostilities. Neither Party may unilaterally abandon the release and repatriation process or refuse to work in good faith with the ICRC to resolve any impediments.
150. The Parties submitted limited evidence regarding this claim, a fact that complicates some key judgements by the Commission. As noted, until the eve of the hearing, Eritrea's emphasis was on the release of POWs still being held, while Ethiopia argued that the whole matter was outside the jurisdiction of the Commission. [...] [T]he Parties, acting with the assistance of the ICRC, began a substantial process of repatriation in both directions promptly after December 12, 2000. Between December 2000 and March 2001, Ethiopia repatriated 855 Eritrean POWs, 38 percent of the total number it eventually repatriated. Eritrea repatriated a smaller number of Ethiopian POWs (628), but they constituted 65 percent of the total eventually repatriated by Eritrea.
151. After March 2001, the process halted for a substantial period. It then resumed in October 2001 with two small repatriations by each Party. Eritrea repatriated all remaining Ethiopian POWs in August 2002. This was followed by the November



2002 Ethiopian repatriation noted above. (The only repatriation of POWs prior to December 2000 was in August 1998 when Eritrea repatriated seventy sick or wounded POWs to Ethiopia.) [...]

153. The record is unclear regarding the circumstances of the interruption and eventual resumption of repatriations. The record includes an August 3, 2001, press report that the Ethiopian Ministry of Foreign Affairs had stated that Ethiopia was suspending the exchange of POWs with Eritrea until Eritrea clarified the situation of an Ethiopian pilot and thirty-six militia and police officers who it understood had been captured by Eritrea in 1998, but whose names were not included in the lists of POWs held by Eritrea that it had received from the ICRC. Eritrea responded that it would also halt further repatriation of Ethiopian POWs but that it was willing to resume repatriations when Ethiopia did so. [...] [T]here were several small repatriations of POWs in October and November 2001 and in February 2002, but it seems clear that the repatriation of the bulk of the remaining POWs was held up for twelve months or more by a dispute over the accounting for these missing persons or other matters not in the record before this Commission.
154. There was conflicting evidence regarding the details of the pilot's capture, but it was common ground that he had been captured and made a POW. The Commission received no direct evidence concerning his fate. Eritrea's Memorial states that "Ethiopia was repeatedly informed about the death of the individual in question by the facilitators in the peace process." The Memorial does not indicate when Eritrea believes that may have occurred, nor does it provide evidence that it, in fact, did occur. Ethiopia's Counter-Memorial does not respond to that statement or directly address the fate of the pilot and other personnel. Neither Party offered documentary or testimonial evidence on this point.
155. Communications between the Parties concerning the delay in repatriations were presumably transmitted through the ICRC but, unfortunately, they have not been made available to the Commission. However, press reports in the record suggest that, at some point, the dispute may have been narrowed to the missing pilot. In particular, documents introduced by Eritrea indicate that, on May 8, 2002, Professor Jacques Forster, Vice President of the ICRC, stated at a press conference at the end of a visit in Ethiopia that the ICRC was concerned by a "slowdown on the part of both countries" in the repatriation of POWs. However, as of that time, in the ICRC's view, "Ethiopia was not in violation of the four Geneva Conventions by failing to repatriate POWs."
156. On July 16, 2002, the Prime Minister of Ethiopia confirmed in a press conference that the "stumbling block" to the completion of the exchange of POWs was the lack of response by Eritrea to what happened to the pilot. The next month, the dispute was evidently resolved. An ICRC press release, dated August 23, 2002, states the following:

Geneva (ICRC) – The President of the International Committee of the Red Cross (ICRC) Mr Jakob Kellenberger, has today completed his first visit to

the region since the end of the international armed conflict between the two countries in 2000.

During his official visits to Eritrea and Ethiopia, Mr Kellenberger met Eritrean President Isaias Afewerki in Asmara on 20 August, and Ethiopian President Girma Wolde Georgis and Prime Minister Meles Zenawi in Addis Ababa on 22 August.

The ICRC President's main objective in both capitals was to ensure the release and repatriation of all remaining Prisoners of War (POWs) in accordance with the Third Geneva Convention and the peace agreement signed in Algiers on 12 December 2000.

During his meeting with Eritrean President Isaias Afewerki, Mr Kellenberger took note of Mr Afewerki's commitment to release and repatriate the Ethiopian POWs held in Eritrea. The release and repatriation of the POWs, registered and visited by the ICRC, will take place next week.

During his meeting with Mr Kellenberger, Ethiopian Prime Minister Meles Zenawi expressed his government's commitment to release and repatriate the Eritrean POWs held in Ethiopia and other persons interned as a result of the conflict. Release and repatriation will take place upon completion of internal procedures to be worked out with the ICRC.

In both capitals, Mr Kellenberger reiterated the ICRC's strong commitment to helping resolve all remaining issues related to persons captured or allegedly captured during the conflict.

The ICRC welcomes the decisive steps taken towards the prompt return of the POWs to their home country and to their families, and looks forward to facilitating the release and repatriation they have been so anxiously awaiting for close to eighteen months.

157. While Eritrea promptly released and repatriated its remaining POWs in late August 2002, Ethiopia waited three months, until November 29, 2002, to release the remainder of its POWs and to repatriate those desiring repatriation. This three-month delay was not explained.
158. In these circumstances, the Commission concludes that Ethiopia did not meet its obligation promptly to repatriate the POWs it held, as required by law. However, the problem remains to determine the date on which this failure of compliance began, an issue on which Eritrea has the burden of proof. Eritrea did not clearly explain the specific point at which it regarded Ethiopia as having first violated its repatriation obligation, and Ethiopia did not join the issue, in both cases for reasons previously explained. The lack of discussion by the Parties has complicated the Commission's present task.
159. Eritrea apparently dates the breach from Ethiopia's decision in August 2001 to suspend further repatriation of POWs until Eritrea clarified the fate of a few persons who Ethiopia believed to have been captured by Eritrea in 1998 but

who were not listed among POWs held by Eritrea. Eritrea argues that concerns about the fate of a relatively few missing persons cannot justify delaying for a year or more the release and repatriation of nearly 1,300 POWs. It also asserts that Ethiopia's suspension of POW exchanges cannot be justified as a non-forcible counter-measure under the law of state responsibility because, as Article 50 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts emphasizes, such measures may not affect "obligations for the protection of fundamental human rights," or "obligations of a humanitarian character prohibiting reprisals." Likewise, Eritrea points out that this conduct cannot be a permitted reprisal under the law of armed conflict; Article 13 of Geneva Convention III emphasises that "measures of reprisal against prisoners of war are prohibited." As noted, Ethiopia defended this claim on jurisdictional grounds and consequently has not responded to these legal arguments.

160. Eritrea's arguments are well founded in law. Nevertheless, they are not sufficient to establish that Ethiopia violated its repatriation obligation as of August 2001. In particular, the Commission is not prepared to conclude that Ethiopia violated its obligation under Article 118 of Geneva Convention III by suspending temporarily further repatriations pending a response to a seemingly reasonable request for clarification of the fate of a number of missing combatants it believed captured by Eritrea who were not listed as POWs. Eritrea presented no evidence indicating that it sought to respond to these requests, or to establish that they were unreasonable or inappropriate.
161. In this connection, the Commission must give careful attention and appropriate weight to the position of the ICRC. As noted above, ICRC Vice-President Forster stated in May 2002 that, as of that time, the ICRC did not regard Ethiopia as being in breach of its repatriation obligation. Eritrea did not address that statement. The ICRC's conclusion is particularly worthy of respect because the ICRC was in communication with both Parties and apparently had been the channel for communications between them on POW matters. Consequently, the ICRC presumably had a much fuller appreciation of the reasons for the delay in repatriations than is provided by the limited record before the Commission.
162. While the length of time apparently required to resolve this matter is certainly troubling, on the record before it the Commission is not in a position to disagree with the conclusion of the ICRC or to conclude that Ethiopia alone was responsible for the long delay in the repatriations that ended when Eritrea repatriated its remaining Ethiopian POWs in August 2002. Consequently, the claim that Ethiopia violated its repatriation obligation under Article 118 of Geneva Convention III by suspending repatriation of POWs in August 2001 must be dismissed for failure of proof.
163. However, in view of the ICRC press release of August 23, 2002, and the repatriation of all remaining Ethiopian POWs in that same month, the Commission sees no legal justification for the continued prolonged detention by Ethiopia of the remaining Eritrean POWs. Ethiopia waited until November 29, 2002, to release

and repatriate the remaining Eritrean POWs. Ethiopia has not explained this further delay, and the Commission sees no justification for its length. While several weeks might understandably have been needed to make the necessary arrangements with the ICRC and, in particular, to verify that those who refused to be repatriated made their decision freely, the Commission estimates that this process should not have been required more than three weeks at the most. Consequently, the Commission holds that Ethiopia violated its obligations under Article 118 of Geneva Convention III by failing to repatriate 1,287 POWs by September 13, 2002, and that it is responsible to Eritrea for the resulting delay of seventy-seven days.

## **V. AWARD**

In view of the foregoing, the Commission determines as follows:

[...]

### **B. Applicable Law**

1. With respect to matters prior to Eritrea's accession to the Geneva Conventions of 1949 on August 14, 2000, the international law applicable to this claim is customary international law, including customary international humanitarian law as exemplified by relevant parts of the four Geneva Conventions of 1949.
2. Whenever either Party asserts that a particular relevant provision of those Conventions was not part of customary international law at the relevant time, the burden of proof will be on the asserting Party.
3. With respect to matters subsequent to August 14, 2000, the international humanitarian law applicable to this claim is relevant parts of the four Geneva Conventions of 1949, as well as customary international law. [...]

### **D. Findings of Liability for Violation of International Law**

The Respondent is liable to the Claimant for the following violations of international law committed by its military personnel and by other officials of the State of Ethiopia:

1. For failing to take effective measures to prevent incidents of beating or other unlawful abuse of Eritrean POWs at capture or its immediate aftermath;
2. For frequently depriving Eritrean POWs of footwear during long walks from the place of capture to the first place of detention;
3. For failing to protect the personal property of Eritrean POWs;
4. For subjecting Eritrean POWs to enforced indoctrination from July 1998 to November 2002 in the camps at Bilate, Mai Chew, Mai Kenetal and Dedessa;
5. For permitting health conditions at Mai Kenetal to be such as seriously and adversely to affect or endanger the health of the Eritrean POWs confined there;

6. For providing all Eritrean POWs prior to December 2000 a diet that was seriously deficient in nutrition;
7. For failing to provide the standard of medical care required for Eritrean POWs, particularly at Mai Kenetal, and for failing to provide required preventive care by segregating from the outset prisoners with infectious diseases and by conducting regular physical examinations, from May 1998 until December 2000; and
8. For delaying the repatriation of 1,287 Eritrean POWs in 2002 for seventy-seven days longer than was reasonably required. [...]

### DISCUSSION

1.
  - a. Was the IHL of international armed conflicts applicable to the conflict between Eritrea and Ethiopia?
  - b. Was Convention III applicable to that conflict even before 14 August 2000, the date of Eritrea's accession to the Geneva Conventions? Did at least Ethiopia, as a party to the Convention, have to respect it? (GC I-IV, Art. 2)
2. In which main fields has the Commission found that Ethiopia violated IHL? Which of Eritrea's claims were rejected? For reasons relating to the interpretation of Convention III? For reasons relating to the insufficient severity of the violations? Because the factual basis of those claims could not be established?
3.
  - a. Must the medical care required for POWs be provided according to one single standard or does the standard vary according to the general health standards and resources of the parties involved? In this regard, are your thoughts in terms of housing, clothing, food, conditions of evacuation, working conditions or criminal proceedings similar to those in terms of medical care? (GC III, Arts 15, 20, 25, 26, 27, 30, 51, 82, 87, 102 and 105)
  - b. What do you think of the Commission's statement in para. 138 that "scarcity of finances and infrastructure cannot excuse a failure to grant the minimum standard of medical care required by international humanitarian law. The cost of such care is not, in any event, substantial in comparison with the other costs imposed by the armed conflict"?
4.
  - a. When should Ethiopia have repatriated all Eritrean POWs? According to the Commission? According to Art. 118 of Convention III?
  - b. When do active hostilities cease, making the repatriation of POWs compulsory under Art. 118 of Convention III? Is a cease-fire agreement sufficient? Must it actually be implemented? What if hostilities cease without an agreement?
  - c. Do you agree with the findings of the Commission in paras 145 and 160? Are they compatible with the wording of Art. 118 of Convention III? Has "state practice" (the Commission refers to it in para. 148) modified the sense of Art. 118? Does the Commission consider that repatriations may be lawfully suspended if the enemy fails to comply with its repatriation obligations? Is that compatible with Art. 13 of Convention III? Justified under the law of treaties? (See Art. 60 of the Vienna Convention on the Law of Treaties, quotation above in Part I, Chapter 13. IX. 2 c) dd)) May this be justified under the law of State responsibility [See **Case No. 53**, International Law Commission, Articles on State Responsibility [Art. 50]]

- d. Assuming, like the Commission, that the obligation to repatriate POWs may be subject to certain considerations of reciprocity, may a State temporarily suspend repatriations of POWs who were registered by the ICRC, pending clarification by the enemy of the fate of missing servicemen who were not registered by the ICRC, if it believes those persons to have been captured by the enemy? According to para. 160 of the Award? In your opinion? What is the risk for the prisoners if their repatriation is linked to clarification of the fate of missing persons? How long does it usually take to clarify the fate of persons who went missing during a conflict? Is the obligation to repatriate POWs an obligation of result? Is the obligation to provide information on persons reported as missing an obligation of result? (GC III, Arts 13, 118 and 122(7); P I, Art. 33)

**Case No.161, Eritrea/Ethiopia, Awards on Occupation**

[The authors would like to thank Ms Anne-Laurence Brugère, teaching assistant at the University of Geneva, for having prepared a summary of this case and its discussion.]

**A. Eritrea's Claims 2, 4, 6, 7, 8 & 22**

[Source: Eritrea-Ethiopia Claims Commission, Partial Award Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, Between the State of Eritrea and the Federal democratic Republic of Ethiopia. The Hague, April 28, 2004. The Permanent Court of Arbitration, the Hague. Footnotes omitted. Full Awards available on [http://www.pca-cpa.org/showpage.asp?pag\\_id=1151](http://www.pca-cpa.org/showpage.asp?pag_id=1151)].

**PARTIAL AWARD****Central Front****Eritrea's Claims 2, 4, 6, 7, 8 & 22****Between the State of Eritrea and the Federal democratic Republic of Ethiopia****I. INTRODUCTION**

[...]

**B. Background and Territorial Scope of the Claims**

3. Between 1998 and 2000, the Parties waged a costly, large-scale international armed conflict along several areas of their common frontier. This Partial Award, like the corresponding Partial Award in Ethiopia's Claim 2, addresses allegations of illegal conduct related to military operations on the Central Front of that conflict.
4. For purposes of these Claims, the Central Front encompassed the area of five Sub-Zobas in Southern Eritrea, that is Adi Quala, Senafe, Areza, Tserona and Mai Mene.

**IV. THE MERITS**

[...]

**C. Summary of Events on the Central Front Relevant to these Claims**

30. After the armed conflict began on the Western Front in May 1998, both Eritrea and Ethiopia began to strengthen their armed forces along what would become the Central Front. From mid-May to early June, Eritrean armed forces attacked at a number of points, first in Ahferom and Mereb Lekhe Weredas, then in Irob and Gulomakheda Weredas. In Gulomakheda Wereda, the significant border town of Zalambessa (with a pre-war population estimated at between 7,000 and 10,000) was also taken. In all four weredas, Eritrean forces moved into areas administered prior to the conflict by Ethiopia, occupied territory, and established field fortifications and trench lines, sometimes permanently and sometimes only

for a brief period before returning to adjacent territory administered prior to the conflict by Eritrea. In all cases, they carried out intermittent operations that extended beyond the occupied areas. These operations included artillery fire, intermittent ground patrols, and the placement of defensive fields of land mines.

31. In response to these military operations, many residents of those areas fled and sought refuge in caves or displaced persons camps established by Ethiopia. Some civilians nevertheless remained in the occupied areas. Some who remained, including those who stayed in Zalambessa, were later moved by Eritrea to internally displaced persons ("IDP") camps within Eritrea.
32. When Ethiopia later introduced substantial numbers of its armed forces into the four weredas, a static, although not fully contiguous, front was created that remained largely the same for nearly two years. Hostilities varied in intensity during that period and included some instances of intense combat during 1999. However, in May of 2000, Ethiopia launched a general offensive that drove all Eritrean armed forces out of the territory previously administered by Ethiopia and took Ethiopian forces deep into Eritrea. Eritrea's claims in the present case arose only in the period beginning in May 2000, when Ethiopian armed forces entered Eritrean territory on the Central Front. In Eritrea, the Central Front extended from Areza and Mai Mene Sub-Zobas in the west, through Adi Quala and Tserona Sub-Zobas to Senafe Sub-Zoba in the east.
33. On May 12, 2000, Ethiopian troops crossed the Mereb River in the Western Front area and moved northeast to Molki. From there, they advanced eastward toward Areza, engaging in combat at several places, including the village of Adi Nifas and the town of Mai Dima. Ethiopian troops then moved south towards Mai Mene. After about ten days, Ethiopian forces in Areza and Mai Mene Sub-Zobas moved east and southeast and returned to Ethiopia through Adi Quala Sub-Zoba.
34. On May 23, Ethiopian forces launched a separate offensive in the Tserona area and captured the town of Tserona on May 25. On May 24, Ethiopian forces also attacked in the vicinity of Zalambessa. They quickly took Zalambessa and, on May 26, moved north into Eritrea, through the town of Senafe to high positions beyond at Keshe'at and Emba Soira, where the advance stopped and the front stabilized. The Ethiopian forces remained in occupation of parts of Tserona and Senafe Sub-Zobas until February and March 2001 when they withdrew to territory administered by Ethiopia prior to the conflict, pursuant to the December 12, 2000 Peace Agreement.
35. Eritrea's claims are based upon actions within the five Sub-Zobas of the Central Front for which Ethiopia was responsible that allegedly were unlawful and resulted in the looting and destruction of public and private property, destruction of infrastructure, personal injury to civilians and desecration of places of worship, graves and monuments. Following a general comment on the evidence of rape on the Central Front, the Commission shall consider these claims sub-zoba by sub-zoba. [...]



**G. Adi Quala Sub-Zoba**

52. Adi Quala Sub-Zoba, which also lies on the south-central section of the Central Front, has twenty kebabis in total and approximately 10,900 families. It was a developing agricultural area and a center of cross-border trade before the war, with a new immigration, customs and police center near the Mereb River in Kisd Ika.
53. The Ethiopian forces that had been in Areza and Mai Mene Sub-Zobas transited Enda Giorgis and Kisd Ika in Adi Quala Sub-Zoba on their return to Ethiopia from Areza and Mai Mene Sub-Zobas. As Eritrean armed forces were also in Adi Quala Sub-Zoba, there was recurring combat there before the last Ethiopian forces left the sub-zoba.
54. Eritrea submitted evidence relating only to four towns or villages that were controlled by Ethiopian forces for periods ranging from a week or ten days to six weeks and all of which had largely been evacuated before the Ethiopian troops arrived. That evidence included a small number of accounts of individual civilians being shot by Ethiopian soldiers, in two of which other Ethiopian soldiers intervened to assist the Eritrean victim. The evidence also included a few troubling accounts of arrests and deportations of civilians to Ethiopia. One Eritrean priest and group leader for the Peoples Front for Democracy and Justice (the governing political party in Eritrea) described being taken to Rama in Ethiopia, where he was detained in a cell for a month and interrogated by police, and then imprisoned in Aksum with political prisoners and subjected to two weeks of political re-education. However, the evidence was not sufficient to indicate a pattern of such events. [...]
56. Considering the evidence as a whole, and in view of the brief period of time during which Ethiopia controlled the locations concerned, the Commission holds that the evidence is not sufficient to establish a pattern of misconduct attributable to Ethiopian forces. All claims relating to Adi Quala Sub-Zoba are dismissed for failure of proof.
57. The Parties disagreed on an issue that arose not just in Adi Quala Sub-Zoba but in all three Eritrean sub-zobas in which Ethiopian armed forces were present only for limited periods, particularly in areas where the troops were passing through on their way to other locations. That issue was whether the provisions of the Geneva Conventions applicable to occupied territory were applicable to parts or all of those three sub-zobas. On the one hand, clearly an area where combat is ongoing and the attacking forces have not yet established control cannot normally be considered occupied within the meaning of the Geneva Conventions of 1949. On the other hand, where combat is not occurring in an area controlled even for just a few days by the armed forces of a hostile Power, the Commission believes that the legal rules applicable to occupied territory should apply. Nevertheless, given the Commission's dismissal of all claims arising in those three subzobas, the Commission need not decide whether any areas within them that were, at any time, under the control of Ethiopian armed forces were occupied territory.

## DISCUSSION

1. According to IHL, when is a territory considered occupied? Does Convention IV define occupation? Is the definition of “occupied territory” the same under Convention IV and under the Hague Regulations (HR, Art. 42)? Why could it be broader?
2.
  - a. When is a territory considered occupied according to the Claims Commission? Does it make a difference whether combat is ongoing?
  - b. Considering the legal findings and the factual elements of this case, are Eritreans who were arrested by Ethiopia while combat was ongoing “protected persons” under Convention IV? (GC IV, Art. 4) If combat was ongoing in some of the Eritrean villages referred to in para. 54 and those villages were, according to the Commission, not covered by GC IV, Part III, Section III on occupied territories, were Eritrean civilians arrested by Ethiopia still protected civilians? Were they covered by Section II? At least by Section I? Can there be protected civilians covered by neither Section II nor Section III but only by Section I? By none of the provisions of Part III? (GC IV, Arts 4, 27-78 and 126)
  - c. If the village where the Eritrean priest was arrested was not occupied territory, was it unlawful under IHL to deport him to Ethiopia? (GC IV, Art. 49(1))

## B. Ethiopia's Claim 2

[Source: Eritrea-Ethiopia Claims Commission, Partial Award Central Front, Ethiopia's Claim 2, Between the Federal democratic Republic of Ethiopia and the State of Eritrea. The Hague, April 28, 2004. The Permanent Court of Arbitration, the Hague. Footnotes omitted. Full Awards available on [http://www.pca-cpa.org/showpage.asp?pag\\_id=1151](http://www.pca-cpa.org/showpage.asp?pag_id=1151)].

### PARTIAL AWARD

#### Central Front Ethiopia's Claim 2

#### Between the Federal democratic Republic of Ethiopia and the State of Eritrea

### I. INTRODUCTION

[...]

### B. Background and Territorial Scope of the Claims

3. Between 1998 and 2000, the Parties waged a costly, large-scale international armed conflict along several areas of their common frontier. This Partial Award, like the corresponding Partial Award in Eritrea's Claims 2, 4, 6, 7, 8 and 22, addresses allegations of illegal conduct related to military operations on the Central Front of that conflict. [...]
5. For purposes of these Claims, the Central Front encompassed the area of military operations extending between Ethiopia's Mereb Lekhe Wereda on the west and Irob Wereda on the east and the corresponding areas to the north in Eritrea. The Central Front in Ethiopia included (from west to east) parts of the border weredas

of Mereb Lekhe, Ahferom, Gulomakheda and Irob. Relevant events are also alleged in Genta Afeshum Wereda, which is located to the south of Gulomakheda Wereda and does not adjoin the boundary.

### **C. Summary of Events on the Central Front Relevant to these Claims**

24. After the armed conflict began on the Western Front in May 1998, both Eritrea and Ethiopia began to strengthen their armed forces along what would become the Central Front. From mid-May to early June, Eritrean armed forces attacked at a number of points, first in Ahferom and Mereb Lekhe Weredas, then in Irob and Gulomakheda Weredas. In Gulomakheda Wereda, the significant border town of Zalambessa (with a pre-war population estimated at between 7,000 and 10,000) was also taken. In all four weredas, Eritrean forces moved into areas administered prior to the conflict by Ethiopia, occupied territory, and established field fortifications and trench lines, sometimes permanently and sometimes only for a brief period before returning to adjacent territory administered prior to the conflict by Eritrea. In all cases, they carried out intermittent operations that extended beyond the occupied areas. These operations included artillery fire, intermittent ground patrols, and the placement of defensive fields of land mines.
25. In response to these military operations, many residents of those areas fled and sought refuge in caves or displaced persons camps established by Ethiopia. Some civilians nevertheless remained in the occupied areas. Some who remained, including those who stayed in Zalambessa, were later moved by Eritrea to internally displaced persons ("IDP") camps within Eritrea.
26. When Ethiopia later introduced substantial numbers of its armed forces into the four weredas, a static, although not fully contiguous, front was created that remained largely the same for nearly two years. Hostilities varied in intensity during that period and included some instances of intense combat during 1999. However, in May of 2000, Ethiopia launched a general offensive that drove all Eritrean armed forces out of the territory previously administered by Ethiopia and took Ethiopian forces deep into Eritrea. Ethiopian armed forces remained in Eritrean territory until late February 2001, when they returned to the pre-war line of administrative control pursuant to the Cessation of Hostilities Agreement of June 2000 and the Peace Agreement of December 12, 2000.
27. The Commission wishes to emphasize that its description of territories administered by one Party or the other prior to the conflict and the conclusions reached in this Partial Award are not intended to, and indeed cannot, have any effect on the lawful boundary between the two nations. The determination of that boundary is the task of the Boundary Commission established by Article 4 of the Peace Agreement of December 12, 2000. That boundary is not relevant to the work of the Claims Commission. Our task under Article 5 of that Agreement is to determine the validity of each Party's claims against the other for violations of international law arising out of the armed conflict for which that other Party is responsible and which caused damage to the Claimant Party, including its nationals. The Commission considers

that, under customary international humanitarian law, damage unlawfully caused by one Party to an international armed conflict to persons or property within territory that was peacefully administered by the other Party to that conflict prior to the outbreak of the conflict is damage for which the Party causing the damage should be responsible, and that such responsibility is not affected by where the boundary between them may subsequently be determined to be.

28. The alternative could deny vulnerable persons in disputed areas the important protections provided by international humanitarian law. These protections should not be cast into doubt because the belligerents dispute the status of territory. The alternative would frustrate essential humanitarian principles and create an *ex post facto* nightmare. Moreover, respecting international protections in such situations does not prejudice the status of the territory. As Protocol I states, "Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question."
29. The responsibility of a State for all acts contrary to international humanitarian law committed by members of its armed forces is clear wherever those acts take place. The Hague Regulations considered occupied territory to be territory of a hostile State actually placed under the authority of a hostile army, and the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Geneva Convention IV") applies to "all cases of partial or total occupation of the territory of a High Contracting Party." However, neither text suggests that only territory the title to which is clear and uncontested can be occupied territory. [...]

## DISCUSSION

1. How does the Commission establish the responsibility of Eritrea and Ethiopia for violations of IHL whilst the boundary between them has subsequently been determined? Is the concept of "occupied territory" of any relevance? Why does the Claims Commission firmly insist on the fact that the boundary determined by the Boundary Commission is not relevant to its work? What is at stake? (P I, Preamble para. 5)
2. Would the reasoning of the Commission also be valid if GC IV did not apply because there was an armed conflict, but because there was belligerent occupation without armed resistance?
3. To which extent is it important for the Commission to have a clear idea of which Party administered which territory prior to the war? When would territory found to belong to a party and over which that party gains control during an international armed conflict not be occupied?
4. Can the finding of a territory being occupied prejudice the legal status of the said territory?

**Case No. 162, Eritrea/Ethiopia, Award on Civilian Internees and Civilian Property**

[The authors would like to thank Ms Anne-Laurence Brugère, teaching assistant at the University of Geneva, for having prepared a summary of this case and its discussion.]

[Source: Eritrea-Ethiopia Claims Commission, Partial Award Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, Between the State of Eritrea and the Federal democratic Republic of Ethiopia. The Hague, December 17, 2004. The Permanent Court of Arbitration, the Hague. Footnotes partially reproduced. Full Awards available on [http://www.pca-cpa.org/showpage.asp?pag\\_id=1151](http://www.pca-cpa.org/showpage.asp?pag_id=1151)].

**PARTIAL AWARD****Civilian Claims****Eritrea's Claims 15, 16, 23 & 27-32****Between the State of Eritrea and the Federal democratic Republic of Ethiopia****I. INTRODUCTION****A. Summary of the Positions of the Parties**

1. These Claims ("Eritrea's Claims 15, 16, 23 and 27-32," "Eritrea's Civilians Claims") covering expellees, civilian detainees and "persons of Eritrean extraction living in Ethiopia," have been brought to the Commission by the Claimant, the State of Eritrea ("Eritrea") against the Federal Democratic Republic of Ethiopia ("Ethiopia"), pursuant to Article 5 of the Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia of December 12, 2000 ("the December 2000 Agreement"). The Claimant asks the Commission to find the Respondent, Ethiopia, liable for loss, damage and injury it suffered, including loss, damage and injury suffered by Eritrean nationals and a large number of other persons, resulting from alleged infractions of international law in the treatment of civilian Eritrean nationals and other persons by Ethiopia in connection with the 1998-2000 international armed conflict between the two Parties.
2. Ethiopia contends that it has fully complied with international law in its treatment of such civilians. [...]

**II. FACTUAL BACKGROUND**

6. Eritrea's main claims and Ethiopia's defenses have their origins in the unusual circumstances leading to the emergence of Eritrea as a separate State during the early 1990s. Eritrea was an Italian colony from 1889 until the British defeated the Italian forces there in 1941, early in the Second World War. It then remained under British administration until 1952, when it entered into a federation with the Empire of Ethiopia. The federation lasted until 1962, when the last vestiges of Eritrea's political autonomy ended and Eritrea became a part of Ethiopia. In 1991, following the success of their long and bitter struggle against the Mengistu regime in Ethiopia, the successful revolutionary movements that had assumed power in Addis Ababa and Asmara agreed that "the people of Eritrea have the

right to determine their own future by themselves and ... that the future status of Eritrea should be decided by the Eritrean people in a referendum...." [Letter from H.E. Meles Zenawi to UN Secretary-General Boutros Boutros-Ghali, Dec. 13, 1991, UN Doc. A/C.3/47/5 (1992).]

7. Organizing the Referendum was a large and complex task undertaken by the Referendum Commission of Eritrea ("RCE") appointed in April 1992. A Referendum Proclamation issued on April 7, 1992 established detailed procedures and limited participation to persons over 18 "having Eritrean citizenship." (The Referendum Proclamation and the associated Citizenship Proclamation are discussed below.) The RCE and the Provisional Government of Eritrea emphasized registration of potential voters outside of Eritrea, where over a million Eritreans lived. According to a report by the International Organization for Migration, 66,022 persons in Ethiopia registered to vote in the Referendum. The Referendum was successfully held on 23-25 April 1993, with extremely high participation and almost 99% of voters voting for Eritrea's independence. On May 4, 1993, Ethiopia's Ministry of Foreign Affairs recognized Eritrea's sovereignty and independence. Eritrea became a member of the United Nations on May 28, 1993.
8. During the decades when Eritrea did not exist as a separate political entity, there was extensive movement of population both into and out of the area of present-day Eritrea. These population movements were compounded by tumult and displacement from decades of bitter internal conflict within Ethiopia. Many Ethiopians of Eritrean ancestry knew only Ethiopia as their home. Many thousands of persons who were born or whose parents were born within the present-day boundaries of Eritrea came to reside as Ethiopian citizens in Addis Ababa and elsewhere in Ethiopia. The Commission received varying estimates of the numbers involved, but both Parties agreed the population was large. A June 12, 1998 Ethiopian Ministry of Foreign Affairs statement concerning "Precautionary Measures Taken Regarding Eritreans Residing in Ethiopia" referred to 550,000 such persons. Both Parties cited this figure during the proceedings, although Eritrea also referred to other lower estimates.
9. The evidence indicated that many persons with Eritrean antecedents were successful economically, owning property and operating businesses in Ethiopia. The evidence also indicated that there were active political and social organizations involving persons of Eritrean national origin. The Parties disagreed sharply regarding the character of these organizations and of their activities.
10. The heart of Eritrea's case is its contention that beginning soon after the outbreak of war in May 1998, Ethiopia wrongfully denationalized, expelled, mistreated and deprived of property tens of thousands of Ethiopian citizens of Eritrean origin in violation of multiple international legal obligations. Eritrea cited evidence it believed established that at least 75,000 persons were so expelled from Ethiopia, but contended that the actual numbers were larger, because some groups, particularly displaced rural Eritreans, were difficult to count. Eritrea also alleged mistreatment of other groups, including civilians alleged to have been wrongfully detained as prisoners of war and otherwise.

11. Ethiopia acknowledged that it expelled thousands of persons during this period, although it maintained that there were far fewer than claimed by Eritrea. Ethiopia contended that, pursuant to its law, the Ethiopian nationality of all Ethiopians who had obtained Eritrean nationality had been terminated and that those expelled were Eritrean nationals, and hence nationals of an enemy State in a time of international armed conflict. It contended that all of those expelled had acquired Eritrean nationality, most by qualifying to participate in the 1993 Referendum. Ethiopia further contended that its security services identified each expellee as having belonged to certain organizations or engaged in certain types of activities that justified regarding the person as a threat to Ethiopia's security. Ethiopia distinguished between the approximately 15,475 persons who it claimed were expelled as threats to security, and an additional number of family members said voluntarily to have elected to accompany or follow them. Ethiopia contended that 21,905 family members left with the expellees on transport provided by Ethiopia and that an unknown number of others left Ethiopia by other means. [...]

## IX. DETENTION WITHOUT DUE PROCESS

107. Introduction. Eritrea's third major claim is that Ethiopia wrongfully detained large numbers of civilians under harsh conditions contrary to international law. This claim involves separate groups, including (a) persons held pending their expulsion, often for brief periods and in temporary facilities; (b) those held in jails or prisons for longer periods, many based on suspicions that the detainee was a spy or otherwise actively assisted the Eritrean war effort; and (c) civilians claimed to be wrongly detained and then wrongly confined together with prisoners of war. This last category included a group of Eritrean university students detained by Ethiopia at the outbreak of the war. For each group, Eritrea contended both that the initial detentions were illegal and that the detainees were held in poor and abusive conditions that did not satisfy legal requirements. [...]
115. The Exchange Students. Eritrea raised the first such group in its Prisoner of War Claim (Eritrea's Claim 17), which cited the allegedly unlawful detention and treatment of about 85 Eritrean university students studying in Ethiopia who were initially detained in June 1998 soon after the war began. The record indicates that their detention became an international *cause célèbre*, leading to numerous international appeals for their release. They were confined under allegedly harsh conditions for varying lengths of time; some were released early in 1999 while others were held much longer. [...]
116. The record indicates that the students were of military age and that some had received military training in Eritrea. Ethiopia contended that their internment was justified under Article 35, paragraph 1, of Geneva Convention IV. Under that provision, nationals of an enemy state have the right to leave a belligerent's territory "unless their departure is contrary to the national interests of the state." *The Handbook of Humanitarian Law* [Dieter Fleck] explains that "[t]his reference to the national interest of the state of residence is intended above all to enable the

state to prohibit residents suitable for military service from leaving.” Leslie Green similarly describes Article 35 as allowing a belligerent to prevent “the departure of those likely to be of assistance to the adverse party in its war efforts.”

117. The evidence in this and other claims before the Commission indicates that some movement of civilians between the two countries continued during the war. Ethiopia could reasonably have feared that the students – and other Eritreans of military age, particularly those with military training – might have returned to Eritrea and joined the Eritrean forces if left at large. Their internment was consistent with Article 35, paragraph 1, of Geneva Convention IV. Further, while the conditions in which they were detained may have been difficult and austere, particularly in comparison to those they previously experienced in Ethiopia, the record does not establish a substantial or widespread failure to meet Geneva Convention requirements with respect to their treatment.
118. It is not apparent from the record whether the students had individual opportunities to appeal either their confinement, as provided in Article 43 of Geneva Convention IV, or Ethiopia’s refusal to allow them to leave, as provided in Article 35. Given the paucity of the record and the requirement for clear and convincing evidence, the Commission cannot find any liability concerning this aspect of their treatment. [...]
120. Eritrea’s prisoner of war evidence includes multiple accounts of Eritrean farmers and other local residents living close to the military fronts who were taken prisoner by the Ethiopian Army and then held as prisoners of war, sometimes for years. These individuals maintained that they were not soldiers and took no part in military operations. Some were in their early teens; others were older men, some well above military age. Eritrea also presented evidence of other Eritrean civilians living far from the fronts who were similarly detained and held as prisoners of war.
121. Ethiopia did not rebut the evidence that Eritrean civilians, including both civilians living close to the front and others from elsewhere in Ethiopia, were detained and then held as prisoners of war. While international law allows the internment of civilian nationals of an enemy State under specified conditions and appropriate safeguards, the record did not show that these requirements were met. Accordingly, their continued detention was contrary to international law. In addition, under Article 84 of Geneva Convention IV, prisoners of war must be held separately from civilians. Ethiopia did not rebut Eritrea’s evidence showing that Eritrean civilians were wrongly held as prisoners of war in breach of these requirements. [...]

## **X. DEPRIVATION OF PROPERTY**

123. Eritrea alleged that Ethiopia implemented a widespread program aimed at unlawfully seizing Eritrean private assets, including assets of expellees and of other persons outside of Ethiopia, and of transferring those assets to Ethiopian governmental or private interests. Ethiopia denied that it took any such actions.



It contended that any losses resulted from the lawful enforcement of private parties' contract rights, or the nondiscriminatory application of legitimate Ethiopian tax or other laws and regulations.

124. Both Parties' arguments emphasized the customary international law rules limiting States' rights to take aliens' property in peacetime; both agreed that peacetime rules barring expropriation continued to apply. However, the events at issue largely occurred during an international armed conflict. Thus, it is also necessary to address the role of the *jus in bello*, which gives belligerents substantial latitude to place freezes or other discriminatory controls on the property of nationals of the enemy State or otherwise to act in ways contrary to international law in time of peace. For example, under the *jus in bello*, the deliberate destruction of aliens' property in combat operations may be perfectly legal, while similar conduct in peacetime would result in State responsibility.
125. The status of the property of nationals of an enemy belligerent under the *jus in bello* has evolved. Until the nineteenth century, no distinction was drawn between the private and public property of the enemy, and both were subject to expropriation by a belligerent. However, attitudes changed; as early as 1794, the Jay Treaty bound the United States and the United Kingdom not to confiscate the other's nationals' property even in wartime. This attitude came to prevail; the 1907 Hague Regulations reflect a determination to have war affect private citizens and their property as little as possible.
126. The modern *jus in bello* thus contains important protections of aliens' property, beginning with the fundamental rules of discrimination and proportionality in combat operations, which protect both lives and property. Article 23, paragraph (g), of the Hague Regulations similarly forbids destruction or seizure of the enemy's property unless "imperatively demanded by the necessities of war." Article 33 of Geneva Convention IV prohibits pillage and reprisals against protected persons' property, both in occupied territory and in the Parties' territory. Article 38 of Geneva Convention IV is also relevant. It establishes that, except for measures of internment and assigned residence or other exceptional measures authorized by Article 27, "the situation of protected persons shall continue to be regulated, in principle, by the provisions governing aliens in time of peace."
127. However, these safeguards operate in the context of another broad and sometimes body of belligerent rights to freeze or otherwise control or restrict the resources of enemy nationals so as to deny them to the enemy State. Throughout the twentieth century, important States including France, Germany, the United Kingdom, and the United States have frozen "enemy" property, including property of civilians, sometimes vesting it for the vesting State's benefit. [...]

Such control measures have been judged necessary to deny the enemy access to economic resources otherwise potentially available to support its conduct of the war.

128. States have not consistently frozen and vested enemy private property. In practice, States vesting the assets of enemy nationals have done so under controlled conditions, and for reasons directly tied to higher state interests; commentators emphasize these limitations. The post-war disposition of controlled property has often been the subject of agreements between the former belligerents. These authorize the use of controlled or vested assets for post-war reparations or claims settlements, thereby maintaining at least the appearance of consent for the taking. This occurred both in the Versailles Treaty after World War I and in peace treaties after World War II.
129. Eritrea did not contend that Ethiopia directly froze or expropriated expellees' property. Instead, it claimed that Ethiopia designed and carried out a body of interconnected discriminatory measures to transfer the property of expelled Eritreans to Ethiopian hands.

These included:

- Preventing expellees from taking effective steps to preserve their property;
- Forcing sales of immovable property;
- Auctioning of expellees' property to pay overdue taxes; and
- Auctioning of expellees' mortgaged assets to recover loan arrears.

Eritrea asserts that the cumulative effect of these measures was to open up Eritrean private wealth for legalized looting by Ethiopians.

[...]

151. The Cumulative Weight of Ethiopia's Measures. In addition to its findings above regarding particular Ethiopian economic measures, the Commission believes that the measures' collective impact must be considered. War gives belligerents broad powers to deal with the property of the nationals of their enemies, but these are not unlimited. In the Commission's view, a belligerent is bound to ensure insofar as possible that the property of protected persons and of other enemy nationals are not despoiled and wasted. If private property of enemy nationals is to be frozen or otherwise impaired in wartime, it must be done by the State, and under conditions providing for the property's protection and its eventual disposition by return to the owners or through post-war agreement. *[See, e.g., Article 38 of Geneva Convention IV, requiring that "the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace."]*
152. The record shows that Ethiopia did not meet these responsibilities. As a result of the cumulative effects of the measures discussed above, many expellees, including some with substantial assets, lost virtually everything they had in Ethiopia. Some of Ethiopia's measures were lawful and others were not. However, their cumulative effect was to ensure that few expellees retained any of their property. Expellees had to act through agents (if a reliable agent could be found and instructed), faced rapid forced real estate sales, confiscatory taxes on sale proceeds, vigorous loan collections, expedited and arbitrary collection

of other taxes, and other economic woes resulting from measures in which the Government of Ethiopia played a significant role. By creating or facilitating this network of measures, Ethiopia failed in its duty to ensure the protection of aliens' assets. [...]

### DISCUSSION

1. a. May nationals of an enemy State be prevented from leaving the territory of a belligerent State? Is there any "right to leave"? What reason can be invoked by the retaining State? (GC IV, Art. 35(1))  
b. Do you think that the condition stated by Article 35(1) of GC IV ("unless their departure is contrary to the national interests of the State") is applicable to the Eritrean exchange students? To your mind, could the departure of all "men of military age" be considered as contrary to the national interests of the State of residence? Would the answer differ if these men had not received military training?
2. a. May civilians who are denied permission to leave the territory be automatically interned? Is the Commission right in stating that the internment of the exchange students "was consistent with Article 35, paragraph 1"? Did the treatment of the detainees have any influence on the Commission's conclusion with respect to the legality of their internment? (GC IV, Arts 41-43)  
b. According to IHL, in which circumstances and for which purpose may the Detaining Power order the internment of civilians? What is the relevant legal basis?  
c. Must internment be based upon an individual determination? May such individual determination flow from the fact that the person is individually denied permission to leave?
3. Must civilians denied permission to leave or interned be given a right to appeal? If there is no record that such appeals were possible, is Ethiopia responsible for a violation of IHL? How could Eritrea have proved that no appeal was available?
4. May a civilian internee be held in a POW camp? Which protections of civilian internees differ from those afforded to POWs?
5. a. Is property belonging to enemy civilians on a party's own territory protected against confiscation? Against being frozen until the end of the conflict? Where can the rules be found according to which economic rights of enemy civilians on a State's own territory are to be treated? Which rules of Art. 38 of GC IV were relevant for our case?  
b. May a combination of lawful measures taken against enemy aliens' property be unlawful because of their cumulative effect? To which provision of GC IV would you link such a prohibition?

**Case No. 163, Eritrea/Ethiopia, Awards on Military Objectives**

[The authors would like to thank Ms Anne-Laurence Brugère, teaching assistant at the University of Geneva, for having prepared a summary of this case and its discussion.]

**A. Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26**

[Source: Eritrea-Ethiopia Claims Commission, Partial Award Central Front, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26, Between the State of Eritrea and the Federal democratic Republic of Ethiopia. The Hague, December 19, 2005. The Permanent Court of Arbitration, the Hague. Footnotes omitted. Full Awards available on [http://www.pca-cpa.org/showpage.asp?pag\\_id=1151](http://www.pca-cpa.org/showpage.asp?pag_id=1151).]

**PARTIAL AWARD****Western Front, Aerial Bombardment and Related Claims  
Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26****I. INTRODUCTION****A. Summary of the Positions of the Parties**

1. [...] Eritrea asks the Commission to find Ethiopia liable for loss, damage and injury suffered by the Claimant, including loss, damage and injury suffered by Eritrean nationals and persons of Eritrean national origin and agents, as a result of alleged infractions of international law occurring during the 1998-2000 international armed conflict between the Parties. The Claimant requests monetary compensation. [...]
2. The Respondent asserts that it fully complied with international law in its conduct of military operations.

**B. Background and Territorial Scope of the Claims**

3. Between 1998 and 2000, the Parties waged a costly, large-scale international armed conflict along several areas of their common frontier. This Partial Award, like the corresponding Partial Award issued today in Ethiopia's Claim 1 for the Western Front ("Ethiopia's Western Front Claims"), addresses allegations of illegal conduct related to military operations on the Western Front of that conflict, as well as allegations of illegal conduct in the course of Ethiopia's aerial bombardment at various places in Eritrea, including but not limited to the Western Front [...]. [...]

**V. UNLAWFUL AERIAL BOMBARDMENT (ERITREA'S CLAIM 26)**

[...]

### C. The Merits

[...]

98. *Harsile Water Reservoir*: Ethiopia acknowledges that it made several air strikes on the water reservoir located at the village of Harsile, which is located in a harsh desert region about 17 kilometers from the large port city of Assab. Bombs were dropped on three days in February 1999 and once in June 2000, but the reservoir either was not damaged or any damage was quickly repaired. Ethiopia's senior Air Force officer who testified at the hearing indicated that the reservoir was targeted because Ethiopia believed that the loss of that supply of drinking water would have restricted Eritrea's military capacity on the Eastern Front, and he identified a few Eritrean military units that Ethiopia believed obtained their water from the reservoir. However, in response to a question, he acknowledged that it was possible that water from the reservoir was used by civilians.
99. Eritrea submitted witness statements indicating, first, that the reservoir served only civilians and was the sole source of drinking water for the town of Assab and, second, that the Eritrean armed forces in that area had their own wells and underground storage tanks. Eritrea claimed that these attacks on the reservoir were illegal under Article 54 of Geneva Protocol I, which prohibits attacks on objects indispensable to the survival of the civilian population.
100. Based on the evidence in the record, the Commission has no doubt that the Government of Ethiopia knew that the reservoir was a vital source of water for the city of Assab. Thus, it seems clear that Ethiopia's purpose in targeting the reservoir was to deprive Eritrea of the sustenance value of its water, and that Ethiopia did not do so on an erroneous assumption that the reservoir provided water only to the Eritrean armed forces.
101. As the area around Assab is extremely harsh, hot and dry, the Commission considers it very fortunate that the water in the reservoir was not lost or made unavailable by those air strikes. Neither, apparently, was a nearby refugee camp damaged by the strikes, but the absence of significant damage would not justify a failure by the Commission to decide the legality of those attacks.
102. The Parties do not disagree that an attack on the reservoir would be prohibited by Article 54 of Geneva Protocol I, were that provision to apply between them.  
[...]
103. In its defense, Ethiopia asserted that destruction of the Harsile water reservoir would have limited significantly Eritrea's ability to conduct military operations on the Eastern Front and, consequently, that the reservoir was a legitimate military objective under the applicable customary international humanitarian law. Ethiopia further maintained that Article 54 of Geneva Protocol I was a new development in 1977 that had not become a part of customary international humanitarian law by the 1998-2000 war.
104. The Commission recognizes the difficulty it faces in deciding this question, as there have been less than three decades for State practice relating to Article 54

to develop since its adoption in 1977. Article 54 represented a significant advance in the prior law when it was included in the Protocol in 1977, so it cannot be presumed that it had become part of customary international humanitarian law more than 20 years later. However, the Commission also notes the compelling humanitarian nature of that limited prohibition, as well as States' increased emphasis on avoiding unnecessary injury and suffering by civilians resulting from armed conflict. The Commission also considers highly significant the fact that none of the 160 States that have become Parties to the Protocol has made any reservation or statement of interpretation rejecting or limiting the binding nature of that prohibition. Only two of those statements relate to the scope of the prohibition. One, by the United Kingdom, merely emphasizes what paragraph 2 of Article 54 says, i.e., that it prohibits only attacks that have the specific purpose of denying sustenance to the civilian population or the adverse Party. The other, by France, preserves a right to attack objects used solely for the sustenance of members of the armed forces. All other statements referring to Article 54 also refer to other articles, and relate solely to the thorny issue of the right of reprisal. The United States has not yet ratified Geneva Protocol I, but the Commission notes with interest that the United States Annotated Supplement (1997) to its Naval Handbook (1995) makes the significant comment that the rule prohibiting the intentional destruction of objects indispensable to the survival of the civilian population for the specific purpose of denying the civilian population of their use is a "customary rule" accepted by the United States and codified by Article 54, paragraph 2, of Protocol I.

105. While the Protocol had not attained universal acceptance by the time these attacks occurred in 1999 and 2000, it had been very widely accepted. The Commission believes that, in those circumstances, a treaty provision of a compelling humanitarian nature that has not been questioned by any statements of reservation or interpretation and is not inconsistent with general State practice in the two decades since the conclusion of the treaty may reasonably be considered to have come to reflect customary international humanitarian law. Recalling the purpose of Article 54, the Commission concludes that the provisions of Article 54 that prohibit attack against drinking water installations and supplies that are indispensable to the survival of the civilian population for the specific purpose of denying them for their sustenance value to the adverse Party had become part of customary international humanitarian law by 1999 and, consequently was applicable to Ethiopia's attacks on the Harsile reservoir in February 1999 and June 2000. Therefore, those aerial bombardments, which fortunately failed to damage the reservoir, were in violation of applicable international humanitarian law. As no damage has been shown, that finding, by itself, shall be satisfaction to Eritrea for that violation. [...]

## **VI. AERIAL BOMBARDMENT OF HIRGIGO POWER STATION (ERITREA'S CLAIM 25)**

[...]

### C. The Merits

111. On May 28, 2000, two Ethiopian jet aircraft dropped seven bombs that hit and seriously damaged the Hirgigo Power Station, which is located about ten kilometers from the port city of Massawa. At that time, construction was complete, and the power station was in the testing and commissioning phase. While not yet fully operational, the power station had successfully supplied some power briefly to Asmara and Mendefera. Eritrea asserted that the bombing of the plant was unlawful because the plant was not a legitimate military objective, and it requested that the Commission hold Ethiopia liable to compensate Eritrea for the damage caused to Eritrea by that violation of international humanitarian law.
112. With respect to the applicable law, Eritrea pointed to Article 52, paragraph 2, of Geneva Protocol I, which defines the objects that are legitimate military objectives as follows:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

113. This provision was not applicable as part of a treaty binding on both Parties to the conflict, but it is widely accepted as an expression of customary international law, and Ethiopia did not contend otherwise. The Commission notes that none of the 160 Parties to that Protocol has attached to its signature or instrument of ratification a reservation or statement of interpretation that would indicate disagreement with that definition. The Commission is of the view that the term "military advantage" can only properly be understood in the context of the military operations between the Parties taken as a whole, not simply in the context of a specific attack. Thus, with respect to the present claim, whether the attack on the power station offered a definite military advantage must be considered in the context of its relation to the armed conflict as a whole at the time of the attack. The Commission finds that Article 52, paragraph 2, of Geneva Protocol I is a statement of customary international humanitarian law and, as such, was applicable to the conflict between the two Parties. [...]
117. As a first step, the Commission must decide whether the power plant was an object that by its nature, location, purpose or use made an effective contribution to military action at the time it was attacked. The Commission agrees with Ethiopia that electric power stations are generally recognized to be of sufficient importance to a State's capacity to meet its wartime needs of communication, transport and industry so as usually to qualify as military objectives during armed conflicts. The Commission also recognizes that not all such power stations would qualify as military objectives, for example, power stations that are known, or should be known, to be segregated from a general power grid and are limited to supplying power for humanitarian purposes, such as medical facilities, or other uses that could have no effect on the State's ability to wage war. Eritrea

asserted that, in May 2000, the Hirgigo plant was not yet producing power for use in Eritrea and that Eritrea's military forces had their own electric generating equipment and are not dependent on general power grids in Eritrea. Eritrea also submitted evidence supporting its assertion that its Defense Ministry used no more than four percent of Eritrea's non-military power supply and that Eritrean manufacturing companies did not produce significant military equipment.

118. The Hirgigo plant had been under construction for a considerable time, and the evidence indicated that much of the related transformer and transmission facilities that would be necessary for it to transmit its power around the country were in place. Also, the Commission notes the witness statement by the head of the Northern Red Sea Region of the Eritrea Electric Authority in which he stated: "Hirgigo was going to be a major asset for us. The plant we were using to supply power to Massawa was in Garar. It was big, but it was old and on its last legs."
119. In fairness to that witness, it should be acknowledged that he also stated that he thought the Ethiopia bombed the power station was its economic importance to Eritrea. Nevertheless, the Commission, by a majority, finds in his reference to the power supply for Massawa being old and on its last legs a suggestive example of the potential value to a country at war of a large, new and nearly completed power station so close as to be visible from Massawa. While the fact that Eritrea placed anti-aircraft guns in the vicinity of the power station does not, by itself, make the power station a military objective, it indicated that Eritrean military authorities themselves viewed the station as having military significance.
120. The Commission, by a majority, has no doubt that the port and naval base at Massawa were military objectives. It follows that the generating facilities providing the electric power needed to operate them were objects that made an effective contribution to military action. The question then is whether the intended replacement for that power generation capacity also made an effective contribution to military action. Ethiopia asserted that a State at war should not be obligated to wait until an object is, in fact, put into use when the purpose of that object is such that it will make an effective contribution to military action once it has been tested, commissioned and put to use. Certainly, as the British Defense Ministry's Manual of the Law of Armed Conflict makes clear, the word "purpose" in Article 52's definition of military objectives "means the future intended use of an object." The Commission agrees.
121. The remaining question is whether the Hirgigo power plant's "total or partial destruction ... in the circumstances ruling" in late May 2000 "offer[ed] a definite military advantage." In general, a large power plant being constructed to provide power for an area including a major port and naval facility certainly would seem to be an object the destruction of which would offer a distinct military advantage. Moreover, the fact that the power station was of economic importance to Eritrea is evidence that damage to it, in the circumstances prevailing in late May 2000 when Ethiopia was trying to force Eritrea to agree to end the war, offered a definite advantage. "The purpose of any military action must always be to influence the political will of the adversary." The evidence does not – and need not – establish



whether the damage to the power station was a factor in Eritrea's decision to accept the Cease-Fire Agreement of June 18, 2000. The infliction of economic losses from attacks against military objectives is a lawful means of achieving a definite military advantage, and there can be few military advantages more evident than effective pressure to end an armed conflict that, each day, added to the number of both civilian and military casualties on both sides of the war. For these reasons, the Commission, by a majority, finds that, in the circumstances prevailing on May 28, 2000, the Hirgigo power station was a military objective, as defined in Article 52, paragraph 2, of Geneva Protocol I and that Ethiopia's aerial bombardment of it was not unlawful. Consequently, this Claim is dismissed on the merits.

[...]

## **B. Ethiopia's Claim 2**

[Source: Eritrea-Ethiopia Claims Commission, Partial Award Central Front, Ethiopia's Claim 2, Between the Federal democratic Republic of Ethiopia and the State of Eritrea. The Hague, April 28, 2004. The Permanent Court of Arbitration, the Hague. Footnotes omitted. Full Awards available on [http://www.pca-cpa.org/showpage.asp?pag\\_id=1151](http://www.pca-cpa.org/showpage.asp?pag_id=1151)].

### **PARTIAL AWARD**

#### **Central Front Ethiopia's Claim 2**

#### **Between the Federal democratic Republic of Ethiopia and the State of Eritrea**

[...]

## **J. Aerial Bombardment of Mekele**

101. On June 5, 1998, Ethiopia and Eritrea exchanged air strikes, Ethiopia attacking the Asmara airport and Eritrea attacking the Mekele airport. Each accuses the other of striking first, but that is a question the Commission need not address, because both airports housed military aircraft and were unquestionably legitimate military objectives under international humanitarian law. Ethiopia's claim in the present case is based not upon deaths, wounds and damage at the Mekele airport, but upon the fact that Eritrean aircraft also dropped cluster bombs that killed and wounded civilians and damaged property in the vicinity of the Ayder School and the surrounding neighborhood in Mekele town. Ethiopia states that those bombs killed fifty-three civilians, including twelve school children, and wounded 185 civilians, including forty-two school children.
102. Ethiopia alleges that Eritrea intentionally targeted this civilian neighborhood in violation of international law. Eritrea vigorously denies this allegation. While Eritrea acknowledges that one of its aircraft did drop cluster bombs in the

vicinity of the Ayder School, it contends that this was an accident incidental to legitimate military operations, not a deliberate attack, and consequently not a basis for liability.

[...]

107. After carefully considering all the evidence, the Commission concludes that the fourth sortie dropped at least one cluster bomb on the Ayder neighborhood and that there is no evidence that it dropped any bomb on or near Mekele airport.  
[...]
108. Consequently, the Commission holds that Eritrea's four sorties resulted in two strikes hitting Mekele airport and two strikes hitting the Ayder neighborhood in Mekele. Nevertheless, the Commission is not prepared to draw the conclusion urged by Ethiopia, as it is not convinced that Eritrea deliberately targeted a civilian neighborhood. Eritrea had obvious and compelling reasons to concentrate its limited air assets on Ethiopia's air fighting capability – its combat aircraft and the Mekele airport, which was within twenty to twenty-five minutes' flight time from Asmara. Moreover, it is not credible that Eritrea would see advantage in setting the precedent of targeting civilians, given Ethiopia's apparent air superiority.
109. The Commission acknowledges the long odds against two consecutive sorties taking precisely the same targeting error, particularly in view of Eritrea's representation that the two aircraft's computers were programmed for two different targets. However, the Commission must also take into account the evidence that Eritrea had little experience with these weapons and that the individual programmers and pilots were utterly inexperienced, and it recognizes the possibility that, in the confusion and excitement of June 5, both computers could have been loaded with the same inaccurate targeting data. It also recognizes that the pilots could reprogram or could drop their bombs without reliance on the computer. For example, it is conceivable that the pilot of the third sortie simply released too early through either computer or human error or in an effort to avoid anti-aircraft fire that the pilots of the previous sorties had reported. It is also conceivable that the pilot of the fourth sortie might have decided to aim at the smoke resulting from the third sortie.
110. The Commission believes that the governing legal standard for this claim is best set forth in Article 57 of Protocol I, the essence of which is that all feasible precautions to prevent unintended injury to protected persons must be taken in choosing targets, in the choice of means and methods of attack and in the actual conduct of operations. The Commission does not question either the Eritrean Air Force's choice of Mekele airport as a target, or its choice of weapons. Nor does the Commission question the validity of Eritrea's argument that it had to use some inexperienced pilots and ground crew, as it did not have more than a very few experienced personnel. The law requires all "feasible" precautions, not precautions that are practically impossible. However, the Commission has serious concerns about the manner in which these operations were carried out. The failure of two out of three bomb runs to come close to their intended targets

clearly indicates a lack of essential care in conducting them, compounded by Eritrea's failure to take appropriate actions afterwards to prevent future recurrence.

[...]

112. From the evidence available to it, the Commission cannot determine why the bombs dropped by the third and fourth sorties hit the Ayder neighborhood. All of the information critical to that issue was in the hands of Eritrea or could have been obtained by it, and Eritrea did not make it available. In those circumstances, the Commission is entitled to draw adverse inferences reinforcing the conclusions already indicated that not all feasible precautions were taken by Eritrea in its conduct of the air strikes on Mekele on June 5, 1998.
113. For these reasons, the Commission finds that Eritrea is liable for the deaths, wounds and physical damage to civilians and civilian objects caused in Mekele by the third and fourth sorties on June 5, 1998.

#### **K. Aksum**

114. Ethiopia claims that Eritrea also bombed the Aksum civilian airport late on June 5, 1998, the same day that Mekele was bombed. Eritrea denies any such bombing. The Commission believes that there is credible evidence that a bomb was dropped and some damage caused at the Aksum airport on that date. It is possible that it was dropped by Eritrea's sortie number four, which may have dropped only one of its two bombs on Mekele. In any event, the Commission finds no liability for this Aksum bombing, as an airfield is a legitimate target, even when there are no military personnel there at the time. The landing strip and other facilities could be used later for military purposes.

[...]

### **DISCUSSION**

1. Is Art. 52(2) of Protocol I customary law?
2.
  - a. Can it be rightly stated that the Hircigo Power Station was a legitimate military objective, as the Commission did? According to IHL, could any electric power station be considered as a military objective? In what sense do electric power stations make an "effective contribution to military action"?
  - b. Is the fact that an electric power station generally meets the wartime needs of communication, transport and industry (*para. 117*) sufficient for it to be considered as making an effective contribution to military action? Is the fact that in our case the port and naval base of Massawa would have been supplied with power sufficient?
  - c. Does the fact that anti-aircraft guns are sited in the vicinity of a power plant make it a military objective? Is it an indication that it contributes to military action?

3. Do you agree with the Commission's understanding of the word "purpose" in Art. 52(2) of Protocol I? Can the Commission argue that the power plant, as a *future* "effective contribution to military action", can be defined as a military objective?
4.
  - a. Would the partial or total destruction of the Hirgigo Power Station have offered a "definite military advantage" to Ethiopia, according to the Commission? According to IHL?
  - b. To your mind, is the Commission right in arguing that the "effective pressure to end an armed conflict" constitutes an evident military advantage? Do you agree with the Commission's understanding of the term "definite military advantage", according to which the military advantage has to be determined "in the context of the military operations between the Parties *taken as a whole*, not simply in the context of a specific attack" (emphasis added)? Is "the armed conflict as a whole" (*para. 113*) and "military operations as a whole" the same standard?
5. If the power plant was a military objective, was the attack on it necessarily lawful? Should not the Commission have evaluated the proportionality between the military advantage of cutting the power supply to the port and naval base of Massawa and the effects upon the civilian population? (P I, Art. 51(5)(b))
6.
  - a. Is Art. 54 of Protocol I customary law? On what elements does the Commission base its finding that it is?
  - b. If Art. 54 of Protocol I had not been found to be customary law, would the Harsile Water Reservoir have been a legitimate military objective?
  - c. Do you think Art. 54(2) could have been applied to the Hirgigo Power Station's case?
7.
  - a. Was the Ayder neighbourhood in Mekele a military objective? If not, was the attack on it not a prohibited attack on civilians and civilian objects? Why was it not? Was the proportionality principle violated? Were the necessary precautionary measures not taken?
  - b. Does the Commission explain which precautionary measures should have been taken? On what elements does the Commission base its finding that not all feasible precautionary measures were taken? What elements influence the feasibility?
  - c. May one assume that a belligerent who had an obligation to take feasible precautionary measures to avoid a result that actually occurred did not take those measures if he does not explain how his forces proceeded?
8. Under which conditions can a civilian airport be regarded as a legitimate military objective? Given that there were no military personnel at the Aksum civilian airport, could one argue that since its "landing strip and other facilities could be used later for military purposes", the airport can be considered a legitimate target?

**Case No.164, Sudan, Report of the UN Commission of Enquiry on Darfur**

[Source: Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva 25 January 2005; footnotes partially reproduced; full report available on [www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf)]

**Pursuant to Security Council Resolution 1564 of 18 September 2004  
Geneva, 25 January 2005**

**INTRODUCTION**

[...]

**II. THE HISTORICAL AND SOCIAL BACKGROUND**

[...]

**3. The Current Conflict in Darfur**

61. The roots of the present conflict in Darfur are complex. In addition to the tribal feuds resulting from desertification, the availability of modern weapons, [...] deep layers relating to identity, governance, and the emergence of armed rebel movements which enjoy popular support amongst certain tribes, are playing a major role in shaping the current crisis.
62. It appears evident that the two rebel groups in Darfur, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) began organizing themselves in the course of 2001 and 2002 in opposition to the Khartoum Government, which was perceived to be the main cause of the problems in Darfur. While only loosely connected, the two rebel groups cited similar reasons for the rebellion, including socio-economic and political marginalization of Darfur and its people. In addition, the members of the rebel movements were mainly drawn from local village defence groups from particular tribes, which had been formed as a response to increases in attacks by other tribes. Both rebel groups had a clearly stated political agenda involving the entirety of the Sudan, demanding more equal participation in government by all groups and regions of the Sudan. Initially the SLM/A, at that stage named the Darfur Liberation Front, came into existence with an agenda focused on the situation of the people of Darfur, and only later expanded its agenda to cover all of the Sudan. The Justice and Equality Movement based its agenda on a type of manifesto – the “Black Book”, published in 2001 – which essentially seeks to prove the disparities in the distribution of power and wealth, by noting that Darfur and its populations, as well as some populations of other regions, have been consistently marginalized and not included in influential positions in the central Government in Khartoum. It is noteworthy that the two movements did not argue their case from a tribal point of view, but rather spoke on behalf of all Darfurians, and mainly directed their attacks at Government installations. It also appears that with regard to policy formulation, the *New Sudan* policy of the SPLM/A [Sudan People’s Liberation Movement/Army] in the South had an impact on the SLM/A, while

the JEM seemed more influenced by trends of political Islam. Furthermore, it is possible that the fact that the peace negotiations between the Government and the SPLM/A were advancing rapidly, did in some way represent an example to be followed by other groups, since armed struggle would apparently lead to fruitful negotiations with the Government. It should also be recalled that despite this broad policy base, the vast majority of the members of the two rebel movements came from essentially three tribes: The Fur, the Massalit and the Zaghawa.

63. It is generally accepted that the rebel movements began their first military activities in late 2002 and in the beginning of 2003 through attacks mainly directed at local police offices, where the rebels would loot Government property and weaponry. [...]
66. Most reports indicate that the Government was taken by surprise by the intensity of the attacks, as it was ill-prepared to confront such a rapid military onslaught. Furthermore, the looting by rebels of Government weaponry strengthened their position. An additional problem was the fact that the Government apparently was not in possession of sufficient military resources, as many of its forces were still located in the South, and those present in Darfur were mainly located in the major urban centres. Following initial attacks by the rebels against rural police posts, the Government decided to withdraw most police forces to urban centres. This meant that the Government did not have *de facto* control over the rural areas, which was where the rebels were based. The Government was faced with an additional challenge since the rank and file of the Sudanese armed forces was largely composed of Darfurians, who were probably reluctant to fight "their own" people.
67. From available evidence and a variety of sources including the Government itself, it is apparent that faced with a military threat from two rebel movements and combined with a serious deficit in terms of military capabilities on the ground in Darfur, the Government called upon local tribes to assist in the fighting against the rebels. In this way, it exploited the existing tensions between different tribes.
68. In response to the Government's call, mostly Arab nomadic tribes without a traditional homeland and wishing to settle, given the encroaching desertification, responded to the call. They perhaps found in this an opportunity to be allotted land. One senior government official involved in the recruitment informed the Commission that tribal leaders were paid in terms of grants and gifts on the basis of their recruitment efforts and how many persons they provided. In addition, the Government paid some of the Popular Defence Forces (PDF) staff their salaries through the tribal leaders, with State budgets used for these purposes. The Government did not accept recruits from all tribes. One Masaalit leader told the Commission that his tribe was willing to provide approximately one thousand persons to the PDF but, according to this source, the Government did not accept, perhaps on the assumption that the recruits could use this as an opportunity to acquire weapons and then turn against the Government. Some reports also indicate that foreigners, from Chad, Libya and other states, responded to this call and that the Government was more than willing to recruit them.

69. These new “recruits” were to become what the civilian population and others would refer to as the “Janjaweed”, a traditional Darfurian term denoting an armed bandit or outlaw on a horse or camel. [...]
70. [...] On 8 April 2004, the Government and the SLM/A and JEM signed a humanitarian ceasefire agreement, and in N’Djamena on 28 May they signed an agreement on ceasefire modalities. Subsequent peace talks took place [...] under the mediation of the African Union. On 9 November in Abuja, the Government, the SLM/A and the JEM signed two Protocols, one on the improvement of the humanitarian situation and the second on the enhancement of the security situation in Darfur. In the context of further negotiations, the parties have not been able to overcome their differences and identify a comprehensive solution to the conflict.

[...]

## **SECTION I: THE COMMISSION’S FINDINGS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND HUMANITARIAN LAW BY THE PARTIES**

[...]

### **II. THE NATURE OF THE CONFLICT IN DARFUR**

74. The first [...] issue relates to the nature of the armed conflict raging in Darfur. This determination is particularly important with regard to the applicability of the relevant rules of international humanitarian law. The distinction is between international armed conflicts, non-international or internal armed conflict, and domestic situations of tensions or disturbances. The Geneva Conventions set out an elaborate framework of rules that are applicable to international armed conflict or ‘all cases of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties’. Common Article 3 of the Geneva Conventions and Additional Protocol II set out the prerequisite of a non-international armed conflict. It follows from the above definition of an international conflict that a non-international conflict is a conflict without the involvement of two States. Modern international humanitarian law does not legally set out the notion of armed conflict. Additional Protocol II only gives a negative definition which, in addition, seems to narrow the scope of Article 3 common to the Geneva Conventions. The jurisprudence of the international criminal tribunals has explicitly elaborated on the notion: ‘an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’. Internal disturbances and tensions, ‘such as riots, isolated and sporadic acts of violence and other acts of a similar nature’ are generally excluded from the notion of armed conflict.
75. The conflict in Darfur opposes the Government of the Sudan to at least two organized armed groups of rebels, namely the Sudan Liberation Movement/

Army (SLM/A) and the Justice and Equality Movement (JEM). [...] The rebels exercise *de facto* control over some areas of Darfur. The conflict therefore does not merely amount to a situation of internal disturbances and tensions, riots, or isolated and sporadic acts of violence. Rather, the requirements of (i) existence of organized armed groups fighting against the central authorities, (ii) control by rebels over part of the territory and (iii) protracted fighting, in order for this situation to be considered an internal armed conflict under common Article 3 of the Geneva Conventions are met.

76. All the parties to the conflict (the Government of the Sudan, the SLA [SLM/A armed branch] and the JEM) have recognised that this is an internal armed conflict. Among other things, in 2004 the two rebel groups and the Government of the Sudan entered into a number of international agreements, *inter se*, in which they invoke or rely upon the Geneva Conventions.

### **III. CATEGORIES OF PERSONS OR GROUPS PARTICIPATING IN THE ARMED CONFLICT**

[...]

#### **1. Government Armed Forces**

[...]

#### **(iv) Popular Defence Forces**

81. For operational purposes, the Sudanese armed forces can be supplemented by the mobilization of civilians or reservists into the Popular Defence Forces (PDF). [...]
82. According to information gathered by the Commission, local government officials are asked by army Headquarters to mobilize and recruit PDF forces through tribal leaders and sheikhs. [...] As one tribal leader explained to the Commission, 'in July 2003 the State called on tribal leaders for help. We called on our people to join the PDF. They responded by joining, and started taking orders from the Government as part of the state military apparatus.'
83. The PDF provides arms, uniforms and training to those mobilized, who are then integrated into the regular army for operations. At that point, the recruits come under regular army command and normally wear the same uniform as the unit they are fighting with. [...]

#### **2. Government supported and/or controlled militias – the 'Janjaweed'**

[...]

#### **(ii.) Uses of the term in the context of current events in Darfur**

105. [...] [I]n practice, the term "Janjaweed" is being used interchangeably with other terms used to describe militia forces working with the Government. Where victims describe their attackers as Janjaweed, these persons might be from a tribal Arab militia, from the PDF or from other entity, as described below.



[...]

**(vi.) The question of legal responsibility for acts committed by the Janjaweed**

[...]

123. When militias attack jointly with the armed forces, it can be held that they act under the effective control of the Government, consistently with the notion of control set out in 1999 in Tadic (Appeal), at para. 98-145 [See Case No. 211, ICTY, The Prosecutor v. Tadic [Part C]]. Thus they are acting as *de facto* State officials of the Government of Sudan. It follows that, if it may be proved that all the requisite elements of effective control were fulfilled in each individual case, responsibility for their crimes is incurred not only by the individual perpetrators but also by the relevant officials of the army for ordering or planning, those crimes, or for failing to prevent or repress them, under the notion of superior responsibility.
124. When militias are incorporated in the PDF and wear uniforms, they acquire, from the viewpoint of international law the status of organs of the Sudan. Their actions and their crimes could be legally attributed to the Government. [...]
125. On the basis of its investigations, the Commission is confident that the large majority of attacks on villages conducted by the militia have been undertaken with the acquiescence of State officials. The Commission considers that in some limited instances militias have sometimes taken action outside of the direct control of the Government of Sudan and without receiving orders from State officials to conduct such acts. In these circumstances, only individual perpetrators of crimes bear responsibility for such crimes. However, whenever it can be proved that it was the Government that instigated those militias to attack certain tribes, or that the Government provided them with weapons and financial and logistical support, it may be held that (i) the Government incurs international responsibility (*vis-à-vis* all other member States of the international community) for any violation of international human rights law committed by the militias, and in addition (ii) the relevant officials in the Government may be held criminally accountable, depending on the specific circumstances of each case, for instigating or for aiding and abetting the violations of humanitarian law committed by militias.

[...]

**IV. THE INTERNATIONAL LEGAL OBLIGATIONS INCUMBENT UPON THE SUDANESE GOVERNMENT AND THE REBELS**

[...]

**1. Relevant Rules of International Law Binding the Government of the Sudan**

143. Two main bodies of law apply to the Sudan in the conflict in Darfur: international human rights law and international humanitarian law. The two are complementary. For example, they both aim to protect human life and dignity, prohibit discrimination on various grounds, and protect against torture

or other cruel, inhuman and degrading treatment. They both seek to guarantee safeguards for persons subject to criminal justice proceedings, and to ensure basic rights including those related to health, food and housing. They both include provisions for the protection of women and vulnerable groups, such as children and displaced persons. The difference lies in that whilst human rights law protects the individual at all times, international humanitarian law is the *lex specialis* which applies only in situations of armed conflict.

[...]

**(i.) International human rights law [...]**

149. In the case of a state of emergency, international human rights law contains specific provisions which prescribe the actions of States. In particular, article 4 of the International Covenant on Civil and Political Rights sets out the circumstances under which a State Party may derogate temporarily from part of its obligations under the Covenant. Two conditions must be met in order for this article to be invoked: first, there must be a situation that amounts to a public emergency that threatens the life of the nation, and secondly, the state of emergency must be proclaimed officially and in accordance with the constitutional and legal provisions that govern such proclamation and the exercise of emergency powers. The State also must immediately inform the other States parties, through the Secretary-General, of the provisions it has derogated from and of the reasons for such measures. Even during armed conflict, measures derogating from the Covenant 'are allowed only if and to the extent that the situation constitutes a threat to the life of the nation'. In any event, they must comply with requirements set out in the Covenant itself, including that those measures be limited to the extent strictly required by the exigencies of the situation. Moreover, they must be consistent with other obligations under international law, particularly the rules of international humanitarian law and peremptory norms of international law.
150. Article 4 of the ICCPR clearly specifies the provisions which are non-derogable and which therefore must be respected at all times. These include the right to life; the prohibition of torture or cruel, inhuman or degrading punishment; the prohibition of slavery, the slave trade and servitude; and freedom of thought, conscience and religion. Moreover, measures derogating from the Covenant must not involve discrimination on the ground of race, colour, sex, language, religion or social origin.
151. Other non-derogable 'elements' of the Covenant, as defined by the Human Rights Committee, include the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; the prohibition against taking hostages, abductions or unacknowledged detention; certain elements of the rights of minorities to protection; the prohibition of deportation or forcible transfer of population; and the prohibition of propaganda for war and of advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence. The

obligation to provide effective remedies for any violation of the provisions of article 2, paragraph 3, of the Covenant must be always complied with.

152. In addition, the protection of those rights recognized as non-derogable require certain procedural safeguards, including judicial guarantees. For example, the right to take proceedings before a court to enable the court to decide on the lawfulness of detention, and remedies such as *habeas corpus* or *amparo*, must not be restricted by derogations under article 4. In other words, 'the provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.'
153. The Sudan has been under a continuous state of emergency since 1999 and, in December 2004, the Government announced the renewal of the state of emergency for one more year. According to the information available to the Commission, the Government has not taken steps legally to derogate from its obligations under the ICCPR. In any event, whether or not the Sudan has met the necessary conditions to invoke article 4, it is bound at a minimum to respect the non-derogable provisions and 'elements' of the Covenant at all times.

**(ii.) International humanitarian law**

154. With regard to international humanitarian law, the Sudan is bound by the four Geneva Conventions of 1949, as well as the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, of 18 September 1997, whereas it is not bound by the two Additional Protocols of 1977, at least qua treaties. As noted above, the Sudan has signed, but not yet ratified, the Statute of the International Criminal Court and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, and is therefore bound to refrain from "acts which would defeat the object and purpose" of that Statute and the Optional Protocol.

[...]

156. In addition to international treaties, the Sudan is bound by customary rules of international humanitarian law. These include rules relating to internal armed conflicts, many of which have evolved as a result of State practice and jurisprudence from international, regional and national courts, as well as pronouncements by States, international organizations and armed groups.
157. The core of these customary rules is contained in Article 3 common to the Geneva Conventions. [...]
158. Other customary rules crystallized in the course of diplomatic negotiations for the adoption of the two Additional Protocols of 1977, for the negotiating parties became convinced of the need to respect some fundamental rules, regardless of whether or not they would subsequently ratify the Second Protocol. Yet other rules were adopted at the 1974-77 Diplomatic Conference as provisions that spelled out general principles universally accepted by States. States considered

that such provisions partly codified, and partly elaborated upon, general principles, and that they were therefore binding upon all States or insurgents regardless of whether or not the former ratified the Protocols. Subsequent practice by, or attitude of, the vast majority of States showed that over time yet other provisions of the Second Additional Protocol came to be regarded as endowed with a general purport and applicability. Hence they too may be held to be binding on non-party States and rebels.

159. That a body of customary rules regulating internal armed conflicts has thus evolved in the international community is borne out by various elements. For example, some States in their military manuals for their armed forces clearly have stated that the bulk of international humanitarian law also applies to internal conflicts. Other States have taken a similar attitude with regard to many rules of international humanitarian law.

[...]

161. Furthermore, in 1995, in its judgment in *Tadic (Interlocutory appeal)* the ICTY Appeals Chamber held that the main body of international humanitarian law also applied to internal conflicts as a matter of customary law, and that in addition serious violations of such rules constitute war crimes.

[...]

163. The adoption of the ICC Statute, followed by the Statute of the Special Court for Sierra Leone, can be regarded as the culmination of a law-making process that in a matter of few years led both to the crystallization of a set of customary rules governing internal armed conflict and to the criminalization of serious breaches of such rules (in the sense that individual criminal liability may ensue from serious violations of those rules).
164. This law-making process with regard to internal armed conflict is quite understandable. As a result both of the increasing expansion of human rights doctrines and the mushrooming of civil wars, States came to accept the idea that it did not make sense to afford protection only in *international* wars to civilians and other persons not taking part in armed hostilities: civilians suffer from armed violence in the course of internal conflicts no less than in international wars. It would therefore be inconsistent to leave civilians unprotected in civil wars while protecting them in international armed conflicts. Similarly, it was felt that a modicum of legal regulation of the conduct of hostilities, in particular of the use of means and methods of warfare, was also needed when armed clashes occur not between two States but between a State and insurgents.
165. Customary international rules on internal armed conflict thus tend both to protect civilians, the wounded and the sick from the scourge of armed violence, and to regulate the conduct of hostilities between the parties to the conflict. [...]
166. For the purposes of this report, it is sufficient to mention here only those customary rules on internal armed conflicts which are relevant and applicable to the current armed conflict in Darfur. These include:

- (i) **the distinction between combatants and civilians, and the protection of civilians, notably against violence to life and person, in particular murder** [footnote 77: The rule is laid down in Common Article 3 of the 1949 Geneva Conventions, has been restated in many cases, and is set out in the 2004 *British Manual on the Law of Armed Conflict* (at para. 15.6). It should be noted that in the Report made pursuant to para. 5 of the UN Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on UN Forces in Somalia, the UN Secretary-General noted that “The [Geneva] Conventions were designed to cover inter-State wars and large-scale civil wars. But the principles they embody have a wider scope. [...] [T]hey are applicable wherever political ends are sought through military means. No principle is more central to the humanitarian law of armed conflict than the obligation to respect the distinction between combatants and non-combatants. That principle is violated and criminal responsibility thereby incurred when organizations deliberately target civilians or when they use civilians as shields or otherwise demonstrate a wanton indifference to the protection of non-combatants.” (UN doc. S/26351, 24 August 1993, Annex, para. 12). According to a report of the Inter-American Commission on Human Rights on the human rights situation in Colombia issued in 1999, international humanitarian law prohibits “the launching of attacks against the civilian population and requires the parties to an armed conflict, at all times, to make a distinction between members of the civilian population and parties actively taking part in the hostilities and to direct attacks only against the latter and, inferentially, other legitimate military objectives.” (Third Report on the Human Rights Situation in Colombia, Doc OAS/Ser.L/V/II.102 Doc. 9 rev.1, 26 February 1999, para. 40). See also Tadic (ICTY Appeals Chamber), *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, (1995), paras 98, 117, 132 [See **Case No. 211**, ICTY, *The Prosecutor v. Tadic* [Part A.]]; *Kordic and Cerkez*, Case No. IT-95-14/2 (Trial Chamber III), *Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction based on the limited Jurisdictional Reach of Articles 2 and 3*, 2 March 1999, paras 25-34 (recognizing that Articles 51(2) and 52(1) of Additional Protocol I and Article 13(2) of Additional Protocol II constitute customary international law).] **(this rule was reaffirmed in some agreements concluded by the Government of the Sudan with the rebels);**
- (ii) **the prohibition on deliberate attacks on civilians;**
- (iii) **the prohibition on indiscriminate attacks on civilians,** [footnote 80: This rule was held to be of customary nature in Tadic (*Interlocutory Appeal*), at paras 100-102, is restated and codified in Article 13 of Additional Protocol II, which is to be regarded as a provision codifying customary international law, and is also mentioned in the 2004 *British Manual of the Law of Armed Conflict* [...]] **even if there may be a few armed elements among civilians;** [footnote 81: In a press release concerning the conflict in Lebanon, in 1983 the ICRC stated that “the presence of armed elements among the civilian population does not justify the indiscriminate shelling of women, children and old people.” (ICRC, Press release no. 1474, Geneva, 4 November 1983). In 1997 in Tadic and ICTY Trial Chamber held that “it is clear that the targeted population [of a crime against humanity] must be of predominantly civilian nature. The presence of certain non-civilian elements in the midst does not change the character of the population” (judgment of 7 May 1997, at para. 638 and see also para. 643).]
- (iv) **the prohibition on attacks aimed at terrorizing civilians;** [footnote 82: See the 2004 *British Manual of the Law of Armed Conflict*, at para. 15.8.]
- (v) **the prohibition on intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian**

assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

- (vi) **the prohibition of attacks against civilian objects;** [footnote 84: Pursuant to para. 5 of General Assembly Resolution 2675 (XXV, of 9 December 1970), which was adopted unanimously and, according to the 2004 *British Manual of the Law of Armed Conflict*, “can be regarded as evidence of State practice” (paras 15-16.2), “dwellings and other installations that are used only by the civilian population should not be the object of military operations” See also the 2004 *British Manual of the Law of Armed Conflict*, at paras 15.9 and 15.9.1, 15.16 and 15.16.1-3).]
- (vii) **the obligation to take precautions in order to minimize incidental loss and damage as a result of attacks,** [footnote 85: See the 2004 *British Manual of the Law of Armed Conflict*, at paras 15.22-15.22.1.] **such that each party must do everything feasible to ensure that targets are military objectives** [footnote 86: See *Zoran Kupreskic and others*, ICTY Trial Chamber, judgment of 14 January 2000, at para. 260 [See **Case No. 215**, ICTY, *The Prosecutor v. Kupreskic et al.*]] **and to choose means or methods of combat that will minimise loss of civilians;** [footnote 87: See for instance the Military Manual of Benin (*Military Manual*, 1995, Fascicule III, pp. 11 and 14 [...]), of Germany (*Military Manual*, 1992, at para. 457), of Kenya (Law of Armed Conflict Manual, 1997, *Precis* no. 4, pp. 1 and 8), of Togo (*Military Manual*, 1996, Fascicule III, pp. 11 and 14), as well as the *Joint Circular on Adherence to International humanitarian Law and Human Rights of the Philippines* (1992, at para. 2(c)). See also *Zoran Kupreskic and others*, [See **Case No. 215**, ICTY, *The Prosecutor v. Kupreskic et al.*] ICTY Trial Chamber, judgment of 14 January 2000, at para. 260]
- (viii) **the obligation to ensure that when attacking military objectives, incidental loss to civilians is not disproportionate to the military gain anticipated;** [footnote 88: In *Zoran Kupreskic and others*, an ICTY Trial Chamber held in 2000 that “Even if it can be proved that the Muslim population of Ahmici [a village in Bosnia and Herzegovina] was not entirely civilians but comprised some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians. [...]” (judgment of 14 January 2000, at para. 513). See also some pronouncements of States. For instance, in 2002, in the House of Lords the British Government pointed out that, with regard to the civil war in Chechnya, it had stated to the Russian Government that military “operations must be proportionate and in strict adherence to the rule of law.” (in 73 *BYIL* 2002, at 955). The point was reiterated by the British Minister for trade in reply to a written question in the House of Lords (*ibidem*, at 957). See also the 2004 *British Manual of the Law of Armed Conflict*, at para. 15.22.1. In 1992, in a joint memorandum submitted to the UN, Jordan and the US stated that “the customary rule that prohibits attacks which reasonably may be expected at the time to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited” (UN doc. A/C.6/47/3, 28 September 1992, at para. 1(h)). In a judgment of 9 December 1985, an Argentinean Court of Appeals held in the *Military Junta case* that the principle of proportionality constitutes a customary international norm [...]. Spain insisted on the principle of proportionality in relation to the internal armed conflicts in Chechnya and in Bosnia and Herzegovina (see the statements in the Spanish Parliament of the Spanish Foreign Minister, in *Actividades, Textos y Documentos de la Política Exterior Española*, Madrid 1995, at 353, 473. In addition, see the 1999 Third Report on Colombia of the Inter-American Commission on Human Rights (Doc. OAS/Se.LV/II.102 Doc.9, rev.1, 26 February 1999, at paras 77 and 79). See also the 1999 UN Secretary-General’s Bulletin, para. 5.5 (with reference to UN forces).]

- (ix) **the prohibition on destruction and devastation not justified by military necessity;** [footnote 89: Rome Statute, at Article 8(2)(e)(xii). See also the 2004 *British Manual of the Law of Armed Conflict*, at paras 15.17-15.17.2). Under Article 23(g) of the Hague Regulations, it is prohibited “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.” The grave breaches provisions in the Geneva Conventions also provide for the prohibition of extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (see First Geneva Convention, Article 50 *in fine*; Second Geneva Convention, Article 51 *in fine*; Fourth Geneva Convention, Article 147 *in fine*; Additional Protocol I, Article 51(1) *in fine*.)
- (x) **the prohibition on the destruction of objects indispensable to the survival of the civilian population;** [footnote 90: Article 14 of the Second Additional Protocol; as rightly stated in the 2004 *British Manual of the Law of Armed Conflict*, at para. 15.19.1, “the right to life is a non-derogable human right. Violence to the life and person of civilians is prohibited, whatever method is adopted to achieve it. It follows that the destruction of crops, foodstuffs, and water sources, to such an extent that starvation is likely to follow, is also prohibited.”]
- (xi) **the prohibition on attacks on works and installations containing dangerous forces;**
- (xii) **the protection of cultural objects and places of worship;**
- (xiii) **the prohibition on the forcible transfer of civilians;**
- (xiv) **the prohibition on torture and any inhuman or cruel treatment or punishment;** [footnote 94: See common Article 3(1)(a)]
- (xv) **the prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment, including rape and sexual violence;** [footnote 95: See common Article 3(1)(c)]
- (xvi) **the prohibition on declaring that no quarter will be given;** [footnote 96: See Article 8(2)(e)(x) of the ICC Statute.]
- (xvii) **the prohibition on ill-treatment of enemy combatants *hors de combat* and the obligation to treat captured enemy combatants humanely;** [footnote 97: See common Article 3(1) as well as the 2004 *British Manual of the Law of Armed Conflict*, at para. 15.6.4]
- (xviii) **the prohibition on the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable by the world community;** [footnote 98: See common Article 3(1)(d); see also General Comment 29 of the Human Rights Committee, at para. 16]
- (xix) **the prohibition on collective punishments;** [footnote 99: See Article 4(b) of the Statute of the ICTR and Article 3(b) of the Statute of the Special Court for Sierra Leone; See also General Comment 29 of the Human Rights Committee, at para. 11, according to which any such punishment is contrary to a peremptory rule of international law.]
- (xx) **the prohibition on the taking of hostages;**
- (xxi) **the prohibition on acts of terrorism;**

(xxii) the prohibition on pillage;

(xxiii) the obligation to protect the wounded and the sick; [footnote 103: Common Article 3(2) of the Geneva Conventions.]

(xxiv) the prohibition on the use in armed hostilities of children under the age of 15; [footnote 104: There are two treaty rules that ban conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities (see Article 8(2)(e)(vii) of the ICC Statute and Article 4(c) of the Statute of the Special Court for Sierra Leone). The Convention on the Rights of the Child, at Article 38, and the Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflicts [See **Document No. 24**, Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict, 25 May 2000] raise the minimum age of persons directly participating in armed conflicts to 18 years, although not in mandatory terms [...]. It may perhaps be held that a general consensus has evolved in the international community on a minimum common denominator: children *under 15* may not take an active part in armed hostilities.]

167. It should be emphasized that the international case law and practice indicated above show that serious violations of any of those rules have been criminalized, in that such violations entail individual criminal liability under international law.

168. Having surveyed the relevant rules applicable in the conflict in Darfur, it bears stressing that to a large extent the Government of the Sudan is prepared to consider as binding some general principles and rules laid down in the two Additional Protocols of 1977 and to abide by them, although formally speaking it is not party to such Protocols. This is apparent, for instance, from the Protocol on the Establishment of Humanitarian Assistance in Darfur, signed on 8 April 2004 by the Government of the Sudan with the SLA and JEM, stating in Article 10(2) that the three parties undertook to respect a corpus of principles, set out as follows:

“The concept and execution of the humanitarian assistance in Darfur will be conform [*sic*] to the international principles with a view to guarantee that it will be credible, transparent and inclusive, notably: the 1949 Geneva Conventions *and its two 1977 Additional Protocols*; the 1948 Universal Declaration on Human Rights, the 1966 International Convention [*sic*] on Civil and Public [*sic*] Rights, the 1952 Geneva Convention on Refugees [*sic*], the Guiding Principles on Internal Displacement (Deng Principles) and the provisions of General Assembly resolution 46/182” (emphasis added).

[...]

170. Significantly, in Article 8(a) of the Status of Mission Agreement (SOMA) on the Establishment and Management of the Cease Fire Commission in the Darfur Area of the Sudan (CFC), of 4 June 2004, between the Sudan and the African Union, it is provided that ‘The African Union shall ensure that the CFC conducts its operation in the Sudan with full respect for the principles and rules of international Conventions *applicable to the conduct of military* and diplomatic personnel. These international Conventions include the four Geneva Conventions



of 12 August 1949 and their *Additional Protocols of 8 June 1977* and the UNESCO Convention of 14 May 1954 on the Protection of Cultural property in the event of armed conflict [...]” (emphasis added). Article 9 then goes on to provide that “The CFC and the Sudan shall therefore ensure that members of their respective military and civilian personnel *are fully acquainted with the principles and rules of the above-mentioned international instruments.*” (emphasis added)

[...]

## 2. Rules binding rebels

172. The SLM/A and JEM, like all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts referred to above. The same is probably true also for the NMRD.
173. Furthermore, as with the implied acceptance of general international principles and rules on humanitarian law by the Government of the Sudan, such acceptance by rebel groups similarly can be inferred from the provisions of some of the Agreements mentioned above.
174. In addition, the SLM/A and the JEM possess under customary international law the power to enter into binding international agreements (so called *jus contrahendum*), have entered various internationally binding Agreements with the Government. In these Agreements the rebels have undertaken, among other things, to comply with humanitarian law. The NMRD concluded two Agreements with the Government of the Sudan on 17 December 2004, one on humanitarian access and the other on security issues in the war zone. In these Agreements the parties pledged to release prisoners of war and organize the voluntary repatriation of internally displaced persons and refugees.

[...]

## VI. VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW – THE COMMISSION’S FACTUAL AND LEGAL FINDINGS.

### 1. Overview of violations of international human rights and humanitarian law reported by other bodies

[...]

182. [...] [T]he Commission carefully studied reports from different sources including Governments, inter-governmental organizations, various United Nations mechanisms or bodies, as well as non-governmental organizations. [...] The Commission [...] received a great number of documents and other material from a wide variety of sources, including the Government of the Sudan. [...] The following is a brief account of these reports, which serves to clarify the context of the fact finding and the investigations conducted by the Commission. In the

sections following this overview, individual incidents are presented according to the type of violation or international crime identified.

[...]

184. Most reports note a pattern of indiscriminate attacks on civilians in villages and communities in all three Darfur states beginning in early 2003. [...]
185. A common conclusion is that, in its response to the insurgency, the Government has committed acts against the civilian population, directly or through surrogate armed groups, which amount to gross violations of human rights and humanitarian law. While there has been comparatively less information on violations committed by the rebel groups, some sources have reported incidents of such violations. There is also information that indicates activities of armed elements who have taken advantage of the total collapse of law and order to settle scores in the context of traditional tribal feuds, or to simply loot and raid livestock.
186. There are consistent accounts of a recurrent pattern of attacks on villages and settlements, sometimes involving aerial attacks by helicopter gunships or fixed-wing aircraft (Antonov and MIG), including bombing and strafing with automatic weapons. However, a majority of the attacks reported are ground assaults by the military, the Janjaweed, or a combination of the two. Hundreds of incidents have been reported involving the killing of civilians, massacres, summary executions, rape and other forms of sexual violence, torture, abduction, looting of property and livestock, as well as deliberate destruction and torching of villages. These incidents have resulted in the massive displacement of large parts of the civilian population within Darfur as well as to neighbouring Chad. The reports indicate that the intensity of the attacks and the atrocities committed in any one village spread such a level of fear that populations from surrounding villages that escaped such attacks also fled to areas of relative security.
187. Except in a few cases, these incidents are reported to have occurred without any military justification in relation to any specific activity of the rebel forces. [...]
191. While a majority of the reports are consistent in the description of events and the violations committed, the crimes attributed to the Government forces and Janjaweed have varied according to the differences in the interpretation of the events and the context in which they have occurred. Analyses of facts by most of the observers, nevertheless, suggest that the most serious violations of human rights and humanitarian law have been committed by militias, popularly termed "Janjaweed", at the behest of and with the complicity of the Government, which recruited these elements as a part of its counter-insurgency campaign.
192. Various reports and the media claim to have convincing evidence that areas have been specifically targeted because of the proximity to or the locus of rebel activity, but more importantly because of the ethnic composition of the population that inhabits these areas. [...]

[...]

## **5. Two Irrefutable Facts: Massive displacement and large-scale destruction of villages**

225. Results of the fact finding and investigations are presented in the next sections of the report and are analysed in the light of the applicable legal framework as set out in the preceding Section. However, before proceeding, two uncontested facts must be highlighted.
226. [...] Firstly, there were more than one million internally displaced persons (IDPs) inside Darfur (1,65 million according to the United Nations) and more than 200,000 refugees from Darfur in neighbouring Chad to the East of the Sudan. Secondly, there were several hundred destroyed and burned villages and hamlets throughout the three states of Darfur. [...]

[...]

## **6. Violations committed by the parties**

[...]

### **(i.) Indiscriminate attacks on civilians**

#### **(a.) Factual findings**

[...]

240. From all accounts the Commission finds that the vast majority of attacks on civilians in villages have been carried out by Government of the Sudan armed forces and Janjaweed, either acting independently or jointly. Although attacks by rebel forces have also taken place, the Commission has found no evidence that these are widespread or that they have been systematically targeted against the civilian population. Incidents of rebel attacks are mostly against military targets, police or security forces. Nevertheless, there are a few incidents in which rebel attacks have been carried out against civilians and civilian structures, as well as humanitarian convoys.

#### *(1). Attacks by Government armed forces and the Janjaweed*

241. [...] [T]he Commission found that attacks on villages in Darfur conducted by Government of the Sudan armed forces and the Janjaweed took place throughout the conflict with peaks in intensity during certain periods. Most often the attacks began in the early morning, just before sunrise between 04:30 AM and 08:00 AM when villagers were either asleep or at prayer. In many cases the attacks lasted for several hours. [...]
242. In many cases a ground attack began with soldiers appearing in Land Cruisers and other vehicles, followed by a large group of Janjaweed on horses and camels, all with weapons such as AK47s, G3s and rocket-propelled grenades. Many of the attacks involved the killing of civilians, including women and children, the burning of houses, schools and other civilian structures, as well as the destruction

of wells, hospitals and shops. Looting and theft of civilian property, in particular livestock, invariably followed the attacks and in many instances every single item of moveable property was either stolen or destroyed by the attackers. Often the civilians were forcibly displaced as a result of the attack.

[...]

249. In this context, the Commission also noted the comments made by Government officials in meetings with the Commission. The Minister of Defence clearly indicated that he considered the presence of even one rebel sufficient for making the whole village a legitimate military target. The Minister stated that once the Government received information that there were rebels within a certain village, 'it is no longer a civilian locality, it becomes a military target.' In his view, 'a village is a small area, not easy to divide into sections, so the whole village becomes a military target.' [...]

***Case Study 1: Anka village, North Darfur***

251. [...] At about 9 am on or about the 17 or 18 February 2004 the village of Barey, situated about 5 kilometres from the village of Anka, was attacked by a combined force of Government soldiers and Janjaweed. [...]

At about 5 PM on the same day, witnesses from Anka observed between 300 and 400 Janjaweed on foot, and another 100 Janjaweed on camels and horseback, advancing towards Anka from the direction of Barey. The attackers were described as wearing the same khaki uniforms as the Government soldiers, and were armed with Kalashnikovs G3s and rocket-propelled grenades (RPGs).

Witnesses observed about 18 vehicles approaching from behind the Janjaweed forces, including four heavy trucks and eighteen Toyota pickup vehicles. Some of the vehicles were green and others were coloured navy blue. The pickups had Dushka (12.7mm tripod mounted machine guns) fitted onto the back, and one had a Hound rocket launcher system which was used to fire rockets into, and across, the village. The trucks carried Government armed forces and were later used to transport looted property from the village.

According to witnesses, villagers fled the village in a northerly direction, towards a wooded area about 5 kilometers from the village.

Before the Janjaweed entered the village, the Government armed forces bombed the area around the village with Antonov aircraft. One aircraft circled the village while the other one bombed. [...] The bombing lasted for about two hours, during which time 20 to 35 bombs were dropped around the outskirts of the village. A hospital building was hit during the bombardment.

After the bombing the Janjaweed and Government soldiers moved in and looted the village including bedding, clothes and livestock. Remaining buildings were then destroyed by burning. Janjaweed also fired RPGs into the village from the top of the hill overlooking Anka. The bombing of the areas around the village

appear to have been conducted in order to facilitate the looting and destruction of the village by Janjaweed and Government armed forces on the ground.

According to witnesses, approximately 30 SLM/A members were present in the village at the time of the attack, apparently to defend the village following the announcement of the imminent attack.

15 civilians were killed in Anka as a result of shrapnel injuries during and after the attack. 8 others were wounded. While some have recovered, others reportedly are disabled as a result of their injuries. The village is now totally deserted.

[...]

**(b.) Legal appraisal**

[...]

259. To ensure that attacks on places or areas where both civilians and combatants may be found, do not unlawfully jeopardize civilians, international law imposes two fundamental obligations, applicable both in international and internal armed conflicts. First the obligation to take precautions for the purpose of sparing civilians and civilian objects as much as possible. Such precautions, laid down in customary international law, are as follows: a belligerent must (i) do everything feasible to verify that the objectives to be attacked are not civilian in character; (ii) take all feasible precautions in the choice of means and methods of combat with a view to avoiding or at least minimizing incidental injury to civilians or civilian objects; (iii) refrain from launching attacks which may be expected to cause incidental loss of civilian life or injury to civilians or civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated; (iv) give effective advance warning of attacks which may affect the civilian population, except "in cases of assault" (as provided for in Article 26 of the Hague Regulations of 1907) or (as provided for in Article 57(2)(c)) "unless circumstances do not permit" (namely when a surprise attack is deemed indispensable by a belligerent). Such warnings may take the form of dropping leaflets from aircraft or announcing on the radio that an attack will be carried out. According to the Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC, Y. Sandoz and others eds, 1987, at para. 2224) a warning can also be given by sending aircraft that fly at very low altitude over the area to be attacked, so as to give civilians the time to evacuate the area.
260. The second fundamental obligation incumbent [...] on any party to an international or internal armed conflict [...] is to respect the principle of proportionality when conducting attacks on military objectives that may entail civilian losses. Under this principle a belligerent, when attacking a military objective, shall not cause incidental injury to civilians disproportionate to the concrete and direct military advantage anticipated. In the area of combat operations the principle of proportionality remains a largely subjective standard, based on a balancing between the expectation and anticipation of military gain

and the actual loss of civilian life or destruction of civilian objects. It nevertheless plays an important role, first of all because it must be applied in good faith, and secondly because its application may involve the prohibition of at least the most glaringly disproportionate injuries to civilians. [...]

263. As noted above, one justification given for the attacks by Government of the Sudan armed forces and Janjaweed on villages is that rebels were present at the time and had used the villages as a base from which to launch attacks – or, at the very least, that villagers were providing support to the rebels in their insurgency activities. Government officials therefore suggested that the villagers had lost their legal status as protected persons.
264. [...] [I]t is clear that the mere presence of a member or members of rebel forces in a village would not deprive the rest of the village population of its civilian character.
265. [...] [C]ontrary to assertions made to the Commission by various Government officials, it is apparent from consistent accounts of reliable eyewitnesses that no precautions have ever been taken by the military authorities to spare civilians when launching armed attacks on villages. [...]
266. The issue of proportionality did obviously not arise when no armed groups were present in the village, as the attack exclusively targeted civilians. However, whenever there might have been any armed elements present, the attack on a village would not be proportionate, as in most cases the whole village was destroyed or burned down and civilians, if not killed or wounded, would all be compelled to flee the village to avoid further harm. The civilian losses resulting from the military action would therefore be patently excessive in relation to the expected military advantage of killing rebels or putting them *hors de combat*.
267. *Concluding observations.* It is apparent from the Commission's factual findings that in many instances Government forces and militias under their control attacked civilians and destroyed and burned down villages in Darfur contrary to the relevant principles and rules of international humanitarian law. Even assuming that in all the villages they attacked there were rebels present or at least some rebels were hiding there, or that there were persons supporting rebels – an assertion that finds little support from the material and information collected by the Commission – the attackers did not take the necessary precautions to enable civilians to leave the villages or to otherwise be shielded from attack. The impact of the attacks shows that the military force used was manifestly disproportionate to any threat posed by the rebels. In fact, attacks were most often intentionally directed against civilians and civilian objects. Moreover, the manner in which many attacks were conducted (at dawn, preceded by the sudden hovering of helicopter gun ships and often bombing) demonstrates that such attacks were also intended to spread terror among civilians so as to compel them to flee the villages. In a majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes. From the viewpoint of

international criminal law these violations of international humanitarian law no doubt constitute large-scale war crimes.

268. From the Commission's findings it is clear that the rebels are responsible for attacks on civilians, which constitute war crimes. In general, the Commission has found no evidence that attacks by rebels on civilians have been widespread, or that rebel attacks have systematically targeted the civilian population.

## **(ii.) Killing of civilians**

### **(a.) Factual findings**

#### *1. Killing by Government forces and/or militias*

269. [...] [T]he great majority of the killings were committed by people who witnesses described as Janjaweed, in most cases uniformed and on horses or camels. [...] Witness testimonies reflected in these reports describe attackers with Kalashnikovs and other automatic weapons shooting either indiscriminately or targeting specific people, usually men of military age. [...] Incidents of confinement of the civilian population, accompanied by arbitrary executions have also been reported, as well as civilian deaths as a result of indiscriminate air attacks by Government forces. The reports note that killings have continued during displacement in camps at the hand of the militias surrounding the camps, and that some IDPs have also been the victims of indiscriminate police shooting inside camps, in response to alleged rebel presence.

[...]

271. [...] [M]ost of the civilians killed at the hands of the Government or the militias are, in a strikingly consistent manner, from the same tribes, namely Fur, Massalit, Zaghawa and, less frequently, other African tribes, in particular the Jebel and the Aranga in West Darfur.

#### *a. Killing in joint attacks by Government forces and Janjaweed*

272. As an example of a case of mass killing of civilians documented by the Commission, the attack on Surra, a village with a population of over 1700, east of Zalingi, South Darfur, in January 2004, is revealing. Witnesses interviewed in separate groups gave a very credible, detailed and consistent account of the attack, in which more than 250 persons were killed, including women and a large number of children. An additional 30 people are missing. The Janjaweed and Government forces attacked jointly in the early hours of the morning. The military fired mortars at unarmed civilians. The Janjaweed were wearing camouflage military uniform and were shooting with rifles and machine guns. They entered the homes and killed the men. They gathered the women in the mosque. There were around ten men hidden with the women. They found those men and killed them inside the mosque. They forced women to take off their maxi (large piece of clothing covering the entire body) and if they found that they were holding their young

sons under them, they would kill the boys. The survivors fled the village and did not bury their dead.

[...]

274. A second attack occurred in March 2004. Government forces and Janjaweed attacked at around 15h00, supported by aircraft and military vehicles. Again, villagers fled west to the mountains. Janjaweed on horses and camels commenced hunting the villagers down, while the military forces remained at the foot of the mountain. They shelled parts of the mountains with mortars, and machine-gunned people as well. People were shot when, suffering from thirst, they were forced to leave their hiding places to go to water points. There are consistent reports that some people who were captured and some of those who surrendered to the Janjaweed were summarily shot and killed. [...] Men who were in confinement in Kailek were called out and shot in front of everyone or alternatively taken away and shot. Local community leaders in particular suffered this fate. There are reports of people being thrown on to fires to burn to death. There are reports that people were partially skinned or otherwise injured and left to die.

[...]

276. The Commission considers that almost all of the hundreds of attacks that were conducted in Darfur by Janjaweed and Government forces involved the killing of civilians.

*b. Killing in attacks by Janjaweed*

[...]

*c. Killing as a result of air bombardment*

279. Several incidents of this nature were verified by the Commission. In short, the Commission has collected very substantial material and testimony which tend to confirm, in the context of attacks on villages, the killing of thousands of civilians.

[...]

*2. Killing by Rebel Groups*

*a. Killing of civilians*

285. The Commission also has found that rebels have killed civilians, although the incidents and number of deaths have been few.

[...]

**(b.) Legal appraisal**

291. As stated above murder contravenes the provisions of the International Covenant on Civil and Political Rights and of the African Charter on Human and



People's Rights, which protect the right to life and to not be "arbitrarily deprived of his life". As for international humanitarian law, murder of civilians who do not take active part in hostilities in an internal armed conflict, is prohibited both by common Article 3 of the 1949 Geneva Conventions and by the corresponding rule of customary international law, as codified in Article 4(2)(a) of Additional Protocol II. [...] It is crucial to stress again at this point that when considering if the murder of civilians amounts to a war crime or crime against humanity, the presence of non-civilians does not deprive a population of its civilian character. Therefore, even if it were proved that rebels were present in a village under attack, or that they generally used the civilian population as a 'shield', nothing would justify the murder of civilians who do not take part in the hostilities.

292. A particular feature of the conflict in Darfur should be stressed. Although in certain instances victims of attacks have willingly admitted having been armed, it is important to recall that most tribes in Darfur possess weapons, which are often duly licensed, to defend their land and cattle. Even if it were the case that the civilians attacked possessed weapons, this would not necessarily be an indication that they were rebels, hence lawful targets of attack, or otherwise taking active part in the hostilities. In addition, it should be noted that the Government of the Sudan did not claim to have found weapons in the villages that were attacked. Furthermore, many attacks occurred at times when civilians were asleep, or praying, and were then not in a position to "take direct part in the hostilities". The mere presence of arms in a village is not sufficient to deprive civilians of their protected status as such.

[...]

**(iii.) Killing of detained enemy servicemen**

[...]

**(b.) Legal appraisal**

298. International humanitarian law prohibits ill-treatment of detained enemy combatants, in particular violence to life and person, including murder of all kinds (see common Article 3(1)(a) of the Geneva Conventions). It also specifically prohibits the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples (see Article 3(1)(d) of the Geneva Conventions). Wilful killing of a detained combatant amounts to a war crime.

[...]

**(v.) *Wanton destruction of villages or devastation not justified by military necessity***  
[...]

315. In conclusion, the Commission finds that there is large-scale destruction of villages in all the three states of Darfur. This destruction has been deliberately caused, by and large, by the Janjaweed during attacks, independently or in combination with Government forces. Even though in most of the incidents the Government forces may not have participated directly in the destruction, their complicity in the attacks during which the destruction was conducted and their presence at the scene are sufficient to make them jointly responsible. The destruction was targeted at the areas of habitation of African tribes, in particular the Fur, Zaghawa and Massalit. There was no military necessity for the destruction and devastation caused as a joint venture by the Janjaweed and the Government forces. The targets of destruction during the attacks under discussion were exclusively civilian objects; and objects indispensable to the survival of civilian population were deliberately and wantonly destroyed.

[...]

**(vi.) *Forcible transfer of civilian populations***

[...]

328. With regard to specific patterns in the displacement, the Commission notes that it appears that one of the objectives of the displacement was linked to the counter-insurgency policy of the Government, namely to remove the actual or potential support base of the rebels. The displaced population belongs predominantly to the three tribes known to make up the majority in the rebel movements, namely the Masaalit, the Zaghawa and the Fur, who appear to have been systematically targeted and forced off their lands. The areas of origin of the displaced coincide with the traditional homelands of the three tribes, while it is also apparent that other tribes have practically not been affected at all.

[...]

**(vii.) *Rape and other forms of sexual violence***

**(a.) *Factual findings***

333. Various sources reported widespread rape and other serious forms of violence committed against women and girls in all three states of Darfur. According to these sources, the rape of individual victims was often multiple, carried out by more than one man, and accompanied by other severe forms of violence, including beating and whipping. In some cases, women were reportedly raped in public, and in some incidents, the women were further berated and called "slaves" or "Tora Bora."

[...]

336. In general, the findings of the Commission confirmed the above reported patterns. However, the Commission considers that it is likely that many cases went unreported due to the sensitivity of the issue and the stigma associated with rape. On their part, the authorities failed to address the allegations of rape adequately or effectively.

[...]

***Case Study: Attack on a school in Tawila, North Darfur***

339. One of the victims of rape during the attack on a boarding school in February 2004, a young girl, told the Commission that:

At about 6:00 in the morning, a large number of Janjaweed attacked the school. She knew that they were Janjaweed because of their “red skin”, a term she used for Arabs. They were wearing camouflage Government uniforms. They arrived in a pickup truck of the same colour as the uniforms they were wearing. On the day before, she noticed that the Government soldiers had moved in position to surround the school. When they attacked the boarding house, they pointed their guns at the girls and forced them to strip naked, took their money, valuables and all of their bedding. There were around 110 girls at the boarding school. [...]

The victim was taken from the group, blindfolded, pushed down to the ground on her back and raped. She was held by her arms and legs. Her legs were forced and held apart. She was raped twice. She confirmed that penetration occurred. The rape lasted for about one hour. Nothing was said by the perpetrators during the rape. She heard other girls screaming and thought that they were also being raped. After the rape, the Janjaweed started burning and looting. [...] The victim became pregnant as a result of this rape and later gave birth to a child.

[...]

***Case Study: Attack on Terga, West Darfur [...]***

342. [T]he Commission found that women who went to market or were in search of water in Tarne, North Darfur, were abducted, held for two to three days and raped by members of the military around March 2003. [...] The Commission further found that twenty-one women were abducted during the joint Government armed forces and Janjaweed attack on Kanjew, West Darfur, in January 2004. The women were held for three months by Janjaweed and some of them became pregnant as a result of rape during their confinement [...].

***Case Study: Flight from Kalokitting, South Darfur***

349. [...] The village was attacked around four in the morning. [...] One of the victims stated as follows: “It was around 04h00 when I heard the shooting. Three of us ran together. We were neighbours. Then we realised that we did not bring our gold. When we returned, we saw soldiers. They said stop, stop. They were several. The first gave his weapon to his friend and said to me to lie down. He pulled me and threw me on the floor. He took off his trousers. He ripped my dress and there was

one person holding my hands. Then he “entered” [a word for intercourse]. Then the second “entered”, and the third “entered.” I could not stand afterwards. There was another girl. When he said lie down, she said no. Kill me. She was young. She was a virgin. She was engaged. He killed her.” The third woman who was also there stated that she was raped in the same way.

[...]

**(b.) Legal appraisal**

[...]

357. Common article 3 to the Geneva Conventions binds all parties to the conflict and, *inter alia*, prohibits “violence to life and person, in particular cruel treatment and torture” and “outrages upon personal dignity, in particular, humiliating and degrading treatment.” While Sudan is not a party to the Additional Protocol II to the Geneva Conventions, some of its provisions constitute customary international law binding on all parties to the conflict. This includes prohibition of “rape, enforced prostitution and any form of indecent assault,” and “slavery”.
358. Rape may be either a war crime, when committed in time of international or internal armed conflict, or a crime against humanity (whether perpetrated in time of war or peace), if it is part of a widespread or systematic attack on civilians; it may also constitute genocide. Rape has been defined in international case law [...]. In short, rape is any physical invasion of a sexual nature perpetrated without the consent of the victim, that is by force or coercion, such as that caused by fear of violence, duress, detention or by taking advantage of a coercive environment.

**(viii.) Torture, outrages upon personal dignity and cruel, inhuman or degrading treatment**

[...]

**(ix.) Plunder**

**(b.) Legal appraisal**

390. As noted above under customary international law the crime of plunder or pillage is a war crime. It consists of depriving the owner, without his or her consent, of his or her property in the course of an internal or international armed conflict, and appropriating such goods or assets for private or personal use, with the criminal intent of depriving the owner of his or her property.

[...]

394. The Commission also finds it plausible that the rebel movements are responsible for the commission of the war crime of plunder, albeit on a limited scale.

**(x.) Unlawful confinement, *incomunicado* detentions and enforce disappearances**

[...]

**(b.) Legal appraisal**

403. The right to liberty and security of person is protected by Article 9 of the ICCPR. The provisions of this Article are to be necessarily read in conjunction with the other rights recognized in the Covenant, particularly the prohibition of torture in Article 7, and Article 10 that enunciates the basic standard of humane treatment and respect for the dignity of all persons deprived of their liberty. Any deprivation of liberty must be done in conformity with the provisions of Article 9: it must not be arbitrary; it must be based on grounds and procedures established by law; information on the reasons for detention must be given; and court control of the detention must be available, as well as compensation in the case of a breach. These provisions apply even when detention is used for reasons of public security.
404. An important guarantee laid down in paragraph 4 of Article 9 is the right to control by a court of the legality of detention. In its General Comments the Human Rights Committee has stated that safeguards which may prevent violations of international law are provisions against *incomunicado* detention, granting detainees suitable access to persons such as doctors, lawyers and family members. In this regard the Committee has also stressed the importance of provisions requiring that detainees should be held in places that are publicly recognized and that there must be proper registration of the names of detainees and places of detention. [...] [F]or the safeguards to be effective, these records must be available to persons concerned, such as relatives, or independent monitors and observers.
405. Even in situations where a State has lawfully derogated from certain provisions of the Covenant, the prohibition against unacknowledged detention, taking of hostages or abductions is absolute. [...] [T]hese norms of international law are not subject to derogation.
406. The ultimate responsibility for complying with obligations under international law rests with the States. The duty of States extends to ensuring the protection of these rights even when they are violated or are threatened by persons without any official status or authority. States remain responsible for all violations of international human rights law that occur because of failure of the State to create conditions that prevent, or take measures to deter, as well as by any acts of commission including by encouraging, ordering, tolerating or perpetrating prohibited acts.
407. The importance of determining individual criminal responsibility for international crimes whether committed under the authority of the State or outside such authority stands in addition to State responsibility and is a critical aspect of the enforceability of rights and of protection against their violation. International

human rights law and humanitarian law provide the necessary linkages for this process of determination.

408. [...] [C]ommon Article 3 of the Geneva Conventions prohibits acts of violence to life and person, including cruel treatment and torture, taking of hostages and outrages upon personal dignity, in particular, humiliating and degrading treatment.
409. According to the Statute of the International Criminal Court, enforced disappearance means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. When committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, these acts may amount to a crime against humanity.
410. The abduction of women by Janjaweed may amount to enforced disappearance [...]. The incidents investigated establish that these abductions were systematic, were carried out with the acquiescence of the State, as the abductions followed combined attacks by Janjaweed and Government forces and took place in their presence and with their knowledge. The women were kept in captivity for a sufficiently long period of time, and their whereabouts were not known to their families throughout the period of their confinement. The Commission also finds that the restraints placed on the IDP population in camps, particularly women, by terrorizing them through acts of rape or killings or threats of violence to life or person by the Janjaweed, amount to severe deprivation of physical liberty in violation of rules of international law.
411. The Commission also finds that the arrest and detention of persons by the State security apparatus and the Military intelligence, including during attacks and intelligence operations against villages [...] may also amount to the crime of enforced disappearance as a crime against humanity. These acts were both systematic and widespread.
412. Abduction of persons during attacks by the Janjaweed and their detention in camps operated by the Janjaweed, with the support and complicity of the Government armed forces amount to gross violations of human rights, and to enforced disappearances. However, the Commission did not find any evidence that these were widespread or systematic so as to constitute a crime against humanity. Nevertheless, detainees were subjected to gross acts of violence to life and person. They were tortured or subjected to cruel and humiliating and degrading treatment. The acts were committed as a part of and were directly linked to the armed conflict. As serious violations of Common Article 3 of the Geneva Conventions [...] the Commission finds that the acts constitute war crimes.

413. Abduction of persons by the rebels also constitute serious and gross violations of human rights, and amount to enforced disappearance, but the Commission did not find any evidence that they were either widespread or systematic in order to constitute a crime against humanity. The Commission, nevertheless, has sufficient information to establish that acts of violence to life and person of the detainees were committed in the incidents investigated by the Commission. They were also subjected to torture and cruel, inhuman and degrading treatment. The acts were committed as a part of and directly linked to the armed conflict and, therefore, constitute war crimes as serious violations of the Common Article 3 of the Geneva Conventions.

**(xi.) *Recruitment and use of children under the age of 15 in armed hostilities***

[...]

**(b.) *Legal appraisal***

[...]

418. [...] [I]f it is convincingly proved that the Government or the rebels have recruited and used children under 15 in active military hostilities, they may be held accountable for such a crime.

**VII. ACTION OF SUDANESE BODIES TO STOP AND REMEDY VIOLATIONS**

[...]

**1. Action by the police**

[...]

422. Normally, in an international armed conflict the civil police force does not formally take part in the hostilities and can, at least theoretically, be considered as a non-combatant benefiting from the safeguards and protections against attack. However, in the particular case of the internal conflict in Darfur, the distinction between the police and the armed forces is often blurred. There are strong elements indicating occurrences of the police fighting alongside Government forces during attacks or abstaining from preventing or investigating attacks on the civilian population committed by the Janjaweed. There are also widespread and confirmed allegations that some members of the Janjaweed have been incorporated into the police. President El-Bashir confirmed in an interview with international media that in order to rein in the Janjaweed, they were incorporated in "other areas", such as the armed forces and the police. Therefore, the Commission is of the opinion that the 'civilian' status of the police in the context of the conflict in Darfur is questionable.

[...]

### **SECTION III: IDENTIFICATION OF THE POSSIBLE PERPETRATORS OF INTERNATIONAL CRIMES**

#### **I. GENERAL**

[...]

525. The Commission has [...] decided to withhold the names of these persons from the public domain. [...]
531. The Commission notes at the outset that it has identified ten (10) high-ranking central Government officials, seventeen (17) Government officials operating at the local level in Darfur, fourteen (14) members of the Janjaweed, as well as seven (7) members of the different rebel groups and three (3) officers of a foreign army (who participated in their individual capacity in the conflict), who may be suspected of bearing individual criminal responsibility for the crimes committed in Darfur.
532. The Commission's mention of the number of individuals it has identified should not however be taken as an indication that the list is exhaustive. [...]

#### **II. MODES OF CRIMINAL LIABILITY FOR INTERNATIONAL CRIMES**

##### **1. Perpetration or co-perpetration of international crimes**

[...]

##### **2. Joint criminal enterprise to commit international crimes**

538. [...] International law also criminalizes conduct of all those who participated, although in varying degrees, in the commission of crimes, without performing the same acts [...].
540. There may be two principal modalities of participation in a joint criminal enterprise to commit international crimes. First, there may be a multitude of persons participating in the commission of a crime, who share from the outset a common criminal design (to kill civilians indiscriminately, to bomb hospitals, etc.). In this case, all of them are equally responsible under criminal law, although their role and function in the commission of the crime may differ (one person planned the attack, another issued the order to the subordinates to take all the preparatory steps necessary for undertaking the attack, others physically carried out the attack, and so on). The crucial factor is that the participants voluntarily took part in the common design and intended the result. Of course, depending on the importance of the role played by each participant, their position may vary at the level of sentencing [...].
541. There may be another major form of joint criminal liability. It may happen that while a multitude of persons share from the outset the same criminal design, one or more perpetrators commit a crime that had not been agreed upon or envisaged at the beginning, neither expressly nor implicitly, and therefore did



not constitute part and parcel of the joint criminal enterprise. For example, a military unit [...] sets out to detain, contrary to international law, a number of enemy civilians; however, one of the servicemen, in the heat of military action, kills or tortures one of those civilians. If this is the case, the problem arises of whether the participants in the group other than the one who committed the crime not previously planned or envisaged, also bear criminal responsibility for such crime. As held in the relevant case law, 'the responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group, and (ii) the accused willingly took that risk.' In the example given above [...], a court would have to determine whether it was foreseeable that detention at gunpoint of enemy servicemen might result in death or torture.

[...]

### **3. Aiding and abetting international crimes**

547. The notion of aiding and abetting in international criminal law. As pointed by international case law, aiding and abetting a crime involves that a person (the accessory) gives practical assistance (including the provision of arms), encouragement or moral support to the author of the main crime (the principal), and such assistance has a substantial effect on the perpetration of the crime. The subjective element or *mens rea* resides in the accessory having knowledge that his actions assist the perpetrator in the commission of the crime.

[...]

### **4. Planning international crimes**

551. Planning consists of devising, agreeing upon with others, preparing and arranging for the commission of a crime. As held by international case law, planning implies that "one or several persons contemplate designing the commission of a crime at both the preparatory and executory phases."

[...]

### **5. Ordering international crimes**

[...]

### **6. Failing to prevent or repress the perpetration of international crimes (superior responsibility)**

[...]

561. With regard to the position of rebels, it would be groundless to argue (as some rebel leaders did when questioned by the Commission) that the two groups of insurgents (SLA and JEM) were not tightly organized militarily, with the consequence that often military engagements conducted in the field had not been planned, directed or approved by the military leadership. Even assuming that this was true, commanders must nevertheless be held accountable for

actions of their subordinates. The notion is widely accepted in international humanitarian law that each army, militia or military unit engaging in fighting either in an international or internal armed conflict must have a commander charged with holding discipline and ensuring compliance with the law. This notion is crucial to the very existence as well as enforcement of the whole body of international humanitarian law, because without a chain of command and a person in control of military units, anarchy and chaos would ensue and no one could ensure respect for law and order.

562. There is another and more specific reason why the political and military leadership of SLA and JEM may not refuse to accept being held accountable for any crime committed by their troops in the field, if such leadership refrained from preventing or repressing these crimes. This reason resides in the signing by that leadership of the various agreements with the Government of the Sudan. By entering into those agreements on behalf of their respective "movements" the leaders of each "movement" assumed full responsibility for conduct or misconduct of their combatants. [...]

#### **SECTION IV: POSSIBLE MECHANISMS TO ENSURE ACCOUNTABILITY FOR THE CRIMES COMMITTED IN DARFUR**

##### **I. GENERAL: THE INADEQUACIES OF THE SUDANESE JUDICIAL CRIMINAL SYSTEM AND THE CONSEQUENT NEED TO PROPOSE OTHER CRIMINAL MECHANISMS**

[...]

##### **II. MEASURES TO BE TAKEN BY THE SECURITY COUNCIL**

###### **1. Referral to the International Criminal Court**

###### **(i.) *Justification for suggesting the involvement of the ICC***

[...] [see hereafter, para. 648]

###### **2. Establishment of a Compensation Commission**

[...]

###### **(i.) *Justification for suggesting the establishment of a Compensation Commission***

[...]

593. Serious violations of international humanitarian law and human rights law can entail not only the individual criminal liability of the perpetrator but also the international responsibility of the State (or state-like entity) on whose behalf the perpetrator was acting. This international responsibility involves that the State (or the state-like entity) must pay compensation to the victim.

594. At the time this international obligation was first laid down, and perhaps even in 1949, when the Geneva Conventions were drafted and approved, the obligation was clearly conceived of as an obligation of each contracting State towards any other contracting State concerned. In other words, it was seen as an obligation between States, with the consequence that (i) each relevant State was entitled to request reparation or compensation from the other State concerned, and (ii) its nationals could concretely be granted compensation for any damage suffered only by lodging claims with national courts or other organs of the State. National case law in some countries has held that the obligation at issue was not intended directly to grant rights to individual victims of war crimes or grave breaches. [...]
595. The emergence of human rights doctrines in the international community [...] had a significant impact on this area as well. In particular, the right to an effective remedy for any serious violation of human rights has been enshrined in many international treaties. Furthermore, the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in 1985, provides that States should develop and make readily available appropriate rights and remedies for victims.
596. The right to an effective remedy also involves the right to reparation (including compensation), if the relevant judicial body satisfies itself that a violation of human rights has been committed; indeed, almost all the provisions cited above mention the right to reparation as the logical corollary of the right to an effective remedy.
597. As the then President of the ICTY, Judge C. Jorda, rightly emphasized in his letter of 12 October 2000 to the United Nations Secretary-General, the universal recognition and acceptance of the right to an effective remedy cannot but have a bearing on the interpretation of the international provisions on State responsibility for war crimes and other international crimes. These provisions may now be construed to the effect that the obligations they enshrine are assumed by States not only towards other contracting States but also vis-à-vis the victims, i.e. the individuals who suffered from those crimes. In other words, there has now emerged in international law a right of victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those abuses.
598. In light of the above [...] the proposition is warranted that at present, whenever a gross breach of human rights is committed which also amounts to an international crime, customary international law not only provides for the criminal liability of the individuals who have committed that breach, but also imposes an obligation on States of which the perpetrators are nationals, or for which they acted as *de jure* or *de facto* organs, to make reparation (including compensation) for the damage made.
599. Depending on the specific circumstances of each case, reparation may take the form of *restitutio in integrum* (restitution of the assets pillaged or stolen), monetary compensation, rehabilitation including medical and psychological care

as well as legal and social services, satisfaction including a public apology with acknowledgment of the facts and acceptance of responsibility, or guarantees of non-repetition. As rightly stressed by the U.N. Secretary-General in 2004, it would also be important to combine various mechanisms or forms of reparation.

600. [...] A similar obligation is incumbent upon rebels for all crimes they may have committed, whether or not the perpetrators are identified and punished.

[...]

### **III. POSSIBLE MEASURES BY OTHER BODIES**

604. While referral to the ICC is the main immediate measure to be taken to ensure accountability, the Commission wishes to highlight some other available measures, which are not suggested as possible substitutes for the referral of the situation of Darfur to the ICC.

#### **1. Possible role of national courts of States other than Sudan**

[...]

##### ***(i.) Referral by the Security Council and the principle of complementarity***

[...]

608. [...] [A] referral by the Security Council is normally based on the assumption that the territorial State is not administering justice because it is unwilling or unable to do so. Therefore, the principle of complementarity will not usually be invoked *in casu* with regard to that State.

609. The Commission's recommendation for a Security Council referral to the ICC is based on the correct assumption that Sudanese courts are unwilling and unable to prosecute the numerous international crimes perpetrated in Darfur since 2003. The Commission acknowledges that the final decision in this regard lies however with the ICC Prosecutor.

##### ***(ii.) The notion of "universal jurisdiction"***

[...]

613. It seems indisputable that a general rule of international law exists authorising States to assert universal jurisdiction over war crimes, as well as crimes against humanity and genocide. The existence of this rule is proved by the convergence of States' pronouncements, national pieces of legislation, as well as by case law.
614. However, the customary rules in question, construed in the light of general principles currently prevailing in the international community, arguably make the exercise of universal jurisdiction subject to two major conditions. First, the person suspected or accused of an international crime must be present on the territory of the prosecuting State. Second, before initiating criminal proceedings

this State should request the territorial State (namely, the State where the crime has allegedly been perpetrated) or the State of active nationality (that is, the State of which the person suspected or indicted is a national) whether it is willing to institute proceedings against that person and hence prepared to request his or her extradition. Only if the State or States in question refuse to seek the extradition, or are patently unable or unwilling to bring the person to justice, may the State on whose territory the person is present initiate proceedings against him or her.

615. In the case of Darfur the second condition would not need to be applied, for, as pointed out above, Sudanese courts and other judicial authorities have clearly shown that they are unable or unwilling to exercise jurisdiction over the crimes perpetrated in Darfur.

**(iii.) Exercise of universal jurisdiction and the principle of complementarity of the ICC**

616. [...] The Commission takes the view that complementarity would also apply to the relations between the ICC and those national courts of countries other than Sudan. In other words, the ICC should defer to national courts other than those of Sudan which genuinely undertake proceedings on the basis of universal jurisdiction. [...] [T]here is [...] no reason to doubt *a priori* the ability or willingness of any other State asserting either universal jurisdiction or jurisdiction based on any of the basis for extra-territorial jurisdiction mentioned above. The principle of complementarity, one of the mainstays of the ICC system, should therefore operate fully in cases of assertion of universal jurisdiction over a crime which had been referred to the ICC by the Security Council.

[...]

## **SECTION V: CONCLUSIONS AND RECOMMENDATIONS**

[...]

### **I. FACTUAL AND LEGAL FINDINGS**

[...]

632. The Commission finds that large scale destruction of villages in Darfur has been deliberately caused, by and large, by the Janjaweed during attacks, independently or in combination with Government forces. Even though in most of the incidents the Government may not have participated in the destruction, their complicity in the attacks during which the destruction was conducted and their presence at the scene of destruction are sufficient to make them jointly responsible for the destruction. [...]
633. The Commission considers that there is a consistent and reliable body of material which tends to show that numerous murders of civilians not taking part in the hostilities were committed both by the Government of the Sudan

and the Janjaweed. It is undeniable that mass killing occurred in Darfur and that the killings were perpetrated by the Government forces and the Janjaweed in a climate of total impunity and even encouragement to commit serious crimes against a selected part of the civilian population. The large number of killings, the apparent pattern of killing and the participation of officials or authorities are amongst the factors that lead the Commission to the conclusion that killings were conducted in both a widespread and systematic manner. The mass killing of civilians in Darfur is therefore likely to amount to a crime against humanity.

634. It is apparent from the information collected and verified by the Commission that rape or other forms of sexual violence committed by the Janjaweed and Government soldiers in Darfur was widespread and systematic and may thus well amount to a *crime against humanity*. The awareness of the perpetrators that their violent acts were part of a systematic attack on civilians may well be inferred from, among other things, the fact that they were cognizant that they would in fact enjoy impunity. The Commission finds that the crimes of sexual violence committed in Darfur may amount to rape as a crime against humanity, or sexual slavery as a crime against humanity.
635. The Commission considers that torture has formed an integral and consistent part of the attacks against civilians by Janjaweed and Government forces. Torture and inhuman and degrading treatment can be considered to have been committed in both a widespread and systematic manner, amounting to a crime against humanity. In addition, the Commission considers, that conditions in the Military Intelligence Detention Centre witnessed in Khartoum clearly amount to torture and thus constitute a serious violation of international human rights and humanitarian law.
636. It is estimated that more than 1,8 million persons have been forcibly displaced from their homes, and are now hosted in IDP sites throughout Darfur, as well as in refugee camps in Chad. The Commission finds that the forced displacement of the civilian population was both systematic and widespread, and such action would amount to a crime against humanity.
637. The Commission finds that the Janjaweed have abducted women, conduct which may amount to enforced disappearance as a crime against humanity. [...]
638. In a vast majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes, who were systematically targeted on political grounds in the context of the counter-insurgency policy of the Government. The pillaging and destruction of villages, being conducted on a systematic as well as widespread basis in a discriminatory fashion appears to have been directed to bring about the destruction of livelihoods and the means of survival of these populations. The Commission also considers that the killing, displacement, torture, rape and other sexual violence against civilians was of such a discriminatory character and may constitute persecution as a crime against humanity.

639. While the Commission did not find a systematic or a widespread pattern to violations committed by rebels, it nevertheless found credible evidence that members of the SLA and JEM are responsible for serious violations of international human rights and humanitarian law which may amount to war crimes. In particular, these violations include cases of murder of civilians and pillage.

## II. DO THE CRIMES PERPETRATED IN DARFUR CONSTITUTE ACTS OF GENOCIDE?

640. The Commission concluded that the Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are, first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. Recent developments have led members of African and Arab tribes to perceive themselves and others as two distinct ethnic groups. The rift between tribes, and the political polarization around the rebel opposition to the central authorities has extended itself to the issues of identity. The tribes in Darfur supporting rebels have increasingly come to be identified as “African” and those supporting the Government as “Arabs”. However, the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.
641. The Commission does recognize that in some instances, individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case-by-case basis.
642. The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken as in any way detracting from the gravity of the crimes perpetrated in that region. Depending upon the circumstances, such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide. This is exactly what happened in Darfur [...].

## III. WHO ARE THE PERPETRATORS?

[...]

645. The Commission decided to withhold the names of these persons from the public domain. This decision is based on three main grounds: 1) the importance of the principles of due process and respect for the rights of the suspects; 2) the fact that the Commission has not been vested with investigative or prosecutorial powers; and 3) the vital need to ensure the protection of witnesses from possible harassment or intimidation. The Commission instead will list the names in a sealed file that will be placed in the custody of the United Nations Secretary-General. The Commission recommends that this file be handed over to a competent Prosecutor (the Prosecutor of the International Criminal Court, according to the Commission's recommendations), who will use that material as he or she deems fit for his or her investigations. A distinct and very voluminous sealed file, containing all the evidentiary material collected by the Commission, will be handed over to the High Commissioner for Human Rights. This file should be delivered to a competent Prosecutor.
646. The Commission's mention of the number of individuals it has identified should not, however, be taken as an indication that the list is exhaustive. [...] [T]he Commission has gathered substantial material on different influential individuals, institutions, groups of persons, or committees, which have played a significant role in the conflict in Darfur, including on planning, ordering, authorizing, and encouraging attacks. These include, but are not limited to, the military, the National Security and Intelligence Service, the Military Intelligence and the Security Committees in the three States of Darfur. These institutions should be carefully investigated so as to determine the possible criminal responsibility of individuals taking part in their activities and deliberations.

#### **IV. THE COMMISSION'S RECOMMENDATIONS CONCERNING MEASURES DESIGNED TO ENSURE THAT THOSE RESPONSIBLE ARE HELD ACCOUNTABLE**

##### **1. Measures that should be taken by the Security Council**

647. With regard to the judicial accountability mechanism, the Commission strongly recommends that the Security Council should refer the situation in Darfur to the International Criminal Court, pursuant to Article 13(b) of the Statute of the Court. Many of the alleged crimes documented in Darfur have been widespread and systematic. They meet all the thresholds of the Rome Statute for the International Criminal Court. The Sudanese justice system has demonstrated its inability and unwillingness to investigate and prosecute the perpetrators of these crimes.
648. The Commission holds the view that resorting to the ICC would have at least six major merits. First, the International Court was established with an eye to crimes likely to threaten peace and security. This is the main reason why the Security Council may trigger the Court's jurisdiction under Article 13(b). The investigation and prosecution of crimes perpetrated in Darfur would have an impact on peace and security. More particularly, it would be conducive, or contribute to, peace and stability in Darfur, by removing serious obstacles to national reconciliation and the restoration of peaceful relations. Second, as the investigation and prosecution



in the Sudan of persons enjoying authority and prestige in the country and wielding control over the State apparatus, is difficult or even impossible, resort to the ICC, the only truly international institution of criminal justice, which would ensure that justice be done. The fact that trials proceedings would be conducted in The Hague, the seat of the ICC, far away from the community over which those persons still wield authority and where their followers live, might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions. Third, only the authority of the ICC, backed up by that of the United Nations Security Council, might impel both leading personalities in the Sudanese Government and the heads of rebels to submit to investigation and possibly criminal proceedings. Fourth, the Court, with an entirely international composition and a set of well-defined rules of procedure and evidence, is the best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor. Fifth, the ICC could be activated immediately, without any delay (which would be the case if one were to establish *ad hoc* tribunals or so called mixed or internationalized courts). Sixth, the institution of criminal proceedings before the ICC, at the request of the Security Council, would not necessarily involve a significant financial burden for the international community.

649. [...] [T]he Commission also proposes the establishment of an International Compensation Commission, consisting of fifteen (15) members, ten (10) appointed by the United Nations Secretary-General and five (5) by an independent Sudanese body.

## 2. Action that should be taken by the Sudanese authorities

650. [...] The Commission of Inquiry therefore recommends the government of Sudan to:

[...]

- (iv) grant the International Committee of the Red Cross and the United Nations human rights monitors full and unimpeded access to all those detained in relation to the situation in Darfur;

[...]

## DISCUSSION

### 1. Qualification of the conflict and applicable law

1. How would you qualify the conflict? If Sudan had been a party to it, would Protocol II have applied? Did the non-applicability of Protocol II have any impact on the Commission's conclusions?
2. Are the rebels bound by exactly the same rules as the government? In the field of international humanitarian law (IHL)? Of international criminal law? Of international human rights law?

3. Which human rights norms apply? In which circumstances may the government derogate from some norms? What are these norms? Are certain norms partially derogable? Did the Sudanese government actually derogate from any of its obligations?
4.
  - a. How does the Commission identify customary IHL? Does it look into the actual practice of the parties to non-international armed conflicts? Should it have done so?
  - b. On what kind of practice are the customary rules listed in para. 166 based? Are you able to identify different categories of such rules according to the supporting practice mentioned by the Commission in the footnotes?
  - c. How can the prohibition of attacks on civilian objects be customary if it is not mentioned in Protocol II? Is the Commission's reference to the provisions of the Geneva Conventions on grave breaches relevant?

## II. Violations of IHL

5. Is the determination of a systematic pattern of violations relevant for IHL? For international criminal law? To identify war crimes? To identify crimes against humanity? To identify genocide?
6. Do the irrefutable facts of massive population displacements and large-scale destruction of villages necessarily indicate a violation of IHL? In the case of Darfur, which facts indicate an obvious violation of IHL?
7. Could the attacks on villages described in paras 240-251 possibly be justified if some or many rebels were present in those villages? Is the government correct in stating that when rebels were within a certain village, the latter became a military objective (*para. 249*)?
8. Are the obligations to take precautionary measures and to respect the proportionality principle as prescribed in Art. 57 of Protocol I the same in international and in non-international armed conflicts? Why? Because they can be derived from the actual practice of belligerents? Because they are necessary in order to comply with the substantive provisions?
9. Is the Commission correct in holding (*paras 291-292*) that even civilians used by rebels as shields or possessing weapons may not be killed? In which circumstances would civilians lose their protection?
10. Can the aim to deprive rebels of the support they receive from the civilian population justify the forced displacement of that population?
11. Do the instances of rape and sexual violence mentioned in the report raise any question regarding the interpretation or adequacy of the applicable IHL?
12. Must every detention in non-international armed conflicts be subject to control by a court? In international armed conflicts?
13. Are police forces legitimate targets of attacks: in non-international armed conflicts? In international armed conflicts? What could justify a different status of police forces in the two kinds of armed conflicts?

## III. Repression of violations

14. Which elements of the crime of genocide were fulfilled in Darfur? Which elements were not fulfilled? Why could the genocidal intent not be deduced from the pattern of violations?
15. What are the modes of criminal liability for international crimes? For which crimes may a participant in the commission of international crimes be held liable? Only for those covered by the common purpose, or also for those committed by some other participants but that go beyond the common purpose?

16. May leaders of rebel groups escape command responsibility more easily than leaders of government armed forces?
17. Why should the perpetrators of international crimes committed in Darfur be brought before the International Criminal Court (ICC)? How was this achieved?
18.
  - a. When may third States exercise universal jurisdiction over international crimes? Even in non-international armed conflicts? Do they have an obligation to exercise such jurisdiction?
  - b. When a case is referred to it by the Security Council, does the ICC have precedence over the obligation of third States to exercise universal jurisdiction over international crimes?
19. Who must pay compensation for violations of IHL? Who has the right to receive such compensation? How is it that the obligation to pay such compensation also exists for non-international armed conflicts, even though in treaties it is only foreseen for international armed conflicts?

**Case No. 165, Sudan, Arrest Warrant for Omar Al-Bashir****A. United Nations Security Council Resolution 1593**

[Source: United Nations Security Council, Resolution 1593 (2005), 31 March 2005, Doc. S/RES/1593 (2005), available at <http://www.un.org/documents/scres.htm>]

**Resolution 1593 (2005)**

**Adopted by the Security Council at its 5158<sup>th</sup> meeting, on 31 March 2005**

*The Security Council,*

*Taking note* of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur [...], [See **Case No. 164**, Sudan, Report of the UN Commission of Enquiry on Darfur]

*Recalling* Article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

[...]

*Taking note* of the existence of agreements referred to in Article 98-2 of the Rome Statute,

*Determining* that the situation in Sudan continues to constitute a threat to international peace and security,

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;
2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;
3. *Invites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;
4. *Also encourages* the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;

[...]

6. *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

[...]

9. *Decides* to remain seized of the matter.

## **B. ICC Prosecutor's Application for an Arrest Warrant**

[Source: International Criminal Court, "Prosecutor's Statement on the Prosecutor's Application for a Warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR," 14 July 2008, available at [www.icc-cpi.int](http://www.icc-cpi.int)]

Mr. Luis Moreno-Ocampo  
Prosecutor of the International Criminal Court

### ***Prosecutor's Statement on the Prosecutor's Application for a Warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR***

The Hague, 14 July 2008

Good afternoon Ladies and Gentlemen.

I have submitted to the Judges an application for the issuance of an arrest warrant against Omar Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes. [...]

AL BASHIR bears criminal responsibility:

- for genocide under Article 6(a), killing members of the Fur, Masalit and Zaghawa ethnic groups, (b) causing serious mental harm, and (c) deliberately inflicting conditions of life calculated to bring about their physical destruction in part;
- for crimes against humanity, including acts of (a) murder, (b) extermination, (d) forcible transfer of the population, (f) torture and (g) rapes; and
- war crimes for intentionally directing attacks against the civilian population and pillaging.

The jurisdiction of the Court comes from a referral by the UN Security Council. [...]

## C. Statement of the Arab Transitional Parliament

[Source: Arab Transitional Parliament's Committee for Legislative, Legal and Human Rights Affairs, "Statement on the ICC Prosecutor's Request to Issue Arrest Warrant against President Omar Hassan Ahmad Al-Bashir, President of the Republic of the Sudan," 5 August 2008, available at [www.arableagueonline.org](http://www.arableagueonline.org)]

### **Statement of The Arab Transitional Parliament's Committee for Legislative, Legal and Human Rights Affairs**

At the Committee's Meeting at Damascus, Capital of the Syrian Arab Republic

On August 4-5 2008

### **On The ICC Prosecutor's Request to Issue Arrest Warrant against President/ Omar Hassan Ahmad Al-Bashir, President of the Republic of the Sudan**

Damascus August 5<sup>th</sup> 2008

[...]

#### **I- On the Security Council Referral Resolution to the ICC The Committee emphasizes the following:**

**First:** The Committee is astounded at the position of the ICC towards the Sudan which discloses grave insufficiency of the legal knowledge and blatant deviation from Rome Statute as well as conspicuous political allegations underlying the ICC Prosecutor request.

[...]

**Seventhly:** The Committee deems this resolution absolutely null and void since the Sudan is not party to the ICC statute, and hence the Security Council may not apply the provision of Article 13 of Rome Statute to the Sudan as long as the statute exclusively applies to parties thereto.

**Eighthly:** The Committee believes that the mandate of the Security Council under Chapter VII of the UN Charter is to take measures necessary to maintain international peace and security and not vice versa. Accordingly, the conflict in the Sudan is an internal affair and is not covered by the provisions of Chapter VII of the UN Charter on the grounds of which the Security Council took the decision of referral to the ICC.

#### **II- On the ICC Prosecutor Request**

The Committee believes that the ICC Prosecutor request suffers from serious legal flaws notably:

- 1- It is a precedent that the ICC accuses a state head who is exercising his powers and enjoys international immunity according to the internationally recognized pacts and conventions. This precedent stands in contrast with all other cases examined by the ICC and referred to it by African member states against rebel groups on their soils and the ICC provided assistance to these states against the rebels.

[...]

- 3- The Sudan is not party to "Rome Statute", so the Security Council may not take a decision to refer the file to the ICC and proceed with investigation. Therefore, the arrest warrant against the President of the Sudan is null as it violates the relative effect of conventions which are only productive and effective between parties thereto subject to Article (34) of Vienna Convention on the Law of Treaties.
- 4- The ICC Prosecutor disregards the issue of immunity from criminal jurisdiction and its significance and the judgment delivered by the International Court of Justice (ICJ) in the case of Mr. Abdulaye Yerodia, Congolese Minister of Foreign Affairs, in 2002 [See Case No. 242, ICJ, Democratic Republic of the Congo v. Belgium] which emphasized that jurisdictional immunity prevails vis-à-vis foreign and international courts. The ICJ's judgment was in favor of the Republic of the Congo against Belgium which had to amend Article (12) of its Criminal Procedures Code in conformity with the judgment to the effect that incumbent officials who enjoy immunity may not be tried before foreign courts.

[...]

- 6- Disregard on the part of the ICC Prosecutor of the distinction between member state and non member state has caused him to invoke Article (21) which disregards immunity of state heads though this Article exclusively applies to member states at the time of trial, for immunity from criminal jurisdiction precludes both national and international judiciaries.

[...]

## **D. ICC Pre-Trial Chamber's Decision on the Application for an Arrest Warrant**

[Source: International Criminal Court, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," 4 March 2009, available at [www.icc-cpi.int](http://www.icc-cpi.int)]

Date: 4 March 2009

### **PRE-TRIAL CHAMBER I**

[...]

### **SITUATION IN DARFUR, SUDAN IN THE CASE OF THE PROSECUTOR**

**v.**

**OMAR HASSAN AHMAD AL BASHIR ("OMAR AL BASHIR")**

[...]

### **Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir**

[...]

### **III. Whether the case against Omar Al Bashir falls within the jurisdiction of the Court and is admissible**

#### **A. The case against Omar Al Bashir falls within the jurisdiction of the Court**

35. Article 19(1) of the Statute requires the Chamber to satisfy itself that any case brought before it falls within the jurisdiction of the Court.

36. In this regard, the Chamber previously stated that:

[...]

[...] article 12(2) does not apply where a situation is referred to the Court by the Security Council acting under Chapter VII of the Charter, pursuant to article 13(b) of the Statute. Thus, the Court may, where a situation is referred to it by the Security Council, exercise jurisdiction over crimes committed in the territory of States which are not Party to the Statute and by nationals of States not Party to the Statute.

[...]

41. Furthermore, in light of the materials presented by the Prosecution in support of the Prosecution Application, and without prejudice to a further determination of the matter pursuant to article 19 of the Statute, the Chamber considers that the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case.

42. The Chamber reaches this conclusion on the basis of the four following considerations. First, the Chamber notes that, according to the Preamble of the Statute, one of the core goals of the Statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which "must not go unpunished".

43. Second, the Chamber observes that, in order to achieve this goal, article 27(1) and (2) of the Statute provide for the following core principles:

(i) "This Statute shall apply equally to all persons without any distinction based on official capacity;"

(ii) "[...] official capacity as a Head of State or Government, a member of Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence;" and

(iii) "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

44. Third, the consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (l)(b) and (l)(c) of article 21 of the Statute, can only



be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and article 21(3) of the Statute.

45. Fourth, as the Chamber has recently highlighted in its 5 February 2009 “Decision on Application under Rule 103”, by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.

[...]

### **FOR THESE REASONS**

**DECIDES** to issue a warrant of arrest for Omar Al Bashir for his alleged responsibility for crimes against humanity and war crimes under article 25(3)(a) of the Statute [...].

## **E. Decision of the African Union following the issuance of the Warrant of Arrest**

[Source: African Union, “Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court”, 3 July 2009, Doc. Assembly/AU/13(XIII), available at [www.africa-union.org](http://www.africa-union.org)]

### **DECISION ON THE MEETING OF AFRICAN STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)**

#### **Doc. Assembly/AU/13(XIII)**

**The Assembly,**

[...]

**2. EXPRESSES ITS DEEP CONCERN** at the indictment issued by the Pre-Trial Chamber of the ICC against President Omar Hassan Ahmed El Bashir of the Republic of The Sudan;

**3. NOTES WITH GRAVE CONCERN** the unfortunate consequences that the indictment has had on the delicate peace processes underway in The Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur;

[...]

**7. FURTHER TAKES NOTE** that any party affected by the indictment has the right of legal recourse to the processes provided for in the Rome Statute regarding the appeal process and the issue of immunity;

[...]

**9. DEEPLY REGRETS** that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of the ICC, has neither been heard nor acted upon, and in this regard, **REITERATES ITS REQUEST** to the UN Security Council;

**10. DECIDES** that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan;

**11. EXPRESSES CONCERN OVER** the conduct of the ICC Prosecutor and **FURTHER DECIDES** that the preparatory meeting of African States Parties to the Rome Statute of the ICC scheduled for late 2009 should prepare, *inter alia*, guidelines and a code of conduct for exercise of discretionary powers by the ICC Prosecutor relating particularly to the powers of the prosecutor to initiate cases at his own discretion under Article 15 of the Rome Statute;

[...]

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

## DISCUSSION

1. Is the non-international armed conflict in Sudan an internal affair of Sudan? Are violations of IHL committed in such a conflict internal affairs of Sudan? May the United Nations Security Council adopt resolutions under Chapter VII of the UN Charter concerning internal affairs of a Member State? (See UN Charter, Art. 2(7))
2. What is the basis for the ICC's jurisdiction in the present case? Does the referral of the situation by the UN Security Council acting under Chapter VII give jurisdiction to the ICC, even though Sudan is not party to the Rome Statute? Or do you agree with the Arab Transitional Parliament that Article 13 of the Rome Statute only applies to States Parties? (ICC Statute, Arts 12 and 13)
3. Does Sudan have an obligation to cooperate with the ICC, although it is not party to the ICC Statute? [See **Case No. 23**, The International Criminal Court] May Sudan invoke the complementarity principle and argue that the case is not admissible under Art. 17 of the ICC Statute, because Sudan itself will investigate and prosecute alleged perpetrators? [See also **Case No. 164**, Sudan, Report of the UN Commission of Enquiry on Darfur [Para. 608]]
4. What does Art. 16 of the ICC Statute say? Why does the African Union request the Security Council to defer proceedings? What would the consequences of a deferral be? Should the ICC have waited until the end of Al-Bashir's mandate as President of Sudan before issuing a warrant of arrest? Would this have been in accordance with the purpose of the Statute to end impunity? (ICC Statute, Preamble)
5. Is para. 6 of Resolution 1593 a deferral under Art. 16 of the ICC Statute? Is it valid only for 12 months? Is para. 6 compatible with IHL relating to compulsory universal jurisdiction over grave breaches? (GC I-IV, Arts 49/50/129/146 respectively) If it is not, which prevails (See also UN Charter, Art. 103)
6. May the ICC open an investigation and prosecute incumbent heads of State? What kind of immunities does an incumbent head of State enjoy? What was the International Court of Justice's conclusion in

the *DRC v. Belgium* case regarding criminal proceedings against heads of State before international courts? [See **Case No. 242**, ICJ, *Democratic Republic of the Congo v. Belgium* [Para. 61]] What was the Special Court for Sierra Leone's conclusion on the same subject in the *Taylor* case? [See **Case No. 275**, Sierra Leone, Special Court Ruling on Immunity for Taylor [Paras 44-57]] Are incumbent heads of State only protected from prosecution by foreign courts? Are they also protected from prosecution by international courts?

7.
  - a. How does the ICC Pre-Trial Chamber justify the fact that the position of Al-Bashir as President of Sudan has no effect on the Court's jurisdiction? What do you think of the first argument (*Pre-Trial Chamber, para. 42*)? Is the ICC Statute's Preamble binding? Does the reference to the Preamble mean that immunities would be inconsistent with the object and purpose of the ICC Statute? Is Sudan under an obligation not to act contrary to the object and purpose of the ICC Statute? (The Sudan signed the Rome Statute on 8 September 2000 but later declared that "Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000.") [See United Nations Treaty Collection, available at <http://treaties.un.org>]
  - b. Does Art. 27(2) of the ICC Statute waive the jurisdictional immunity that incumbent heads of State enjoy? Does Art. 27(2) apply to Sudan, even though it is not party to the ICC Statute? May a treaty create obligations for non-States Parties? Did the UN Security Council's resolution make the whole of the ICC Statute applicable to Sudan? Even though the resolution clearly says that the Security Council recognizes "that States not party to the Rome Statute have no obligation under the Statute"? (Vienna Convention on the Law of Treaties, Art. 34)
  - c. What does para. 44 of the Pre-Trial Chamber's decision mean? Why does the Chamber refer to other sources of law? Does it mean that the ICC Statute takes precedence over the international rules on immunities? Where can the rules on immunities be found?
  - d. What does para. 45 of the Pre-Trial Chamber's decision mean? Does it mean the UN Security Council implicitly agreed that the rules on immunities enshrined in the ICC Statute would apply? Would you agree with such an argument? Even though the resolution made no reference to the possibility that State officials would be prosecuted?
8.
  - a. Are other States Parties to the ICC Statute under an obligation to cooperate with the ICC? On what legal basis? Are they under an obligation to surrender President Al-Bashir to the ICC if he is present on their territory? What does Art. 98 of the Statute mean? Does the UN Security Council's resolution take precedence over Art. 98?
  - b. Does the UN Security Council's resolution create obligations for States that are not party to the ICC Statute? Are they under an obligation to cooperate with the ICC and to surrender Al-Bashir if he is present on their territory? On what legal basis?
9.
  - a. Does IHL say anything about immunities? Is there an obligation under IHL to prosecute persons suspected of having committed war crimes? When does the obligation exist? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85)
  - b. Would it make a difference if the alleged crimes amounted to grave breaches? Does IHL allow for immunity when grave breaches have been committed? Can there be any exception to the obligation to search for and bring to court persons having committed or ordered to commit grave breaches? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85)
10. May President Al-Bashir be tried for violations of the ICC Statute, although the UN Security Council made the Statute applicable to him only after he had allegedly committed the crimes concerned?

## Document No. 166, South Africa, African National Congress Manual

[Source: African National Congress Manual, in "Report of Commission on National Structures, Constitutional Guidelines and Codes of Conduct," released at the ANC National Consultative Conference at Kabwe, June 1985; available at [www.anc.org.za](http://www.anc.org.za)]

**AFRICAN NATIONAL CONGRESS MANUAL****Preamble**

Recognising that our army, *Umkhonto we Sizwe*, must define its aims and objects in clear and precise terms, and that the rights and duties of each member should be likewise defined without ambiguity, the Politico-Military Council, acting on behalf of the African National Congress of South Africa, has adopted and hereby decrees this code for the guidance of members in cell positions.

**1. *Umkhonto we Sizwe* – a People's Army**

The ANC and its allies created *Umkhonto* as a new and indispensable weapon in the struggle for people's power. Unlike the armed forces of the racist regime of South Africa, which we have vowed to crush and annihilate, and unlike all other armies of imperialism, *Umkhonto we Sizwe* is a People's Army organised and dedicated to waging a people's war for the liberation of our country.

*Umkhonto* is an army of volunteers. It consists of volunteers drawn from the revolutionary sections of our people. By joining *Umkhonto*, combatants commit themselves to the solemn and noble duty of serving our suffering and dispossessed people in the struggle that will continue for each and all of us until victory or death.

In the words of our founding Manifesto, published on the historic day of 16<sup>th</sup> December 1961: '*Umkhonto we Sizwe* will be at the front line of the people's defence. It will be the fighting arm of the people against the racist government and its policies of racial oppression. It will be the striking force of the people for liberty, for rights and for their final liberation.'

[...]

**2. Political and Military Struggle**

*Umkhonto we Sizwe* is the fighting arm of the ANC and its allies. Our armed struggle is a continuation of our political struggle by means that include armed force. The political leadership has primacy over the military. Our military line derives from our political line. Every commander, commissar, instructor and combatant must therefore be clearly acquainted with the policy with regard to all combat tasks and missions. [...] *Umkhonto* cadres, with arms in hand, are political activists and leaders, as well as warriors. This combination of political and military functions is characteristic of all popular, revolutionary armies especially in the phase of guerrilla warfare.

### 3. People's War

*Umkhonto* is a people's army fighting a people's war. We fight to liberate our oppressed and exploited people. We fight for their interests. *Umkhonto* has no mercenaries, no paid soldiers or conscripted troops. [...]

The people support their army by providing it with recruits – their sons and daughters – food, shelter, and information about the enemy. The people open the way for our guerrillas and make the enemy's path hard. Everyone can become a freedom fighter. The struggle has many fronts and is not confined to trained soldiers alone.

The ANC mobilises the people in support of the revolution through skillful combination of all forms of struggle: violent and non-violent, legal and illegal, strikes and demonstrations, boycotts and non-collaboration, propaganda, education and sabotage. A people's war is fought by the people with arms and all other forms and methods of struggle. Without the organised support of the people, armed struggle is in danger of being isolated and strangled. The enemy attempts to isolate us by launching campaigns to win the 'hearts and minds' of the people – of our people, the oppressed and suffering workers and peasants. To defeat the enemy, we must involve the entire people in the National Democratic Revolution.

[...]

#### **5. *Umkhonto* insists on a high standard of selfless devotion to the revolution on the part of all its members.**

They are required at all times to:

- a. behave correctly to the people;
- b. respect their persons and property;
- c. refrain from molesting or interfering with their legitimate activities;
- d. assist them to solve their problems and where possible give material aid in their labour; and
- e. demonstrate high moral qualities in word and deed.

### 6. Revolutionary Discipline and Consciousness

To defeat the enemy in combat, our soldiers must be disciplined, trained to obey commands promptly, and ready to spring into battle immediately when ordered. Vigilance, alertness and readiness to engage the enemy at a moment's notice are qualities that can develop only out of discipline, proper training and political consciousness.

[...]

*Umkhonto* soldiers pledge themselves to safeguard the revolution at all times regardless of personal hardships, suffering and danger. A soldier who breaks discipline, disobeys commands or by improper conduct betrays the high moral standards of our army will be punished. Such punishment is necessary to maintain the qualities

expected of a people's army. Every attempt is made to correct bad behaviour and rehabilitate members who violate the army's code. But punishment is severe in cases of serious crimes, treachery and criminal neglect endangering the safety of others and the security of the army.

Our procedure and rules are well defined, precise and to the point. Military orders are issued with a definite purpose and must be obeyed. It is the duty and responsibility of every soldier to know and understand the army's code of conduct, to recognise his military commanders, to be clear about his own duties, and to carry out orders immediately and without question. Orders must be obeyed cheerfully, promptly and exactly. A soldier who does not understand an order has a right to have it explained. He must know when to raise problems, to whom he must report, and how to obtain clarification. He must not, in any circumstances, refuse to obey a command or argue over the execution of an order.

Outright disobedience and failure to obey an order promptly may have serious consequences. A soldier who thinks that he has been given a wrong order must obey it first and if need be complain afterwards to his commander. Our commanding officers, commissars, instructors and others who are entrusted with responsibility to lead must be above reproach. They are to be a shining example of modesty, sound moral behaviour, correct attitudes towards all members, respectful and helpful to every member of the army, regardless of his position. Commanders and Political Commissars occupy a central role in *Umkhonto*. Without them disorder can result. They are the principal target of the enemy and must be given maximum protection. *Umkhonto* is engaged in guerrilla warfare, against a powerful and remorseless enemy which resorts to torture, banditry and terrorism.

[...]

### General Regulations

**1. All army units shall preserve and safeguard political and military and organisational information relating to the army's security and well-being.**

The wilful or negligent disclosure of classified information to unauthorised persons, and the unauthorised acquisition and/or retention of secrets and classified documents shall be an offence.

**2. All combatants must defend the ANC and be loyal to it, the army and the revolution.**

The following acts or omissions shall be an offence:

1. Disloyalty or deception designed or likely to give assistance to the enemy.
2. Rebellion or revolt against the army command or part of it or attempts to commit such an act of rebellion or revolt.
3. Conduct which causes despondence, spreads a spirit of defeatism, or undermines morale in any member or section of the army.

4. Cowardly conduct in the face of the enemy.
5. Wilful disobedience or refusal of orders properly given by a commander.
6. Desertion from the army.

**3. All combatants shall act in such a manner that the people will put their trust in the army, recognise it as their protector, and accept the liberation movement as their legitimate and authentic representative.**

The following acts or omissions shall be an offence:

1. Conduct that weakens the people's trust, confidence and faith in the ANC and *Umkhonto*.
2. Theft from a comrade or the people, looting of property, or other forcible seizure of goods.
3. Abuse of authority and/or power.
4. Cruelty inflicted on a member of the army or public.
5. Assaults, rape, disorderly conduct, the use of insulting and/or obscene language, bullying and intimidation, whether against a comrade or member of the public.
6. Shameful conduct likely to disgrace the ANC army or the offender, or bring them into disrepute, or provoke indignation and contempt against them, such as violating the rights and dignity of the opposite sex, whether in operational or base areas.
7. Unjustifiable homicide.
8. Ill-treatment of prisoners of war or persons in custody.

**4. All combatants shall protect the leadership and property of the ANC and *Umkhonto***

The following acts or omissions shall be an offence:

1. Failure to protect commanders and commissars against assault or attacks.
2. Wilful negligent destruction, neglect or misuse of the property and/or funds of the ANC and army.
3. Failure to submit and hand over to the commanding authority property seized or acquired during military operations.
4. Negligence in handling, using or storing and loss of weapons.

**5. All combatants are required to have the permission of a competent authority to travel, move from one place to another or leave a camp, base or residence to which they are assigned.**

The following acts or omissions shall be an offence:

1. Absence without permission.
2. Escaping or attempting to escape from the custody of a competent authority.

[...]

**8. Punishment**

All members of the ANC and combatants are required to respect the terms of the Geneva Convention on the Treatment of Prisoners of War in line with the formal acceptance by the ANC of these terms in 1981. Any violation of these terms shall be an offence. [...]

The following punishments may be ordered for offences under the regulations according to the gravity of the offence and the circumstances under which it was committed:

1. Reprimand or rebuke administered in private or public.
2. Suspension from duty for a specified period.
3. Fatigue and drills.
4. Restriction with hard labour for a specified period determined by tribunal.
5. Demotion from a position of responsibility.
6. Restriction in a rehabilitation centre.
7. Dishonourable discharge.
8. Solitary confinement for a period determined by tribunal.
9. The maximum penalty.
10. Any other penalty not included herein but appearing in the schedule of penalties for grave or serious crimes and violations.

**Rules and Regulations Covering the Handling of Weapons and Explosives  
of our Movement**

**Introduction**

[...]

In the interests of our revolution the following rules and regulations will be strictly enforced:

[...]



4. Unauthorised possession and use of weapons is strictly prohibited.
5. It is strictly forbidden to point a weapon, loaded or otherwise, at any person other than our enemy.
6. It is a serious offence to abandon without proper cause, lose, misuse, neglect or damage weapons, ammunition and explosives.

[...]

8. All weapons, ammunition and explosives must be handled by authorised persons and must be totally concealed in public except during combat marches in our training camps and schools and where permission is granted to have weapons for the defence of ANC personnel and property.

[...]

10. The use of war materials for emergency purposes has to be reported to the appropriate authority.

[...]

**Case No. 167, South Africa, Sagarius and Others**

[Source: *South African Law Reports*, vol. 1, 1983, pp. 833-838; original in Afrikaans, unofficial translation.]

**THE STATE**  
**v.**  
**SAGARIUS AND OTHERS**  
**(SOUTH WEST AFRICA DIVISION)**  
**1982 May 24-28; June 1-2 Before Judge BETHUNE**

[...]

A criminal trial. The facts appear from the reasons for judgment.

*J.S. Hiemstra* for the State.

*B. O'Linn SC* (assisted by *P. Teek* and *A.T.E.A. Lubowski*) for the accused. [...]

**Judge BETHUNE:** On 24 February of this year, the three accused were found guilty of participating in terrorist activities in terms of the provisions of Law 83 of 1967. [T]he evidence pointing to their guilt was overwhelming.

In brief, what the evidence comes down to is that the three accused were part of a group of 22 members of SWAPO which, in April last year, infiltrated South West African territory from Angola while in possession of firearms, ammunition and explosives. The group later split into smaller groups, but, following various contacts with the Defence Force, all of them, with the exception of the three accused, were either wiped out or driven back across the frontier. It is common knowledge that the members of the group were clad in a characteristic uniform worn by the armed wing of SWAPO, and that their contacts with the Defence Force occurred in what could be described as a war situation. The three accused were taken prisoner at a stage when they were already in the process of retreating towards the northern frontier of South West Africa. [...]

[...]

When the hearing was resumed [...]. The evidence relating to the verdict dealt with historical events before, during and after the period of German colonial administration and, in particular, with political and constitutional complications which have come into effect since the Second World War.

After the first defence witness had given his evidence, *Mr Hiemstra*, for the State, objected to it on the grounds of irrelevance, given that there was no evidence that the events which had been referred to influenced any of the accused in any way when they committed the crimes. I did, however, allow the defence to proceed with this evidence [...] I shall, in the accused favour, accept that the events about which the defence witnesses gave evidence probably did play a part in the state of mind of the accused when they committed the offence. The events which led to the armed conflict of SWAPO extend over many years, and their effect has been widespread. [...]

It appears, moreover, that the World Court and the authoritative organs of UNO brand South Africa's presence in SWA illegal, and that this view is subscribed to by a large part of the international community.

Even if the accused had no previous knowledge of this fact, it is highly probable that they would have been told about it by SWAPO supporters during their training outside South Africa. All three were obviously youth when they left South Africa. Considering all the circumstances, they probably regarded their actions as part of a legitimate conflict which enjoyed strong support both at home and abroad. In the evidence, reference was made to the fact that there is a tendency in international law to accord prisoner of war status to captives who have openly participated, in a characteristic uniform, in an armed conflict against a colonial, racist or foreign regime. However, Professor Dugard, who testified on this point, made it clear that such recognition rests on a contractual basis. Governments such as those of South Africa and Great Britain, which do not accept the relevant Protocol, are not bound by it. In my opinion, Professor Dugard was right in his opinion that this Court cannot simply declare that the accused must be treated as prisoners of war, but that the tendency in international law must be taken into consideration when deciding whether the death sentence must be imposed.

In this connection, I would refer you to the following passage from his testimony:

South Africa did not sign the text of the First Protocol, nor had it ratified or acceded to the 1977 Protocols. Consequently it was quite clear that South Africa is not bound by Protocol 1 and therefore, in terms of the treaty, is not obliged to confer prisoner of war status upon members of SWAPO.

Although South Africa is not bound in terms of this treaty, I suggested that there is support for the view that this position has now become part of customary international law, part of the common law of international law. In my judgment this argument is premature, in that Protocol 1 has not yet received that support to argue that it is a part of international law, binding upon States that have not ratified the convention.

Yes, I have already expressed the view that in my judgment a South African Court has no option but to exercise criminal jurisdiction over SWAPO; that a Court cannot simply direct that members of SWAPO be treated as prisoners of war. Nevertheless, it is my view, having regard to new developments in international humanitarian law as reflected in Protocol 1 of the 1977 Geneva Convention and having regard to the special status of a Namibian, that such factors should be taken into account when it comes to the imposition of a sentence and, in particular, it is my view that a Court might have regard to these developments when it comes to the question of the death penalty because the Convention on Prisoners of War of 1949 makes it clear that a prisoner of war may not be executed by the detaining power for military activities prior to his arrest unless they amounted to war crimes.

Mr O'Linn has argued that, in the light of the extent of the armed conflict, a heavy sentence would not have any deterrent effect. I cannot agree with this assertion. It may be the case that people who have already decided to participate in the armed conflict would not, perhaps, be deterred by the sentences which this Court imposes, but the provisions of the Law also apply to any other citizen of this country who may possibly

consider committing an act of terrorism (as defined by the Law). Such persons would certainly, in my opinion, take heed of the penalties which this Court imposes. [...]

Mr *Hiemstra* has argued that it is in the interests of the community that a very heavy sentence be imposed. However, it appears from the undisputed evidence that a large part of the population of this country, as well as of the international community, would view the accused actions in a less serious light. In addition, it is probable that the accused were exploited by others for political gain. It is not unusual for people who are not themselves prepared to run the risks of armed conflict to influence young people to commit actions such as this.

All three of the accused are very young, and have no previous convictions. I accept that, after they left South Africa, they were trapped in a web of events over which they had little or no control. It seems, judging from the statement that Accused No. 3 made to the police, that he was disillusioned when he found out precisely what the promised training which he would undergo outside South Africa consisted of. After their military training began, it was certainly extremely difficult, and even life-threatening, for them to leave. This situation, which to a certain extent was of their own making, is not in itself a justification for their actions, but it is nonetheless an important factor which must be weighed when deciding their punishment. On the other hand, the accused must have foreseen that the actions (such as the laying of land mines and the damaging of railway tracks), which they and the group of infiltrators certainly did perform, could injure or kill innocent people. While I am of the opinion that this is not a case in which the death penalty must be imposed, I am satisfied that a long term of imprisonment is justified. [...]

In the light of the indications by the defence that a heavy sentence will not deter members of SWAPO, it will not serve any purpose to suspend any part of the sentence.

Accordingly, the following sentences are imposed:

Accused Nos 1 and 2: 9 years imprisonment.

Accused No. 3: 11 years imprisonment.

## DISCUSSION

1. Under IHL, is this “war situation” an international or a non-international armed conflict? Does it matter that the accused have infiltrated from Angola? Whether the South African presence in Namibia was lawful or unlawful? Whether the South African government could be qualified as a “racist regime”? (GC I-IV, Art. 2; P I, Arts 1(4) and 96; P II, Art. 1)
2. a. Is SWAPO a national liberation movement? If so, because of the international status of Namibia? Because of recognition by the international community? Of what relevance is it whether SWAPO is deemed a national liberation movement? Must SWAPO represent the South African people to be a national liberation movement fighting against South Africa? Or is it sufficient that it represents the South West African people? Is its national liberation war here directed against the South African government as “colonial domination,” “alien occupation,” or “racist regime”? (P I, Art. 1(4))

- b. If SWAPO formally declared its intention to respect and apply the Geneva Conventions and the Protocols, would they then apply to this conflict? (P I, Art. 96)
3.
  - a. As fewer States were party to Protocol I (compared with the States party to the four Conventions), does this indicate that its Article 1(4) had little or no practical effect or value? Particularly because Israel and South Africa were not States Parties? Why?
  - b. Are none of the principles reflected in the Protocols customary law and thus binding on South Africa? Did the law of international armed conflicts under the customary law of 1982 apply to national liberation wars? Under today's customary law, taking into account that South Africa became a State party to Protocol I in 1995? How could a rule like Art. 1(4) of Protocol I become customary?
  - c. Although the Court rejects the Protocols as a reflection of customary law, what remains the significance of the Court's consideration and use of the Protocols? What do you think of Professor John Dugard's assessment of the status of the Protocols?
4. If the law of international armed conflicts applies, do the accused have prisoner-of-war status? Could they be sentenced, as in this judgement, if they were prisoners of war?
5. What impact would it have if the accused had not been wearing distinctive uniforms during their military engagement: Under the law of international armed conflict? According to the Court's approach? (P I, Arts 43-44; CIHL, Rule 106)
6. Is Professor Dugard correct in stating that Convention III "makes it clear that a prisoner of war may not be executed by the detaining power for military activities prior to his arrest unless they amounted to war crimes"? (GC III, Arts 85 and 100)
7. Under IHL, are the accused criminally responsible if they "had foreseen that the actions (such as the laying of land mines and the damaging of railway tracks), which they and the group of infiltrators certainly did perform, could injure or kill innocent people"? (P I, Arts 51, 57 and 85(3); CIHL, Rules 11-12, 15 and 17-21)
8. If the law of international armed conflict did not apply, was the law of non-international armed conflict necessarily applicable? Is the judgement compatible with that law?

## Case No. 168, South Africa, S. v. Petane

[Source: *South African Law Reports*, vol. 3, 1988, pp. 51-67]

**S v. PETANE****CAPE PROVINCIAL DIVISION**

[...]

*Postea* (November 3 [1987]).

**Conradie J:** The accused has been indicted before this Court on three counts of terrorism, that is to say, contraventions of s 54(1) of the Internal Security Act 74 of 1982. He has also been indicted on three counts of attempted murder. [...]

When [...] the accused was called upon to plead he refused to do so. A plea of not guilty on each count was accordingly entered [...].

The accused's position is stated to be that this Court has no jurisdiction to try him.

I then heard argument on what was submitted to be a jurisdictional question. As the argument progressed I began to doubt whether the point which was being raised was really a jurisdictional point at all. The point in its early formulation was this. By the terms of Protocol I to the Geneva Conventions the accused was entitled to be treated as a prisoner-of-war. A prisoner-of-war is entitled to have notice of an impending prosecution for an alleged offence given to the so-called 'protecting power' appointed to watch over prisoners-of-war. Since, if such a notice were necessary, the trial could not proceed without it, Mr Donen suggested that the necessity or otherwise for giving such a notice should be determined before evidence was led. [...]

Articles 45(1) and (2) of Protocol I contain the following provisions:

1. 'A person who takes part in hostilities and falls in the power of an adverse Party shall be presumed to be a prisoner of war and therefore shall be protected by the Third Convention if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.
2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner of war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence.'

It is not necessary to quote the remainder of para 2 of art 45.

If the terms of the Protocol were found to apply I would be bound by these provisions and failure to give effect thereto might amount to an irregularity. I say 'might' amount to an irregularity because the article, to my mind, clearly envisages a situation where the applicability of the Protocol is conceded and the only question before the Court is the entitlement to protection of an individual captive.

The issue raised by such a plea is, in my view, not a jurisdictional issue. A captive who raises such a defence avers that, because he fought a war as a soldier in accordance with the laws of war, he is not guilty of any crime, despite having deliberately killed or injured others or damaged their property. In *R v Guiseppe and Others* 1942 TPD 139, Malan J set aside the conviction of Italian prisoners-of-war on the ground that the convictions, without notice to the protecting power, had been irregular. He did not hold that the court, in that case a magistrate's court, had no jurisdiction to try the offenders. The case is not authority for the proposition that the accused's acts are not justiciable before a municipal tribunal. Indeed, art 45(1) of Protocol I envisages that the status of such a prisoner should be determined by a competent municipal tribunal. [...]

On 12 August 1949 there were concluded at Geneva in Switzerland four treaties known as the Geneva Conventions. The only one of these Conventions which concerns me today is the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949.

South Africa was among the nations which concluded the treaties. According to the *International Review of the Red Cross* (January/February 1987 No 256), 165 countries were as at 31 December 1986 parties to the Geneva Conventions. This must be very nearly all the countries in the world. It is fair to state that the terms of these Conventions enjoy universal recognition. One of these terms is, of course, that which describes their field of application. Except for the common art 3, [...] they apply to wars between States.

After the Second World War many conflicts arose which could not be characterised as international. It was therefore considered desirable by some States to extend and augment the provisions of the Geneva Conventions so as to afford protection to victims of and combatants in conflicts which fell outside the ambit of these Conventions. The result of these endeavours was Protocol I and Protocol II to the Geneva Conventions, both of which came into force on 7 December 1978.

Protocol II relates to the protection of victims of non-international armed conflicts. Since the state of affairs which exists in South Africa has by Protocol I been characterised as an international armed conflict, Protocol II does not concern me at all. [...]

Article 2 common to all the Geneva Conventions provides, *inter alia*, that:

'The present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the State of war is not recognized by one of them.'

Article 1(4) of Protocol I amplifies and extends common art. 2 by providing that:

‘The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.’

The extension of the scope of art 2 of the Geneva Conventions was, at the time of its adoption, controversial. According to Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts* (1982), the debate about this article took up almost the whole of the first session.

The article has remained controversial. More debate has raged about its field of operation than about any other articles in Protocol I. It has been criticised for having introduced political objectives into humanitarian law, thus making it very difficult for any State to concede its applicability; and it has been criticised for the vagueness of its terminology. (See Andrew Borrowdale “The Law of War in Southern Africa: The Growing Debate” XV *Cilsa* 1982 at 41.) So, although practically every State in the world has agreed that the principles of the Geneva Conventions should apply to conventional international armed conflicts, far fewer (as I shall show) were or are satisfied with the extension of these provisions to the new conflicts characterised as ‘international’.

South Africa is one of the countries which has not acceded to Protocol I. Nevertheless, I am asked to decide, [...] as a preliminary point, whether Protocol I has become part of customary international law. If so, it is argued that it would have been incorporated into South African law. If it has been so incorporated it would have to be proved by one or other of the parties that the turmoil which existed at the time when the accused is alleged to have committed his offences was such that it could properly be described as an ‘armed conflict’ conducted by ‘peoples’ against a ‘racist régime’ in the exercise of their ‘right of self-determination’. Once all this has been shown it would have to be demonstrated to the Court that the accused conducted himself in such a manner as to become entitled to the benefits conferred by Protocol I on combatants, for example that, broadly speaking, he had, while he was launching an attack, distinguished himself from civilians and had not attacked civilian targets. [...]

[T]he Appellate Division accepted that customary international law was, subject to its not being in conflict with any statutory or common municipal law, directly operative in the national sphere. The Appellate Division described the attributes of a rule of customary international law which would make it applicable in South Africa. It would have to be either universally recognised or it would have to have received the assent of this country. In holding this, the Court referred to a passage in Oppenheim *International Law* 8<sup>th</sup> ed vol 1 at 39 which States the conditions concerning universal acceptance or State assent for recognition of a rule of customary international law as part of the law of England. Our law and English law in this respect is therefore the same.

[...] International law does not require universal acceptance for a usage of States to become a custom.



[...] I am prepared to accept that where a rule of customary international law is recognised as such by international law it will be so recognised by our law. [...]

Custom is usage which is considered by States to be legally binding:

‘All that theory can say is this: Whenever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law.’

(Oppenheim (*op. cit.* vol 1 at 27).) The conduct of States is referred to as State practice. The view that such conduct is legally right or obligatory is called the *opinio juris*.

G J H van Hoof *Rethinking the Sources of International Law* (1983) is one of the many writers on international law who supports this two-element approach. He says at 93 that it

‘buttresses the practice-oriented character of international custom by demanding that the formulation of the content of the rule in stage one takes place through *usus*: customary law is built upon repetition. Without the repetition of similar conduct in similar situations there can be no custom, and without custom there can be no customary law. It is therefore a reminder of the fact, sometimes overlooked, that although *opinio juris* turns a rule into a rule of international law, it is the *usus* which makes it a rule of customary law’. [...]

There are writers who espouse the view that State practice alone is sufficient to create a rule of customary international law, and others who believe that the *opinio juris* alone is sufficient. [...]

I am prepared to accept that, as might happen in rapidly developing fields of technical or scientific endeavour, like space exploration, if all the States involved share an understanding that a particular rule should govern their conduct, such a rule may be created with little or no practice to support it. Indeed, the opportunity for putting the understanding into practice may not arise. It may be, as *Van Hoof (op. cit.)* suggests at 86, that it would be better to regard customary international law so created as not emanating from custom but from a new and different source.

I am also prepared to accept that customary international law may in this way be created very quickly, but before it will be considered by our municipal law as being incorporated into South African law the custom, whether created by *usus* and *opinio juris* or only by the latter, would at the very least have to be widely accepted.

Mr *Donen* says that by near-universal State practice the provisions of Protocol I have passed into customary international law which, since it is part of South African law, obliges this Court to apply the provisions thereof. He argues that the State practice which has made the provisions of the first Protocol part of customary international law is the attitude of States, practically all the States of the world, expressed in frequent condemnation of the policies of this country at the United Nations. There are, to my mind, several difficulties with this proposition.

In the first place, it is doubtful whether resolutions passed by the United Nations General Assembly qualify as State practice at all. There is, says *Van Hoof* (*op. cit.* at 108), no unanimity on what is to be considered State practice [...]. *Akehurst's* detailed study on custom shows that it is far from easy to indicate *in abstracto* whether a certain type of act can be taken to belong to *usus* or not. *Akehurst* himself employs an extremely broad concept of *usus*. Almost all activities of States are counted. Illustrative in this respect is his opinion on statements by States *in abstracto*:

'It is impossible to study modern international law without taking account of declaratory resolutions and other statements made by States *in abstracto* concerning the content of international law.'

This statement as such is certainly correct. It does not follow, however, that such resolutions or declarations can be classified as *usus* giving rise to custom. They may constitute *opinio juris* which, if expressed with respect to a rule sufficiently delineated through *usus*, may create a customary rule of international law. To this extent *Akehurst* is correct in stating that

'(w)hen States declare that something is customary law it is artificial to classify such a declaration as about something other than customary law'.

But, if there is no preceding *usus*, such a declaration cannot give birth to a customary rule, unless, of course, the declaration itself is treated as *usus* at the same time. However, it takes too wide a stretching of the concept of *usus* to arrive at the latter conclusion. As was rightly observed, 'repeated announcements at best develop the custom or usage of making such pronouncements'.

As was already reiterated in the foregoing, it is dangerous to denature the practice-oriented character of customary law by making it comprise methods of law-making which are not practice-based at all. This undermines the certainty and clarity which the sources of international law have to provide. The Universal Declaration on Human Rights may be taken as an example in this respect. It has been asserted that in the course of time its provisions have grown into rules of customary international law. This view is often substantiated by citing abstract statements by States supporting the Declaration or references to the Declaration in subsequent resolutions or treaties. Sometimes it is pointed out that its provisions have been incorporated in national constitutions. But what if States making statements like these or drawing up their constitutions in conformity with the Universal Declaration at the same time treat their nationals in a manner which constitutes a flagrant violation of its very provisions, for instance, by not combatting large-scale disappearances, by practicing torture or by imprisoning people for long periods of time without a fair trial? Even if abstract statements or formal provisions in a constitution are considered a State practice, they have at any rate to be weighed against concrete acts like the ones mentioned.

In the present author's view, the best position would seem to be that it is solely the material, concrete and/or specific acts of States which are relevant as *usus*. As was said, it is difficult to come up with a definition *in abstracto*, but the following description would seem to offer a useful handhold:

'The substance of the practice required is that States have done, or abstained from doing, certain things in the international field [...]. State practice, as the material element in the formulation of custom, is, it is worth emphasizing, material: it is composed of acts by States with regard to a particular person, ship, defined area of territory, each of which amounts to the assertion or repudiation of a claim relating to a particular apple of discord.'

It is, I believe, correct to say that the practice of condemnation of South Africa is evidence only of a general dislike of its internal policies. There is nothing in the condemnation from which the content of a rule of customary international law may be derived. I fail completely to appreciate how the condemnation of South Africa, or even the labelling of apartheid as a crime against humanity, leads to the inference that Protocol I has been accepted as part of customary international law by those States uttering those condemnations. I suppose that, since ratification of Protocol I is open to every State, very little short of that could be construed as an acceptance of its provisions.

In particular, United Nations resolutions cannot be said to be evidence of State practice if they relate, not to what the resolving States take it upon themselves to do, but to what they prescribe for others. Customary international law is founded on practice, not on preaching.

Indeed, Amato [*sic*], *The Concept of Customary International Law* (Cornell University Press 1971) puts forward the view that not even claims put forward by States can be considered as State practice. The State must act.

'What is an "act" of State? In most cases a State's action is easily recognised. A State sends up an artificial satellite, tests nuclear weapons, receives ambassadors, levies customs duties, expels an alien, captures a pirate vessel, sets up a drilling rig in the continental shelf, visits and searches a neutral ship and similarly engages in thousands of acts through its citizens and agents. On the other hand, a claim is not an act. As a matter of daily practice, international law is largely concerned with conflicting international claims. But the claims themselves, although they may articulate a legal norm, cannot constitute the material component of custom, for a State has not done anything when it makes a claim; until it takes enforcement action the claim has little value as a prediction of what the State will actually do.'

MacGibbon (in Bin Cheng (ed.) *International Law Teaching Practice*) in a chapter entitled 'Means for the Identification of International Law' and subtitled 'General Assembly Resolutions: Custom Practice and Mistaken Identity', concludes that General Assembly resolutions can neither create new customary international law, nor be evidence of State practice [...].

Nor, in the view of MacGibbon, a view of which the logic seems inescapable, can a General Assembly resolution constitute the required *opinio juris* to create custom:

'If the existence of the *opinio juris* is in question, what is sought is evidence of what the Court in the *North Sea Continental Shelf* cases described as a general recognition that a rule of law or legal obligation is involved. To focus that search exclusively on a General Assembly resolution is bound to prove profitless because

such an instrument of an essentially recommendatory character is incapable of exhibiting such an attribute. Again, the issue turns on the answer to the question posed earlier: what are States voting for when they vote in favour of a resolution? And, as before, the answer can only be: they are voting for what they know to be merely a recommendation. It is axiomatic that such a vote cannot convey the sense of legal obligation essential to an expression of the *opinio juris*. [...]'

(MacGibbon (*op. cit.* at 23).)

The same point is also well made by Thirlway *International Customary Law and Codification*, who writes at 58:

"The mere assertion *in abstracto* of the existence of a legal right or legal rule is not an act of State practice; but it may be adduced as evidence of the acceptance by the State against which it is sought to set up a claim, of the customary rule which is alleged to exist, assuming that the State asserts that it is not bound by the alleged rule. More important, such assertions can be relied on as supplementary evidence, both of State practice and of the existence of the *opinio juris*; but only as supplementary evidence, and not as one element to be included in the summing up of State practice for the purpose of assessing its generality.

[...] The only apparent exception to this principle – which is not really an exception – is the act of a State in ratifying or acceding to a multilateral treaty which directly or indirectly asserts the existence, at least for the future and for the States party to the treaty, of a rule of law. Just as a series of bilateral treaties concluded over a period of time by various States, all consistently adopting the same solution to the same problem of the relationships between them, may give rise to a new rule of customary international law, so the general ratification of a treaty laying down general rules to govern the future relationships of States in a given field has a similar effect. The practice here is concrete in the sense that each State does not merely assert the desirability, or even the existence, of the rule of law in question, but by a definite and formal decision accepts the rule for the regulation of its own interests in future differences in the field covered by the treaty. For this reason it is possible, as the International Court of Justice stated in the *North Sea Continental Shelf* cases, for a custom to arise simply from the general (but not universal) ratification of a codifying treaty."

To my way of thinking, the trouble with the first Protocol giving rise to State practice is that its terms have not been capable of being observed by all that many States. At the end of 1977 when the treaty first lay open for ratification there were few States which were involved in colonial domination or the occupation of other States and there were only two, South Africa and Israel, which were considered to fall within the third category of racist régimes. Accordingly, the situation sought to be regulated by the first Protocol was one faced by few countries; too few countries, in my view, to permit any general usage in dealing with armed conflicts of the kind envisaged by the Protocol to develop. [...]

Mr Donen contended that the provisions of multilateral treaties can become customary international law under certain circumstances. I accept that this is so. There seems

in principle to be no reason why treaty rules cannot acquire wider application than among the parties to the treaty.

Brownlie *Principles of International Law* 3<sup>rd</sup> ed. at 13 agrees that non-parties to a treaty may by their conduct accept the provisions of a multilateral convention as representing general international law. Van Hoof (*op. cit.*) writes at 109:

“Most writers agree that treaties are to be considered State practice which may generate customary rules of international law. They may find support in the ICJ’s statement in the *North Sea Continental Shelf* case, holding that: “There is no doubt that this process is a perfectly possible one and does from time to time occur. It constitutes indeed one of the recognised methods by which new rules of customary international law may be formed.”

It is true that treaties may be considered *usus*, but a number of things should be kept in mind in this respect. First, the treaty concerned must be concrete or specific enough to be able to delineate the content of a customary rule. Furthermore, and this is more important here, a treaty is, of course, binding on the States parties to it. Consequently, the question of its being capable of generating a customary rule is relevant only with respect to States which are not parties to it. For a customary rule of international law to come into being for non-parties, the latter must express their *opinio juris* with respect to it. One should be careful, however, to draw the conclusion that they indeed have done so. [...] Similarly, it would seem that in the case of a multilateral treaty which is open for ratification by all states, the *opinio juris* constituting the “accession by way of custom” has to be unambiguous. The fact that a State is not prepared to ratify the treaty cannot be without significance in such a situation.”

I incline to the view that non-ratification of a treaty is strong evidence of non-acceptance.

Starke (*op. cit.*) remarks at 43:

‘The mere fact that there are [*sic*] a large number of parties to a multilateral convention does not mean that its provisions are of the nature of international law binding non-parties. Generally speaking, non-parties must by their conduct distinctly evidence an intention to accept such provisions as general rules of international law. This is shown by the decision of the International Court of Justice in 1969 in the *North Sea Continental Shelf* cases, holding on the facts that art. 6 of the Geneva Convention of 1958 on the Continental Shelf, laying down the equidistance rule of apportionment of a common continental shelf, had not been subsequently accepted by the German Federal Republic – a non-party – in the necessary manifest manner.’

Suppose for the moment that Protocol I had been enthusiastically embraced by the world community, and suppose that it was good law to say that its terms bound South Africa in spite of its non-assent, what we would then have is a situation in which neither party which is engaged in what has been called the ‘armed conflict’ in South Africa has accepted Protocol I. I shall explain.

The one party to what the accused's counsel characterised as the 'armed conflict' is the South African State. The other party is said to be the ANC through its military wing, Umkhonto We Siswe, of which the accused has been admitted to be a member.

It was suggested by defence counsel that the ANC acceded to the Protocol, as it would have been entitled to do in terms of art. 96. However, this suggestion is open to serious doubt. In his article entitled 'The Law of War in South Africa-The Growing Debate', referred to earlier, *Andrew Borrowdale* writes at 41:

'On 20 October 1980 Oliver Tambo, President of the African National Congress of South Africa (ANC), handed to the President of the Red Cross the following declaration signed by himself:

"The African National Congress of South Africa hereby declares that it intends to respect and be guided by the general principles of international humanitarian law applicable in armed conflicts.

Wherever practically possible, the African National Congress of South Africa will endeavour to respect the rules of the four Geneva Conventions of 12 August 1949 for the victims of armed conflicts and the 1977 additional Protocol I relating to the protection of victims of international armed conflicts." [...]

*Borrowdale* comes to the conclusion, however, that the ANC declaration

'would not seem to have been made in the context of art 96(3). In the first place, it does not appear to have been addressed to, or deposited with, the depository referred to in art 96(3), viz the Swiss Federal Council. Secondly, the ANC has not undertaken to apply the rules of the Geneva Conventions of 1949 and the additional Protocol I of 1977 unconditionally, but merely to respect them whenever practically possible. [...]

[...]

Nevertheless, despite the refusal of each party to the 'conflict' to bind itself to the Protocol, Mr *Donen* contends that the Protocol binds them both. This proposition is far-reaching. What one has here are two parties, one of which is not a State, which are agreed on at least one thing. Neither, for its own reasons, appears to desire the protection for civilians or combatants of Protocol I. Were an international tribunal to hear a dispute between the parties about the binding force of Protocol I, it would be faced with contentions from each side that neither desired its application. I have not found a case in which a rule or alleged rule of customary international law has been applied in these circumstances. There is hardly likely to be such a case, since customary international law rests on a foundation of consensuality. For that proposition reference may be made to Oppenheim's *International Law* 8<sup>th</sup> ed. vol 1 at 15-18, and to the work by *Van Hoof*, which I have already cited, at 97. [...]

I have not been persuaded by the arguments which I have heard on behalf on the accused that the assessment of Professor Dugard, writing in the *Annual Survey of South African Law* (1983) at 66, that 'it is argued with growing conviction that under contemporary international law members of SWAPO and the ANC are members of

liberation movements entitled to prisoner-of-war status, in terms of a new customary rule spawned by the 1977 Protocols', is correct. On what I have heard in argument I disagree with his assessment that there is growing support for the view that the Protocols reflect a new rule of customary international law. No writer has been cited who supports this proposition. Here and there someone says that it may one day come about. I am not sure that the provisions relating to the field of application of Protocol I are capable of ever becoming a rule of customary international law, but I need not decide that point today.

For the reasons which I have given I have concluded that the provisions of Protocol I have not been accepted in customary international law. They accordingly form no part of South African law. [...]

In the result, the preliminary point is dismissed. The trial must proceed.

## DISCUSSION

1. a. Which roles does IHL assign to the Protecting Power?
- b. Which purpose is served by notifying the Protecting Power of trials or sentences of prisoners of war? (GC III, Arts 104 and 107)
- c. What may the results be if a court of a Detaining Power fails to notify the Protecting Power of the trial of a prisoner of war? Does the court then have no jurisdiction to try him, as the defendant here argues? Or is it that the trial could not proceed without such notice? Is the issue of notification thus a jurisdictional or a procedural issue? (GC III, Art. 104; P I, Art. 45)
2. a. If Protocol I had been binding for South Africa, why does the Court nevertheless state that, even in that case, failure to give effect to its provisions only "might amount to an irregularity"?
- b. Under which condition could the defendant invoke Protocol I although at the time South Africa had not become party to it? If Protocol I was applicable, what would the consequences be for the defendant? Could the trial take place? Would he have combatant status? Could the Court decide upon this question? If he did have combatant status, could he be punished for acts of terrorism? Could he be punished for having killed South African soldiers? Is it necessary for attaining or maintaining prisoner-of-war status that he must not have attacked civilian targets, as the Court asserts? (P I, Arts 44 and 45)
- c. Even if Protocol I is binding for South Africa as customary law, must not both parties to the conflict be bound by Protocol I for it to be applicable? Is the ANC a party to the Protocol? Is it bound by customary law? If Art. 1(4) of Protocol I is customary law, does the ANC have to formally declare its intention to respect and apply the Geneva Conventions and the Protocols in conformity with Art. 96 of Protocol I? If Art. 1(4) of Protocol I is customary law, is customary IHL of international armed conflicts applicable in the conflict between the government of South Africa and the ANC even though neither desired its application?
3. a. Has there to be first *usus* and later *opinio juris* to form a customary rule? Or can both elements appear simultaneously? Are there certain material sources which show *usus* and others *opinio juris*? Or do all show simultaneously *usus* and *opinio juris*?
- b. Is customary law based on the acceptance of States or on their opinion? Does the answer to that question matter? Can you think of a rule which would be either customary or not, depending on the answer to this question?



- c. Can customary IHL also be derived from State acts such as diplomatic statements, undertakings and declarations? Are the latter *usus*? Can only acts or also words show *usus*? Do claims necessarily conflict, or can they also show agreement on a norm? If declarations also count as practice, must they refer to an actual situation, or can they also be abstract statements about (i.e. in favour of) the rule? Can a rule become customary on the basis of statements alone? What if the actual behaviour of belligerents is incompatible with those abstract statements?
  - d. Do UN General Assembly resolutions constitute State practice? Do repeated announcements only “at best develop the custom and usage of making such pronouncements”? What about, for instance, the prohibition of torture? Is there no customary law against committing torture because some States practice torture? Yet what explains the fact that most of those States deny committing acts of torture? Do such denials not constitute a concrete act of which the Court speaks? Would D’Amato agree?
  - e. Is ratification of Protocol I (together with the practice of other States) an instance of State practice able to make all its provisions customary? Is non-ratification of a treaty strong evidence of its non-acceptance? Does non-ratification indicate non-acceptance of all rules contained in the treaty, or perhaps only of some of them? Thus, does non-ratification of Protocol I automatically mean that Art. 1(4) of Protocol I in particular is not customary law?
  - f. Once a rule has been included in a multilateral treaty, is the question whether it is customary only relevant for non-Parties? Has only their practice to be considered whenever evaluating whether it is customary? What would this mean for rules laid down in a treaty as widely accepted as the Geneva Conventions?
  - g. Does the fact that when Protocol I was concluded in 1977 the category of “racist regimes” listed in Art. 1(4) was limited to very few countries, one of them being South Africa, make it impossible to determine the general usage necessary for establishing the article as customary law? If so, because those States chose not to be bound by the Protocol? Even if almost all other States considered Protocol I applicable to such a situation? If a situation rarely arises or arises in only a few States, can rules regulating that situation never become customary international law? Is the position of the Court on this question connected to its theory on what counts as *usus*?
  - h. Can a rule of IHL become customary even if South Africa objects to it? Must a rule of customary IHL be applied by South African courts although South Africa has never accepted that rule? Even though South Africa was against that rule as a treaty rule in Protocol I? Even though South Africa has persistently objected to that rule?
  - i. Are none of the principles reflected in Protocol I customary law and, as such, binding on South Africa? Under the customary law of 1987, did the law of international armed conflict apply to national liberation wars? Does it apply under today’s customary law, taking into account that South Africa became a State party to Protocol I in 1995? How could a rule like Art. 1(4) of Protocol I become customary?
4. Do you agree with the criticism that Art. 1(4) of Protocol I introduced political objectives into humanitarian law? Does Art. 1(4) of Protocol I introduce anything at all, i.e., is it an innovative development in the law of war, or is it merely a reflection of existing international law? Does Art. 1(4) lead to a situation where both sides in an armed conflict are not equal under IHL? Does Art. 1(4) violate the separation between *jus in bello* and *jus ad bellum*? [See **Case No. 77**, United States, President Rejects Protocol I]
  5. What is the place of international customary law within your national law? Within South African national law at the time of the case? Must customary law be universally recognized before it may or must be incorporated into your national law?



**Case No. 169, South Africa, AZAPO v. Republic of South Africa**

[Source: Constitutional Court of South Africa, Case CCT 17/96, July 25, 1996, footnotes omitted]

**THE AZANIAN PEOPLES ORGANIZATION  
(AZAPO) [...]**

**v.**

**[...] THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA  
JUDGEMENT**

[...]

- 1) For decades South African history has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination. [...]
- 2) [...] [I]n the early nineties [...] negotiations resulted in an interim Constitution committed to a transition towards a more just, defensible and democratic political order based on the protection of fundamental human rights. [...] It was realised that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past.
- 3) This fundamental philosophy is eloquently expressed in the epilogue to the Constitution which reads as follows:

**“National Unity and Reconciliation**

[...] The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed. [...]”

[...] Parliament enacted during 1995 what is colloquially referred to as the Truth and Reconciliation Act [...] (“the Act”).

- 4) [...] A Truth and Reconciliation Commission [...] also is required to facilitate "...the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective..." [...]
- 5) Three committees are established for the purpose of achieving the objectives of the Commission. [...] The Committee on Amnesty is given elaborate powers to consider applications for amnesty. The Committee has the power to grant amnesty in respect of any act, omission or offense to which the particular application for amnesty relates, provided that the applicant concerned has made a full disclosure of all relevant facts and provided further that the relevant act, omission or offense is associated with a political objective committed in the course of the conflicts of the past [...].
- 6) [...] Section 20(7) (the constitutionality of which is impugned in these proceedings) provides as follows:
  - a) "No person who has been granted amnesty in respect of an act, omission or offense shall be criminally or civilly liable in respect of such act, omission or offense and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offense." [...]
- 8) The applicants sought in this court to attack the constitutionality of section 20(7) on the grounds that its consequences are not authorised by the Constitution. They aver that various agents of the state, acting within the scope and in the course of their employment, have unlawfully murdered and maimed leading activists during the conflict against the racial policies of the previous administration and that the applicants have a clear right to insist that such wrongdoers should properly be prosecuted and punished. [...]
- 16) I understand perfectly why the applicants would want to insist that those wrongdoers who abused their authority and wrongfully murdered, maimed or tortured very much loved members of their families who had, in their view, been engaged in a noble struggle to confront the inhumanity of apartheid, should vigorously be prosecuted and effectively be punished for their callous and inhuman conduct in violation of the criminal law. [...]
- 17) [...] Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. [...] Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatizing to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigors of the law. The Act seeks to address this massive problem by encouraging these survivors and the dependents of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so

desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. [...]

- 18) The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully, to continue to keep the dependents of such victims in many cases substantially ignorant about what precisely happened to their loved ones, to leave their yearning for the truth effectively unassuaged, to perpetuate their legitimate sense of resentment and grief and correspondingly to allow the culprits of such deeds to remain perhaps physically free but inhibited in their capacity to become active, full and creative members of the new order by a menacing combination of confused fear, guilt, uncertainty and sometimes even trepidation. [...]
- 22) South Africa is not alone in being confronted with a historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to, and consolidation of, an overtaking democratic order. Chile, Argentina and El Salvador are among the countries which have in modern times been confronted with a similar need. Although the mechanisms adopted to facilitate that process have differed from country to country and from time to time, the principle that amnesty should, in appropriate circumstances, be accorded to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all these countries and truth commissions were also established in such countries.
- 23) The Argentinean truth commission was created by Executive Decree 187 of December 15, 1983. It disclosed to the government the names of over one thousand alleged offenders gathered during the investigations. The Chilean Commission on Truth and Reconciliation was established on April 25, 1990. It came to be known as the Rettig Commission after its chairman, Raul Rettig. Its report was published in 1991 and consisted of 850 pages pursuant to its mandate to clarify "the truth about the most serious human right violations ... in order to bring about the reconciliation of all Chileans". The Commission on the Truth for El Salvador was established with similar objectives in 1992 to investigate "serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth". In many cases amnesties followed in all these countries.
- 24) What emerges from the experience of these and other countries that have ended periods of authoritarian and abusive rule, is that there is no single or uniform international practice in relation to amnesty. Decisions of states in transition, taken with a view to assisting such transition, are quite different from acts of a state covering up its own crimes by granting itself immunity. In the former case, it is not a question of the governmental agents responsible for the violations indemnifying themselves, but rather, one of a constitutional compact being entered into by all sides, with former victims being well-represented, as part of an ongoing process to develop constitutional democracy and prevent a repetition of the abuses.

25) Mr. Soggot contended on behalf of the applicant that the state was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of section 20(7) which authorized amnesty for such offenders constituted a breach of international law. We were referred in this regard to the provision of article 49 of the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, article 50 of the second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, article 129 of the third Geneva Convention relative to the Treatment of Prisoners of War and article 146 of the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. The wording of all these articles is exactly the same and provides as follows:

“The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches...” defined in the instruments so as to include, *inter alia*, wilful killing, torture or inhuman treatment and wilfull causing great suffering or serious injury to body or health. They add that each High Contracting Party shall be under an obligation to search for persons alleged to have committed such grave breaches and shall bring such persons, regardless of their nationality, before its own courts.

26) The issue which falls to be determined in this Court is whether section 20(7) of the Act is inconsistent with the Constitution. If it is, the inquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law. International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment. [...]

27) [...] Section 35(1) of the Constitution is also perfectly consistent with these conclusions. It reads as follows:

“In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law”.

The court is directed only to “have regard” to public international law if it is applicable to the protection of the rights entrenched in the chapter.

28) The exact terms of the relevant rules of public international law contained in the Geneva Conventions relied upon on behalf of the applicants would therefore be

irrelevant if, on a proper interpretation of the Constitution, section 20 (7) of the Act is indeed authorised by the Constitution, but the content of these Conventions in any event do not assist the case of the applicants.

- 29) In the first place it is doubtful whether the Geneva Conventions of 1949 read with the relevant Protocols thereto apply at all to the situation in which this country found itself during the years of the conflict to which I have referred.
- 30) Secondly, whatever be the proper ambit and technical meaning of these Conventions and Protocols, the international literature in any event clearly appreciate the distinction between the position of perpetrators of acts of violence in the course of war (or other conflicts between states or armed conflicts between liberation movements seeking self-determination against colonial and alien domination of their countries), on the one hand, and their position in respect of violent acts perpetrated during other conflicts which take place within the territory of a sovereign state in consequence of a struggle between the armed forces of that state and other dissident armed forces operating under responsible command, within such a state on the other. In respect of the latter category, there is no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterized as serious invasions of human rights. On the contrary, article 6(5) of Protocol II to the Geneva Conventions of 1949 provides that
- “At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”.
- 31) The need for this distinction is obvious. It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatized by such a conflict to reconstruct itself. The erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and the state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction. [...]

## Conclusion

- 50) In the result, I am satisfied that the epilogue to the Constitution authorised and contemplated an “amnesty” in its most comprehensive and generous meaning so as to enhance and optimize the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future. Parliament was, therefore,

entitled to enact the Act in the terms which it did. This involved more choices apart from the choices I have previously identified. [...] They could conceivably have chosen to differentiate between the wrongful acts committed in defense of the old order and those committed in the resistance of it, or they could have chosen a comprehensive form of amnesty which did not make this distinction. Again they were entitled to make the latter choice. [...]

## Order

51) In the result, the attack on the constitutionality of section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 must fail. [...]

## DISCUSSION

1. What is your opinion on the dilemma between peace and justice, between reconciliation and prosecution of offenders, between the (practical) chance of the victims to know the truth and their (theoretical) right to see their victimizers punished? In which sense is the South African solution a compromise between the two positions?
2.
  - a. Which acts are covered by Art. 6(5) of Protocol II? Does it also cover violations of the law of non-international armed conflict? Why should Protocol II deal with prosecutions for violations only from the standpoint of amnesty, while it does not prescribe their punishment? [*See also Case No. 243*, Colombia, Constitutional Conformity of Protocol II [Paras 41-43]]
  - b. In the cited provisions (concerning international armed conflicts) of the Geneva Conventions, does the obligation to prosecute grave breaches exclude amnesty or pardon for such acts? Are Arts 51/52/131/148 respectively of the four Conventions relevant to the answer? Assuming that IHL does not prohibit grants of amnesty, also for persons who have committed grave breaches, which criteria could be brought forward to circumscribe an admissible amnesty?
  - c. Is the explanation of the Court as to why impunity for violations of IHL is more necessary and acceptable in non-international armed conflicts than in international ones convincing? Is the dilemma between peace and justice, between reconciliation and punishment greater within a State than between States? In international armed conflicts, does the obligation to punish violations only concern “officers of a hostile power”?
  - d. In granting amnesty, would a distinction between violations of IHL “committed in defense of the old order and those committed in resistance of it” be acceptable from the point of view of IHL? Does such a distinction violate IHL? At least in international armed conflicts? Which principles of IHL are involved?
3. Does South Africa have to respect IHL or only to “have regard to it”? Why must the Court only “have regard to” IHL? Would the Court have invalidated the Act if it had come to the conclusion that it violated IHL?
4. How does the decision qualify the situation prevailing in South Africa before the end of apartheid? Does the Court refer to Art. 1(4) of Protocol I? Is that provision applicable? On what substantive point does the definition of a “national liberation war” by the Court differ from that given in Art. 1(4) of Protocol I? Is that difference understandable in view of the philosophy of the South African Constitution and the reasoning of the Court? What is left of Art. 1(4) if a South African court deems that the situation in South Africa under apartheid did not fall under its provisions? Does this result

support or weaken the US criticism of Art. 1(4)? [See **Case No. 77**, United States, President Rejects Protocol I]

**Case No. 170, ICRC, Iran/Iraq Memoranda****A. The Memorandum of May 7, 1983**

[Source: Memorandum from the International Committee of the Red Cross to the States Parties to the Geneva Conventions of August 12, 1949 concerning the conflict between Islamic Republic of Iran and Republic of Iraq, Geneva, May 7, 1983]

**APPEAL**

Since the outbreak of the conflict between the Islamic Republic of Iran and the Republic of Iraq, the highest authorities of both these States parties to the Geneva Conventions have several times confirmed their intention to honour their international obligations deriving from those treaties.

Despite these assurances, the International Committee of the Red Cross, which has had a delegation in the Islamic Republic of Iran and in the Republic of Iraq from the very start of the hostilities in 1980, has encountered all kinds of obstacles in the exercise of the mandate devolving on it under the Geneva Conventions, despite its repeated representations and the considerable resources which it has deployed in the field.

Faced with grave and repeated breaches of international humanitarian law which it has itself witnessed or of which it has established the existence through reliable and verifiable sources,

and having found it impossible to induce the parties to put a stop to such violations, the ICRC feels in duty bound to make these violations public in this present Appeal to States and its attached memorandum.

The ICRC wishes to stress that, pursuant to its invariable and published policy, it undertakes such overt steps only in very exceptional circumstances, when the breaches involved are major and repeated, when confidential representations have not succeeded in putting an end to such violations, when its delegates have witnessed the violations with their own eyes (or when the existence and the extent of those breaches have been established by reliable and verifiable sources) and, finally, when such a step is in the interest of the victims who must as a matter of urgency be protected by the Conventions.

The ICRC makes this solemn Appeal to all States parties to the Geneva Conventions to ask them – pursuant to the commitment they have undertaken according to Article 1 of the Conventions to *ensure respect* of the Conventions – to make every effort so that:

- international humanitarian law is respected, with the cessation of these violations which affect the lives, the physical and mental well-being and the treatment of tens of thousands of prisoners of war and civilian victims of the conflict;
- the ICRC may fully discharge the humanitarian task of providing protection and assistance which has been entrusted to it by the States;



- all the means provided for in the Conventions to ensure their respect are used to effect, especially the designation of Protecting Powers to represent the belligerents' interests in their enemy's territory.

The ICRC fervently hopes that its voice will be heeded and that the vital importance of its mission and of the rule of international humanitarian law will be apparent to all and fully recognized, in the transcending interest of humanity and as a first step towards the restoration of peace.

## **MEMORANDUM**

### **SITUATION OF PRISONERS OF WAR HELD IN THE ISLAMIC REPUBLIC OF IRAN**

According to the Iranian authorities they today hold 45,000 to 50,000 prisoners of war. The Third Geneva Convention confers on those prisoners a legal status entitling them to specific rights and guarantees.

#### **Registration and capture cards**

One of the essential provisions of the Conventions demands that each prisoner of war be enabled, immediately upon his capture or at the latest one week after his arrival in a camp, to send his family and the Central Prisoners-of-War Agency a card informing them of his captivity and his state of health.

This operation proceeded normally at the beginning. However, the obstacle which the Iranian authorities constantly put in the way of the ICRC delegates' work led to a progressive decline in that activity from May 1982 onwards.

At present the ICRC has registered only 30,000 prisoners of war, leaving 15,000 to 20,000 families in the agony of uncertainty, which is precisely what the imperative provisions of the Conventions are designed to avoid.

#### **Correspondence between prisoners of war and their families**

The considerable delay and the holding up of mail, every aspect of which is regulated by the Convention, aggravate the families' worries and the prisoners' distress.

Although thousands of messages are sent each month by Iraqi families through the ICRC and hence to the Iranian military authorities for censorship and distribution, a great many prisoners of war complain they have received no mail for many months. The ICRC is no longer able to exercise any supervision of the distribution and collection of family messages.

#### **ICRC visits to prisoner-of-war camps**

The Third Geneva Convention stipulates that ICRC delegates shall be allowed, with no limitation of time or frequency, to visit all places where prisoners of war are held and to

interview the prisoners without witnesses. In the Islamic Republic of Iran this essential provision is being violated.

The ICRC has lost track of the interned population since May 1982: only 7,000 prisoners of war have benefited from regular visits by the ICRC.

Many places of internment have been opened since then but the ICRC has never had access to them and has not even been notified of their existence.

Consequently the ICRC can no longer monitor the material living conditions and treatment of the Iraqi prisoners of war interned in Iran.

Although there did occur at the end of 1982 one truncated visit during which the delegates were not permitted to interview prisoners without witnesses, and two spot visits in March 1983, the latest complete visit to a prisoner-of-war camp consistent with treaty rules dates back to May 1982.

The fact that it has not had access to the great majority of prisoners of war for more than a year, and the systematic concealment of some categories of prisoners of war – high ranking officers, foreigners enlisted in the Iraqi army – gives the ICRC cause to be profoundly concerned about the plight of those prisoners.

### **Treatment of prisoners of war**

In a general way, the Iraqi prisoners of war, right from the time of their capture, are subjected to various forms of ideological and political pressure – intimidation, outrages against their honour, forced participation in mass demonstrations decrying the Iraqi Government and authorities – which constitute a serious attack on their moral integrity and dignity. Such treatment, which runs counter to the spirit and the letter of the Convention, has gone from bad to worse since September 1981.

Last but not least, concordant information from various sources and witnesses confirm the ICRC's certainty that some camps have been the scene of tragic events leading to the death or injury of prisoners of war.

### **Severely wounded and sick prisoners of war**

The Third Geneva Convention states that “parties to the conflict are bound to send back to their own country, regardless of numbers or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel...”. Although there have been three repatriation operations – on 16 June, 25 August 1981 and 30 April 1983 – and despite the constitution of a mixed medical commission, most of the severely wounded and sick prisoners of war have not been repatriated, as required by the Convention.

## **SITUATION OF IRANIAN PRISONERS OF WAR AND IRANIAN CIVILIANS IN THE POWER OF THE REPUBLIC OF IRAQ**

### **1. Prisoners of war**

So far the ICRC has registered and visited at regular intervals some 6,800 prisoners.

#### **Registration and capture cards**

In general, these prisoners of war are registered by the ICRC within the time limit specified by the Convention.

#### **Correspondence between prisoners of war and their families**

After some initial difficulties, the exchange of messages between prisoners and their families has been satisfactory for the last several months.

#### **ICRC visits to prisoner-of-war camps**

Every single month since October 1980, ICRC delegates have visited prisoners of war in a manner consistent with Article 126 of the Third Geneva Convention, which specifies *inter alia* that the delegates shall be enabled freely to interview prisoners of their choice without witnesses.

However, in the course of its activities in the Republic of Iraq, the ICRC realised that the Iraqi authorities have never fully respected the Third Geneva Convention.

The ICRC has established with certainty that many Iranian prisoners of war have been concealed from it since the beginning of the conflict. The ICRC has drawn up lists containing several hundred names of Iranian prisoners of war incarcerated in places of detention to which the ICRC has never had access. Although several dozen such prisoners have been returned to the camps and registered by the ICRC no acceptable answer has been found to the problem of concealed prisoners.

#### **Treatment of prisoners of war**

In the prisoner-of-war camps the ICRC has noted some appreciable improvement in material conditions. On the other hand, ill-treatment has frequently been observed and on at least three occasions disorders have been brutally quelled, causing the death of two prisoners of war and injury to many others.

#### **Severely injured and sick prisoners of war**

The Third Geneva Convention states that "parties to the conflict are bound to send back to their own country, regardless of numbers or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel...". Although there have been four repatriation operations – on 16 June, 25 August and 15 December 1981 and on 1 May 1983 – and despite the constitution of a mixed

medical commission, most of the severely wounded and sick prisoners of war have not been repatriated, as required by the Convention.

## **2. Iranian civilians**

Tens of thousands of Iranian civilians from the Khuzistan and the Kurdistan border regions [on Iranian territory], residing in areas under Iraqi army control, have been deported to the Republic of Iraq, in grave breach of the Fourth Geneva Convention.

The ICRC delegates have had only restricted access to a few of these people.

In the prisoner-of-war camps the ICRC has registered more than a thousand civilians, including women and old men arrested in the occupied territories by the Iraqi army, deported into the Republic of Iraq and unjustifiably deprived of their freedom since the beginning of the conflict.

### **GRAVE BREACHES COMMITTED BY BOTH PARTIES TO THE CONFLICT**

Both in Iran and Iraq captured soldiers have been summarily executed. These executions were sometimes the act of individuals involving a few soldiers fallen into enemy hands; there has sometimes been systematic action against entire enemy units, on orders to give no quarter.

Wounded enemies have been slain or simply abandoned on the field of battle. In this respect the ICRC must point out that the number of enemy wounded to which it has had access and whom it has registered in hospitals in the territory of both belligerents is disproportionate to the number of registered able-bodied prisoners in the camps or to even the most conservative estimates of the extent of the losses suffered by both parties.

The Iraqi forces have indiscriminately and systematically bombarded towns and villages, causing casualties among the civilian inhabitants and considerable destruction of civilian property. Such acts are inadmissible, the more so that some were declared to be reprisals before being perpetrated.

Iraqi towns also have been the targets of indiscriminate shelling by Iranian armed forces.

Such acts are in total disregard of the very essence of international humanitarian law applicable in armed conflicts, which is founded on the distinction between civilians and military forces.

Geneva, May 7, 1983

## B. The Memorandum of February 10, 1984

[Source: Second Memorandum from the International Committee of the Red Cross to the States Parties to the Geneva Conventions of August 12, 1949 concerning the conflict between Islamic Republic of Iran and Republic of Iraq, Geneva, February 10, 1984]

On May 7, 1983, the International Committee of the Red Cross was compelled to address an appeal to all the States Parties to the Geneva Conventions. With reference to the solemn undertaking of these States to respect and *ensure respect* for the Conventions at all times, the ICRC asked them to make every effort to ensure the rigorous application of International Humanitarian Law by the two belligerent states i.e. the Islamic Republic of Iran on the one hand and the Republic of Iraq on the other, and to enable the ICRC to effectively perform its humanitarian task of helping the great number of civilian and military victims of this conflict.

Nine months after making its first Appeal, the ICRC notes that the results hoped for have been achieved only to a very limited degree, and it feels that the States Parties to the Conventions should be informed of the lack of respect for the principles of Humanitarian Law in the Islamic Republic of Iran and the Republic of Iraq.

The ICRC wishes to stress that its two memoranda concern serious infringements of International Humanitarian Law which are known to have occurred and which endanger the lives and liberty of the tens of thousands of people caught up in this conflict, and which flout the very spirit and principles of that law. These infringements, if unchecked, may, in time, bring into discredit those rules of law and universal principles which the States parties to the Conventions laid down to provide human beings with a better defence against the evils of war.

From its experience the ICRC is conscious that increasingly numerous violations of International Humanitarian Law have invariably placed insurmountable obstacles in the way of peace negotiations, even when all belligerents wished to end the conflict. For example, recent conflicts have been needlessly prolonged because no agreement was reached on arrangements concerning prisoners of war. The ICRC thus calls upon the States working towards the restoration of peace in the region to consider most carefully the problems which will inevitably arise because of the infringements of the Geneva Conventions by the belligerents.

In particular, the ICRC would ask States, in the course of their dealings with each of the two parties to the conflict, to broach the humanitarian questions which are hereby submitted to them. The States are also urged to lend their active support to the ICRC's efforts to help the victims of the conflict which is strictly within the terms of the humanitarian mandate assigned to the ICRC through the Geneva Conventions. Finally, the ICRC hopes that discussions will be held to designate Protecting Powers willing to undertake the tasks incumbent on such States by the Geneva Conventions. Naturally, the ICRC would wish to work closely with the Protecting Powers.

The ICRC is convinced that the States parties to the Conventions are aware of what is truly at stake in the steps proposed, and that it will be their desire and intention

to translate into action the commitment which they undertook in adopting Article 1 common to the Four Geneva Conventions of 12 August 1949.

## ISLAMIC REPUBLIC OF IRAN

### A. Iraqi prisoners of war interned in the Islamic Republic of Iran

1. The activities of the International Committee of the Red Cross in favour of the Iraqi prisoners were again suspended on 27 July 1983. The ICRC considers that, in general terms, it has not been able to discharge its mandate as prescribed by the Third Geneva Convention relative to the treatment of prisoners of war for almost two years.

At present, some 50,000 prisoners are without the international protection to which they are entitled by virtue of their status.

In this connection, the ICRC is no longer able to perform the following tasks:

- To ascertain the precise number of prisoners of war and to ascertain how they are distributed among various places of internment.
- To obtain information on the identity and state of health of each prisoner of war in order to notify his family and the Iraqi Government.
- To monitor the material, psychological and disciplinary conditions of internment by means of regular visits to the camps and interviews without witness with the prisoners.
- To draw up lists of prisoners of war who should quickly be repatriated because of severe wounds or illness.
- To maintain effective surveillance of the flow of Red Cross messages between the prisoners and their families.

These tasks of surveillance are all categorically stipulated in the Convention and constitute indispensable requirements for the effective protection of prisoners by ICRC delegates.

2. Numerous facts and indications, when considered together, arouse great concern on the part of the ICRC with regard to the fate of the prisoners and the authorities' real reasons for preventing the ICRC from carrying out its activities. The ICRC has noted the following specific points:
  - The ICRC has constantly been denied access to certain categories of prisoners such as high-ranking officers.
  - Severe sentences have been passed on a number of prisoners. Despite repeated demands, the ICRC has received neither notifications nor explanations which should, by law, have been submitted to it.
  - Serious incidents have occurred in certain camps. Furthermore, among the death certificates issued by the Iranian authorities for members of the enemy

armed forces “killed in action”, the ICRC has received a number which were despatched very tardily and without any comment in relation to persons who were known to have been interned in the Islamic Republic of Iran for many years, since they had been registered and visited on several occasions by ICRC delegates.

- Ideological and political pressure, intimidation, systematic “re-education” and attacks on the honour and dignity of the prisoners have remained a constant feature of life in the camps, and even seem to increase as a result of the activities of certain persons having no connection with the normal running of the camps. Representatives of a “department of political and ideological education”, members of Iraqi opposition groups who have fled to the Islamic Republic of Iran, and the official press all attempt to incite the prisoners against their government. On many occasions, the ICRC has submitted to the highest authorities of the Islamic Republic of Iran detailed and clearly reasoned requests that a stop should be put to these practices which States, in drawing up the Third Geneva Convention, agreed to ban. The ICRC has made the abolition of these practices a condition for the resumption of its activities, since the discharge of its mandate is incompatible and irreconcilable with attempts at political and ideological conditioning of prisoners. To date, the ICRC has received no satisfactory reply to the written and oral representations which it has made on the subject to the Government of the Islamic Republic of Iran.

## **B. Iraqi civilian refugees in the Islamic Republic of Iran**

The ICRC has failed in its attempts to bring aid to these groups, consisting mainly of Iraqi Kurds who have fled from their home territory and are now living in camps in the Islamic Republic of Iran. The ICRC knows that these groups are in great need of food and medicine. By virtue of their status as refugees from an enemy power, these people come under the aegis of the Fourth Geneva Convention relative to the protection of civilians in time of war. They should therefore be allowed to receive the aid which an organization such as the ICRC could provide.

## **REPUBLIC OF IRAQ**

### **A. Iranian prisoners of war held in the Republic of Iraq**

1. Every month without fail since October 1980, ICRC delegates have visited Iranian prisoners of war, who currently number 7,300 and are held in six internment camps. The visits take place in accordance with the conditions laid down in Article 126 of the Third Geneva Convention, a main stipulation of which is that the delegates should be able to talk freely and without witnesses with prisoners of their choice.

As a rule, prisoners of war are registered by the ICRC within a reasonably short time of being captured.

On the whole, the exchange of Red Cross messages between the prisoners and their families works well, though delays which may sometimes be quite long are still caused by the Iraqi censorship procedure.

2. In the camps themselves, the ICRC has observed a number of significant improvements in the material conditions of internment. Moreover, the authorities have taken steps to put an end to the random acts of brutality to which the ICRC drew their attention on many previous occasions. Furthermore, an improvement in disciplinary measures has been apparent since autumn 1983.
3. On 29 January 1984, 190 Iranian prisoners, 87 of whom were severely wounded or sick, were handed over by the Iraqi authorities to the ICRC in Ankara for repatriation.
4. The ICRC is concerned by the fact that a large number of members of the enemy armed forces, both officers and other ranks, some of whom were taken prisoner by the Iraqi armed forces at the beginning of the conflict, are still being held in detention centres to which the ICRC is denied access. The ICRC has regularly submitted to the government and military authorities of Iraq lists of names showing that several hundred such prisoners of war exists. The ICRC mentions with satisfaction that at the end of 1983 it was allowed to register several dozens of these prisoners, who had been captured at the start of the conflict and have now been placed in camps visited by the ICRC.

The ICRC has good grounds to be concerned about the prisoners held in places to which it does not have access. These prisoners are deprived of their most basic rights and, according to many mutually corroborating sources of information, are held in conditions which do not meet the requirements of humanitarian law.

#### **B. Iranian civilians who have been deported to or taken refuge in the Republic of Iraq**

1. During the conflict, several tens of thousands of Iranian civilians have been displaced from their homes in the frontier areas of Khuzestan and Kurdistan to Iraqi territory.

The Iraqi authorities have accepted that in principle the ICRC should be present from now on among these civilians, and considerable efforts have recently been made to improve the living conditions of these civilians when it was necessary.

2. Since the start of the conflict, the ICRC has registered more than a thousand civilians in the prisoner-of-war camps, including women and elderly men arrested in the territories occupied by the Iraqi armed forces. Although it has been possible to repatriate several hundred of these people, an overall solution to the problem still has to be found.

#### **C. Bombing of civilian areas by the Iraqi armed forces**

The Iraqi air force has continued to carry out regular indiscriminate bombing of Iranian built-up areas, sometimes more than 200 kms from the front. The result has been loss of life, sometimes on a large scale, and considerable destruction of purely civilian



property. These deliberate attacks on civilians and civilian property are sometimes designated as reprisals; they contravene the laws and customs of war, in particular with regard to the basic principle that a distinction must be made between military objectives and civilian persons and property.

### DISCUSSION

1.
  - a. What must States Parties do in order to fulfil their obligation under Art. 1 common to the Conventions and Protocol I “to ensure respect” for IHL? What may they do? What may they not do?
  - b. Must States Parties act to “ensure respect” for IHL only when the ICRC appeals to them to do so? What meaning do ICRC appeals, such as the two Memoranda, have in terms of the obligation of the States Parties? Does such an appeal mean that in certain situations the normal and specific mechanisms for the implementation of IHL do not work?
  - c. What criteria would you suggest to the ICRC for deciding whether to issue an appeal to all States Parties on violations in a specific situation?
  - d. Did the two Memoranda respect the Red Cross principles of neutrality and impartiality? Was it necessary for the ICRC under those principles to criticize both Iran and Iraq? Because of the denounced violations? Because under those two principles the ICRC may never criticize only one side of an armed conflict?
  - e. In the Memoranda, is the revelation to all States Parties of facts the ICRC learned through its visits to prisoners of war compatible with the ICRC’s working principle of confidentiality?
2.
  - a. Did Iran and Iraq have an obligation to designate Protecting Powers? Can you imagine why no Protecting Powers were designated? (GC I-IV, Arts 8/8/8/9 respectively)
  - b. If a Protecting Power is designated, can it replace the ICRC for visits to prisoners of war? What is the advantage of a Protecting Power acting parallel to the ICRC? What are the strong points of a Protecting Power? What are the strong points of the ICRC? (GC III, Arts 10 and 126)
3.
  - a. Has the ICRC a right to visit prisoners of war? Even those who do not want to be visited by the ICRC? Why are ICRC visits important? (GC III, Arts 7 and 126; CIHL, Rule 124)
  - b. Can you imagine why Iran impeded ICRC visits to Iraqi prisoners of war? Why did Iran and Iraq try to conceal certain categories of prisoners of war from the ICRC? Which categories? How may the ICRC have learned about the existence of those hidden prisoners?
  - c. Why does the ICRC insist on visiting prisoners and interviewing them without witnesses? Does the ICRC have a right to insist on the latter condition? (GC III, Art. 126) Should the ICRC renounce interviewing without witnesses if it heightens tension between different groups of prisoners?
4.
  - a. Do efforts of a Detaining Power to indoctrinate prisoners of war – to put them under ideological and political pressure with the aim of turning them against their own government – violate IHL? Even if no prohibited means (e.g., threats, intimidation, or deprivation of rights to which they are entitled under Convention III) are used? Which provisions of Convention III are violated?
  - b. May prisoners of war sever their allegiance towards the Power on which they depend? What are the risks and interests involved in answering this question? Does a severing of their allegiance deprive them of their prisoner-of-war status? May they renounce their status? (GC III, Art. 7)

- c. May a Detaining Power release prisoners of war who sever their allegiance to the power on which they depend? (GC III, Arts 16 and 21; CIHL, Rule 128)
  - d. May prisoners of war voluntarily join the armed forces of the Detaining Power? Do they keep their prisoner-of-war status if they do so? (GC III, Arts 7, 23, 52 and 130)
  - e. Has the Detaining Power a responsibility for the killing of prisoners who keep their allegiance by prisoners who have severed their allegiance to the Power on which they depend? For killings of the latter by the former? What action must the Detaining Power take to avoid such events? May it or must it separate these two categories of prisoners? What are the risks of such a separation? (GC III; Arts 13, 16, 22, 121 and 122)
5. a. By which means does IHL ensure that a family is informed about the capture and detention of a prisoner of war? May prisoners of war renounce some or all of those means used to inform their families? What reasons could they have for doing so? (GC III, Arts 69, 70, 122 and 123; CIHL, Rules 125 and 126)
- b. Who must enable prisoners of war to fill in capture cards? Can capture cards be filled in even when the ICRC is impeded from visiting prisoners of war? Has the ICRC a right to register prisoners of war? Even those who do not wish to be registered? Why is the registration of prisoners of war important to the ICRC? (GC III, Arts 70, 122, 123 and 126; CIHL, Rule 123)
- c. Must death certificates for prisoners of war indicate the cause of death? For enemy soldiers found dead on the battlefield? (GC I, Art. 16; GC II, Art. 19; GC III, Art. 120; CIHL, Rule 116)
6. Did Iran have an obligation to inform the ICRC about sentences passed against prisoners of war? (GC III, Art. 107)
7. a. Must a detaining power repatriate seriously wounded and seriously sick prisoners during the hostilities? Why? Even if the enemy does not do so? (GC III, Arts 13(3), 109 and 110)
- b. Who decides whether a prisoner of war is seriously wounded or seriously sick? What happens if that body is unable to agree on who is seriously wounded or seriously sick? (GC III, Arts 110-113 and Annex II)
8. a. Could Iraq lawfully detain Iranian civilians it found while its offensive advanced on Iranian territory? In which cases? Could Iraq lawfully evacuate Iranian civilians living in Iranian territories it controlled once Iraq had to retreat from those territories under the pressure of an Iranian counter-offensive? At least those among them who were lawfully detained? (GC IV, Arts 49 and 76-79)
- b. May Iraq detain civilians in prisoner-of-war camps? If it respects all the provisions of Convention IV applicable to them? (GC IV, Arts 76 and 84)
- c. Are Iraqi civilian refugees in Iran protected persons under Convention IV? Under which circumstances has the ICRC the right to assist them? (GC IV, Arts 4, 23 and 44; P I, Arts 70 and 73)
9. a. How can the ICRC know about summary executions of captured soldiers? When is a party to a conflict responsible for executions of individual enemy soldiers, immediately after their capture, by individual members of its armed forces who were not ordered to execute them? Were such individual enemy soldiers prisoners of war? (Hague Convention IV, Art. 3; GC I-IV, Arts 49/50/129/146; GC III, Arts 5 and 12; CIHL, Rule 149)
- b. How can the ICRC know that wounded enemies were executed or abandoned on the battlefield?
10. a. Does the indiscriminate bombardment of towns and villages violate IHL, although neither Iran nor Iraq were party to Protocol I? Does it make a difference for IHL that such towns were more

than 200 km away from the front line? Is the concept of a “military objective” different on the front-line compared with 200 km away?

- b. Were such bombardments even less admissible under IHL when they were announced as reprisals? (GC IV, Art. 33(3); P I, Arts 51(6) and 52; CIHL, Rules 146-147) Under which conditions do reprisals that would amount to violations of treaty-based IHL, are admissible under customary IHL?
11. Do the violations of IHL mentioned in the two Memoranda “discredit the rules of IHL”? Did those rules apparently have no influence on the Parties? Did they have a protective effect for the victims of the conflict?

**Case No. 171, Iran/Iraq, UN Security Council Assessing Violations  
of International Humanitarian Law****A. UN Doc.S/15834**

[Source: UN Doc.S/15834 (June 20, 1983)]

**MISSION TO INSPECT CIVILIAN AREAS IN IRAN AND IRAQ  
WHICH HAVE BEEN SUBJECT TO MILITARY ATTACK*****Report of the Secretary-General***

1. On May 2, 1983, the Permanent Representative of the Islamic Republic of Iran called on me to convey his Government's request that I send a representative to visit civilian areas in Iran which have been subject to military attack by Iraq. He indicated that, should the Government of Iraq wish to invite the representative to visit Iraq, the Government of Iran would welcome it.
2. [...] On May 3, 1983, I discussed the matter with the Permanent Representative of Iraq, who, after consulting his Government, informed me on May 12, 1983 that Iraq would also wish the representative to visit civilian areas in Iraq which had been subject to military attack by Iran. [...]
3. I informed the Security Council on May 12, of my intention to dispatch a small mission [...]. As agreed with the two Governments, the task assigned to the mission was to survey and assess, as far as possible, the damage to civilian areas in the two countries said to have suffered war damage and to indicate, where possible, the types of munitions that could have caused the damage. The mission was not expected to ascertain the number of casualties or the value of the property damage in those areas. The mission was assigned the responsibility of presenting to me an objective report on its inspections and observations. [...]
8. The mission has reported to me that during discussions in the Ministry of Foreign Affairs of each State, there was mention of alleged violations of the Fourth Geneva Convention of 1949. [...]
9. The mission has reported to me that it met officials of the International Committee of the Red Cross (ICRC) in Geneva to discuss its findings as well as the relevant portions of the ICRC memorandum of May 7, 1983 circulated to States parties to the Geneva Conventions of 1949. [...]
11. The report that the mission has submitted to me is annexed.

**Annex**  
**Report of the mission**

**Introduction**

1. The mission toured war zones in Iran from May 21 to May 26, 1983, and war zones in Iraq from May 28 to May 30, 1983. [...]
2. The mission was instructed (a) to determine whether civilian areas had been subject to damage or destruction by military means, such as air bombardment, artillery shelling, missile and rocket attacks or use of other explosives; (b) to assess the extent of such damage and destruction as far as possible; (c) to indicate, where possible, the types of munitions used. While the mission was not expected to ascertain the number of casualties, it kept in view the obvious correlation between the extent of damage to civilian areas and the probable extent of loss of life, taking into consideration the degree to which such areas were populated at the time the damage was inflicted. The statistics on casualties provided by the two Governments are mentioned in the report of the mission without comment. [...]
4. The mission wishes to place on record that, in the circumstances in which it worked, it was not in a position to verify the information given by the authorities concerned relating to the location of military units or installations, distances from lines of hostilities, situation of communications or economic installations of strategic or military significance etc. Therefore, the mission had to rely in that regard essentially on the information provided by the respective Government supplemented by whatever information it could ascertain by its own observations.
5. In accordance with its instructions, the members of the mission at no point discussed with any official of either Government or any other person the possible content of its report. Also, it made it a point not to discuss with one Government what it had observed or ascertained during its visit to the territory of the other State. The members of the mission did not make any substantive statement or comment to the press. [...]

**I. TOUR OF WAR ZONES IN IRAN**

7. The itinerary drawn up by the Government of Iran included visits to civilian areas which had suffered war damage relatively recently as well as in the past. The dates of its visits to the various sites are indicated in brackets. The times indicated are local times. Casualty figures relate to civilians.

**A. Dezful**  
**(May 21, 1983)**

**Information presented to the mission by the Iranian authorities**

8. [...] The distance [of the city] to the border is approximately 80 km.

9. The authorities said that the city had been attacked on April 20, April 22 and May 12, 1983, on each occasion by a surface-to-surface missile from a westerly direction. Three sites of impact within the city were the Cholian area, the Afshar hospital area and the Siah-Poshan area, respectively. [...]

Some buildings had had to be demolished by bulldozers to gain access to the third site to evacuate the dead and wounded, and many bodies were said to be still buried [*sic*] under the debris.

10. The distance to the lines of hostilities was not provided. A major air base is situated 8 km north-west of the city towards Andimeshk. There are no troops stationed in the city, and the nearest major area where combat troops were deployed was about 80 km away. There are air defence detachments deployed in the city. There are no factories of any military significance in the city.
11. The mission was also informed that there had been over 50 previous missile attacks from September 1980 to date. There had been, in the same period, over 6,000 impacts from aerial bombardment and shelling. Those had caused total casualties of 600 killed and more than 2,500 injured. There had been destruction of varying degree to 1,300 houses, 32 schools and 22 mosques.

### **Observations by the mission**

12. Dezful is a sizeable city situated on the southern bank of the Dez River, which separates it from the air base area located to the north of the city. There is a dam about 20-25 km to the north-east. There are two bridges over the Dez River in the city. The city is not situated on any major communications route. Within the time available, the mission was unable to determine whether there were installations of strategic or economic importance located in the city other than those indicated by the Iranian authorities. [...]
16. The observations by the mission and examination of the evidence presented to it support the claim that the first three sites were hit by surface-to-surface missiles, which the team identified as Scud-B missiles. Although the mission could not inspect all the damaged buildings, the extent of the property damage claimed appears to be plausible. [...]

**D. Musian**  
**(May 22, 1983)**

### **Information presented to the mission by the Iranian authorities**

32. The mission was informed that the town had a population of 5,000 people, mostly Arabic speaking. It is 6 km from the border. The area is mainly agricultural and is not in a military zone. However, there were oil installations nearby in Abu Ghareib and Biad. It was occupied on about October 8, 1980 after 15 days of fighting during which 60 persons were killed. The number of injured was not known, since most of the inhabitants had fled on the outbreak of hostilities. It

was recaptured on March 22, 1982 after one week of fighting. The authorities further stated that the town had been largely destroyed before it was retaken and that many buildings had been blown up by explosives. Thirty-three outlying villages had also been destroyed. Five hundred and eighty families had been taken prisoner. Since its recapture, it had been under frequent bombardment until a month prior to the mission visit. The distance to the front line was not given.

#### **Observations by the mission [...]**

34. The mission formed the impression that the buildings still standing had been damaged by shelling and direct fire, and, in some cases, by planting high explosives. However, in the areas that had been razed to the ground the extent of destruction indicated that high-explosive charges and engineering equipment might have been used.

**E. Dehloran  
(May 22, 1983)**

#### **Information presented to the mission by the Iranian authorities**

35. Dehloran is located about 25 km from the border. The mission was informed that it had been attacked more than 50 times by air since the outbreak of hostilities in September 1980 and that about 60 per cent of it had been destroyed. One hundred persons had been killed, and 500 others injured. The town had been occupied three times by Iraqi forces, and, in the course of the latest occupation, the power station and waterworks had been destroyed. Most of the inhabitants had fled the town during the first attack, and the population of 45,000 before then had dwindled to 5,000. There is no factory located within or near the town. No troops were stationed in the area in 1980. The authorities stated that since March 1982, when the town was recaptured by Iranian troops, no military units have been deployed in the area. There are, however, a small air defence detachment, a gendarmerie unit and a reconstruction unit stationed in the town. The distance to the front line was not given.

#### **Observations by the mission**

36. [...] From what the mission could observe, more than half the town had been heavily damaged beyond repair. Almost all the buildings in the other areas were damaged to varying degrees. The damage appeared to have been caused by both shelling and aerial bombardment.
37. Apart from the air defence and the gendarmerie units located in the town, the mission observed a number of personnel in military uniform and military vehicles. It was informed that they belonged to reconstruction teams. [...]

39. The mission is of the view that the destruction described was caused by aerial bombardment and exchange of fire on the occasions when the town changed hands and by subsequent shelling.

**F. Abadan  
(May 23, 1983)**

**Information presented to the mission by the Iranian authorities**

40. The population of the city before the hostilities was 400,000, with another 200,000 people in its suburbs. The authorities stated that soon after the town was attacked in September 1980 most of the population had been evacuated. The city remained subject to heavy shelling and aerial bombardment. Only about 70,000 inhabitants remained and were currently helping in the reconstruction of the city. Twelve hundred persons had been killed and 7,000 injured, of which 79 were maimed. Civilians taken prisoner numbered 2,228. The damage to 40,000 houses ranged from 20 per cent to 100 per cent. The city was still under shelling and direct fire, and daily casualties averaged 1 person killed and 6 or 7 injured. There was very little aerial bombardment. Before the hostilities, there had been one gendarmerie border post and no military units located in the city. The nearest military unit, one infantry battalion was stationed in Khorramshahr some 30 km away. After the city was attacked and the road to Ahvaz cut on October 20, military units to defend the city had had to be brought in by air and through the Bahmanshir River.
41. The mission was taken to one of the oldest and largest hospitals in the city, whose location was well known, and was informed that it had been hit the previous day by a 120-mm mortar shell which had caused no casualties. The mission was also later taken to a second hospital on the outskirts of the city which was said to have been bombed from the air at an early stage in the hostilities.
42. An oil refinery complex located near the city was said to have been almost destroyed and the remaining installations to be under constant attack. The mission was not taken to that area because, the Iranian authorities said, it was not a civilian area and could be considered an economic installation of military significance and, therefore, a legitimate target.

**Observations by the mission [...]**

44. On inspecting the first hospital, the mission was shown various points of past damage. It found shrapnel and glass fragments caused by one very recent impact of a shell which had made a gaping hole in the corner of one of the wards. The mission also observed that the roof of another ward, which was clearly marked with a red cross on both sides, had received several direct hits, four of which had penetrated the roof and caused damage inside. The mission was also shown a part of a canister of a bomb which was said to be one of the two found in the



hospital grounds and was positively identified as belonging to a cluster bomb of the same type found in other cities [...].

45. The second hospital building showed signs of considerable damage that had been repaired. [...]
46. [...] It is also evident that the city remains under fire.
47. During the visit to the first hospital, at about 0900 hours on May 23, 1983, the mission heard sounds of artillery or mortar fire. While in Khorramshahr, the mission was informed that three shells had hit the Abadan refinery, and one had dropped in the city a kilometre from the first hospital the team visited. That could not be verified by the mission.
48. From its observations, the mission is of the opinion that the evidence supports the claim that the city had been under a prolonged siege. It was clear that the destruction seen had been caused by aerial bombardment, artillery fire and direct fire.

**G. Khorramshahr  
(May 23, 1983)**

**Information presented to the mission by the Iranian authorities**

49. Before September 1980, the population of Khorramshahr had been 200,000. On September 22, 1980, it had been heavily bombarded and attacked by two army divisions. An infantry battalion stationed in the city, supported by civilians, had resisted for 40 days, after which the larger part of the city north of the Karun River was occupied by Iraqi forces and remained under occupation until late March 1982. Two hundred persons, including whole families, had been killed in the initial fighting. During the evacuation of the population several thousand civilians had been killed, and thousands more wounded, and a large number had been taken prisoner (no precise figures were given).
50. The Iranian authorities stated that their troops had recaptured the city in March 1982 without much fighting. Of about 23,000 residential and other units, it was found that 8,000 buildings had been totally levelled, including 120 mosques and religious establishments, 100 schools, 2 colleges, 4 major hospitals and several clinics. Of about 15,000 residential units, 60 per cent had been destroyed and were beyond repair. A large number of shops had been looted and burned. From 50 to 60 vessels of foreign registration had been sunk or heavily damaged. Another 1,000 private vessels of Iranian registration, of all types and sizes, had also been destroyed or sunk. [...]

**Observations by the mission [...]**

55. The scene in the northern part of the city supported the version of events given by the authorities. Although the mission could not conduct detailed inspections,

the nature and extent of the destruction gave the impression that, apart from air and artillery bombardment, high-explosive charges and engineering equipment had been used. [...] The mission was not in a position to determine whether the open spaces had been mined, and, if so, to what extent they had been cleared.

56. From what it could observe of the almost total devastation of the city, the mission is of the opinion that in those parts where buildings were still standing the destruction was the result of intensive shelling and bombardment in the course of the hostilities. However, in those areas of the city which were completely levelled, it was evident that other means, such as high-explosive demolition charges and engineering equipment, must have been deliberately employed. [...]

**L. Baneh**  
**(May 26, 1983)**

**Information presented to the mission by the Iranian authorities**

73. Baneh has 13,000 inhabitants and is about 20 km from the border. The mission was informed that the town had been attacked on the day before its visit, that is, on May 25, at about 1015 hours by two of four aircraft coming from a westerly direction. Twenty-two bombs had been dropped in the north-eastern section of the town, of which some had landed outside the town limits. Five had failed to function. The rest had fallen in an area 300 m in diameter. The aircraft had also strafed the town with machine-guns. Eight persons had been killed, of whom 3 were women and 5 were children. Seventy-three had been injured, of whom about 70 per cent were children, 20 per cent women and 10 per cent men.
74. The authorities stated that, since the outbreak of hostilities, no military operations had been conducted in that part of the country by either side, except for the air attack the previous day. There is no major military installation in the area. There is a small supply depot of about 150 men solely in support of internal security operations. It is located about 1-1.5 km from the area of impact, to the north-east of the town. The town is on a very small side road, with no industry of military significance.

**Observations by the mission**

75. Baneh is a small town situated in mountainous terrain. [...] It is not near any major communication lines and has no industry of any significance, being mainly an agricultural town. The only military installation observed was the small supply depot already mentioned, which contained several large trucks.
76. The area affected is residential and showed a large number of fragment marks, but there was no major property damage. A large number of window panes had been broken.

[...]

77. Although the mission was not, in general, expected to estimate the number of casualties, it felt that, in the circumstances, it would be inappropriate not to take note of the evidence of an incident which had occurred only one day before its visit.
78. The mission was taken to the graveyard to see the bodies of the dead just before burial. There were the bodies of two women and five children in open coffins. The mission was informed that another woman who had been evacuated to a hospital in a nearby town had succumbed to her wounds.
79. The mission was then taken to a hospital where 56 of the wounded were said to be under care, the others having been sent to hospitals in nearby towns. Two doctors showed the mission 1 young boy, 8 women and 14 children of ages 2-12 who had suffered moderate to severe wounds the preceding day. One baby had been prematurely delivered by Caesarian operation, as its mother was severely wounded. Because of the time factor the mission could not visit the other wounded.
- [...]
81. From its observations and examination of the evidence presented to it, the mission is of the view that the town had been subjected to aerial bombardments with cluster bombs. Such bombs are mainly effective against personnel, and this would explain the high number of casualties and the relatively low damage to property. The mission is therefore of the opinion that the details of the incident as reported were reasonably accurate. The mission is not in a position to judge whether the intended target could have been the supply depot. [...]

## **II. TOUR OF WAR ZONES IN IRAQ**

83. The itinerary drawn up by the Government of Iraq included visits to civilian areas which had suffered war damage relatively recently as well as in the past. The dates of its visits to the various sites are indicated in brackets. The times indicated are local times. Casualty figures relate to civilians. [...]

### **C. Khanagin (May 28, 1983)**

#### **Information presented to the mission by the Iraqi authorities**

92. Khanagin is 8 km from the border. Its population was 52,000 before the hostilities began. The town and a nearby oil refinery had been shelled and bombarded by air even before September 4, 1980. Many residential areas had been evacuated. The authorities stated that on September 22, 1980, Iraqi forces had crossed the border in retaliation and subsequently advanced some 45-50 km beyond it. Between September 1980 and June 1982, the town had been beyond artillery range but had been attacked three times by air. On June 18, 1982, the Iraqi forces had started to withdraw from their advanced position and, by June 28,

had withdrawn to the border. Since then, the town had been under rocket and artillery attack. Sites affected included hospitals and schools. About 4 per cent of the town had been damaged beyond repair. The distance to the front line was not given.

93. In an attack on a residential area on September 4, 1982, 8 women and children had been killed and 19 injured, and some houses had been destroyed. On December 18, 1982, a school had been hit, 20 children and 1 teacher had been killed and 50 children injured. About two months prior to the mission's visit a supermarket had been hit by rockets. Seven persons had been killed and 19 injured, including women and children. In all, 66 inhabitants had been killed and 455 injured, including 33 maimed. The last artillery attack, on May 16, 1983, had resulted in 1 person killed and 8 injured.
94. The authorities stated that no major military operations had been mounted from the town at any time. No military units were stationed in the city, except for air defence detachments comprising militia men. There were two supply routes 6-10 km from the town. An oil refinery is located at a distance of 2 km from the town.

### **Observations by the mission**

95. The mission visited the school, the supermarket and the residential areas mentioned. On inspection, it saw that the schoolyard had been hit by two shells, many fragments of which had shattered windows and penetrated into two classrooms. There was one impact outside the supermarket entrance which had scattered fragments against the facade. In the residential area on the outskirts attacked in September 1980, four houses had been badly damaged and two more lightly damaged. The nearby refinery and its residential area had been heavily damaged. In that area a number of military emplacements were seen.
96. In the opinion of the mission, the oil refinery was the main targets of the attack, but a number of civilian targets at some distance from it had also been hit. The estimate of damage to the town appeared to be accurate.
97. During its visit to Khanaqin, the mission heard sounds of four rounds of artillery or mortar fire from the direction of the border. It was informed that these came from Iranian guns, but that claim could not be verified.

**D. Kirkuk  
(May 29, 1983)**

### **Information presented to the mission by the Iraqi authorities**

98. The population of the city was 200,000 before September 1982, and remains at the same level. The city is 140 km from the border and, thus, not within range of Iranian artillery. The nearest land operations were near the border 70 km north of Khanaqin. According to the authorities, the city had been heavily raided

by air from September 23, 1980 until February 26, 1982. The raids, which were particularly intense in the first days of the hostilities, had been concentrated on residential areas, and targets hit included a hospital, a school, a market-place and a graveyard. There was a good civil defence system, and, therefore, casualties were limited. There had been a total of about 50 successful raids and a great number that were not successful. The authorities stated that cluster and fragmentation bombs, rockets and machine-guns were used, as were napalm and booby-traps in civilian areas.

99. There was heavy damage to residential areas, 120 units as well as 15 public buildings having been destroyed, of which nearly all had been rebuilt, as it was government policy to restore damaged property as quickly as possible. Such reconstruction work also was the target of attacks. Casualties since September 1980 had totalled 30 killed and 245 injured.
100. An air base and a training centre for logistic personnel were located about 25 km and 10 km respectively, from the city. Kirkuk is in an oil-producing area, and the nearest oil installation was 10 km away. There were numerous small factories and workshops of no military significance in the city, many of which had been destroyed by attacks and then rebuilt.

### **Observations by the mission**

101. The mission was taken to five sites. At the first site, it was shown one house which had been destroyed in a residential area located about 200 m from an oil-storage area where four of seven storage tanks had also been destroyed. At the second site, in a residential area across from a railway station and bus terminal, a house had been destroyed and two other buildings damaged and rebuilt. At the third site, in another residential area, a local health centre had been destroyed and some houses damaged. In yet a fourth residential area, two houses had been destroyed and rebuilt. At the fifth site, a shopping area in the old part of the city had been destroyed [...]. The mission was informed that at that particular site, rockets had been used, resulting in 12 persons killed and 53 injured. The facade of a nearby mosque had been slightly damaged. The distances between the five sites averaged 1 km. The incidents were well documented, and, to support their claim, the authorities showed the mission photographs of the munitions allegedly used, including cluster bombs, and of the damaged buildings before they were rebuilt. The mission was not shown parts of the munitions used, as those were said to have been sent to Baghdad. [...]
102. Since those events had taken place in an early stage of the hostilities, and most of the damage had been repaired, the mission was unable physically to inspect or verify the type of the munitions used in the various sites. However, the mission is of the view that the evidence, i.e., photographs and still visible damage, supports the claims concerning damage to property. [...]

**F. Al-Faw  
(May 30, 1983)**

**Information presented to the mission by the Iraqi authorities**

106. The town had 42,000 inhabitants before the hostilities started. The current population is about 3,000 most of its inhabitants having abandoned the town by mid-1981, since it had come under almost daily bombardment from September 1980. It is located on the border about 500 m from the mouth of the Shatt-al-Arab, which is about 800 m wide. At this time, it is the only station in Iraq used for off-shore loading of oil in the Gulf. There is no oil refinery.
107. According to the authorities, between September 1980 and December 1981, there had been 136 air raids, the last having taken place in December 1981. Since the outbreak of hostilities, the town had been under daily shelling, with an average of 20-30 shells every day. The town was also under direct fire from tanks and machine-guns from across the river. Total casualties to date were 96 killed and 236 injured, of whom many were maimed. Eighty per cent of the casualties were from shelling, 10 per cent from air attacks and 10 per cent from other means. Three thousand houses had been hit, of which 50 per cent had been totally destroyed, and 30-40 per cent were beyond repair. No repairs had been attempted because of the constant threat from shellings. There are no military units located near the town, but Iraqi artillery deployed about 10 km from the town had been used to return fire from the other side. The town had not been used at any time for launching military operations, and the river had not been crossed in either direction during the hostilities. There were no military units in the city, except for border forces along the Shatt-al-Arab.

**Observations by the mission**

108. The mission was taken to visit six sites. At the first, it was shown an unoccupied house which, it was told, had been hit two days earlier by a shell. One wall of the house had collapsed, but no point of impact or shell fragments were found. At the second, a power plant on the edge of the town towards the river and several workshops in the vicinity had been hit on May 20, 1983, and three people were said to have died, but the plant was still functioning. At the third site, 8 houses, 400 m from a transformer, had been destroyed by an air raid in early 1981. At the fourth site, near some oil-storage tanks 8-10 prefabricated houses had been destroyed, as had most of the tanks. At the fifth site, in a residential area, two houses had been completely destroyed and several more damaged to varying degrees evidently by artillery. The sixth site was five km outside the town, where water-storage tanks had been destroyed at the start of the hostilities.
109. During its tour, the mission saw about 40 large oil-storage tanks grouped in various parts of the town. Most of the tanks had been destroyed or damaged.
110. The mission is of the opinion that the oil installations were the main target of the attacks. The power station could have been another target. However, it was

clear that in the course of the shelling, a large number of residential and other buildings had been hit and heavily damaged. [...]

## **B. Security Council Resolution 540 (1983)**

[Source: UN Doc. S/RES/540 (October 31, 1983), available at <http://www.un.org/documents/scres.htm>]

*The Security Council,*

*Having considered* again the question entitled “The situation between Iran and Iraq”, [...]

*Recalling* the report of the Secretary-General of June 20, 1983 (S/15834) on the mission appointed by him to inspect civilian areas in Iran and Iraq which have been subject to military attacks, and expressing its appreciation to the Secretary-General for presenting a factual, balanced and objective account, [...]

*Deploing* once again the conflict between the two countries, resulting in heavy losses of civilian lives and extensive damage caused to cities, property and economic infrastructures,

*Affirming* the desirability of an objective examination of the causes of the war, [...]

2. *Condemns* all violations of international humanitarian law, in particular, the provisions of the Geneva Conventions of 1949 in all their aspects, and calls for the immediate cessation of all military operations against civilian targets, including city and residential areas; [...]

## **C. Letter of June 28, 1984 from Iraq to the Secretary-General**

[Source: UN Doc. S/16649 (June 28, 1984)]

### **Letter dated June 28, 1984 from the deputy permanent representative of Iraq to the United Nations addressed to the Secretary-General**

I wish to refer once again to what was stated in the letter from His Excellency President Saddam Hussein, President of the Republic of Iraq, which he addressed to you on June 10, 1984 in reply to your appeal addressed to both Iraq and Iran to end the bombardment of purely civilian centres and in which he affirms that it was essential for both sides to refrain from concentrating their military forces in or near civilian centres, so that there would be no intermingling during military operations. I wish also to refer to my letter addressed to you on May 21, 1984, in which I explained to you that the Iranian side was using the town near the Iraqi frontier as centres for concentrating its forces and making them point of departure for the attack which it intended to launch against Iraqi territory and towns.

I wish to refer also to the note sent to you by the Permanent Representative of Iraq on June 23, 1984. We have ascertained that the Iranian authorities have actually assembled numerous military units in the following Iranian cities: Abandan, Mohammarah, Khosrowabad, Ahvaz, Hoveyzeh, Bisitin, and Andi-meshk. The Iranian authorities' use of purely civilian centres for military purposes in order to prepare fresh aggression against Iraq is a clear violation of the agreement reached through you to avoid the bombardment of civilian centres, as well as being a violation of article 28 of the Fourth Geneva Convention, signed on August 12, 1949, relative to the protection of civilian persons in time of war, which prohibits the use of the presence of protected persons to render certain points or areas immune from military operations and to turn such towns into military centres. This prohibition was reaffirmed clearly in Protocol I, signed in Geneva in 1977. Article 58, paragraph (b), states the necessity of avoiding the establishment of military targets in or near densely populated areas. In stressing once again the necessity of taking swift and appropriate measures to verify that and the necessity of the Iranian side's abiding by its commitments, we confirm what we warned of at the start, namely, that the Iranian régime intends to use the agreement to conceal its aggressive, expansionist intentions for the purpose of low duplicity, which places such situations outside the scope of what was stated in your letter of June 9, 1984 concerning the avoidance of the bombardment of purely population centres.

We emphasize our strong desire for faithful implementation of the agreement and for United Nations bodies to perform their duties well. We enclose a list containing information about the Iranian military forces present in the above-mentioned towns.

*(Signed)* Tariq Aziz Deputy Minister and Minister for Foreign Affairs

#### **D. Letter of June 29, 1984 from the Secretary-General to Iran and Iraq**

[Source: UN Doc.S/16663 (July 6, 1984)]

##### **Text of messages dated June 29, 1984 from the Secretary-General addressed to the President of the Islamic Republic of Iran and to the President of the Republic of Iraq**

I am deeply gratified and encouraged that the Governments of Iran and Iraq are implementing in good faith their undertakings to refrain from military attacks on purely civilian areas. While there have been reports of civilian casualties, I have reason to believe that both Governments are determined to honour the commitments made in response to my appeal. This is to be commended by the international community.

I feel I should underline once again, now that the inspection arrangements are in place, that compliance with the undertakings is principally the responsibility of the two Governments. In this respect I must point out that, inasmuch as my appeal as well as the responses of the two Governments were motivated by a desire to spare



innocent civilian lives, I am deeply concerned that allegations have been made that civilian population centres are being used for concentration of military forces. If this were indeed the case, such actions would constitute a violation of the spirit of my appeal and of basic standards of warfare that the international community expects to be observed.

I am sure you will understand that, until this ruinous conflict can be stopped, I have a special responsibility to make every effort to mitigate the suffering it causes. [...]

## DISCUSSION

1. a. May a party to a conflict deliberately attack a hospital as described, e.g., in Abadan or Khorramshahr in Iran, or Khanagin in Iraq? Or a mosque? A school? Is a power station in a modern society an object necessary for the survival of the civilian population? (HR, Art. 25; P I, Arts 48, 51(2)-(3), 52 and 54; P II, Arts 13 and 14; CIHL, Rules 7-10 and 54) How would the fact that troops were stationed in each of these locations affect these determinations? (GC IV, Art. 19; P I, Arts 51(7) and 52(2); CIHL, Rule 10)
- b. Are civilians accorded protection by IHL? For example, from indiscriminate attacks? (P I, Art. 51(4)-(5); CIHL, Rules 11-13) What constitutes an indiscriminate attack? The aerial bombardment with cluster bombs in the town of Baneh, Iran (para. 81 of the UN Mission report above)? Are women and children not granted special protection under IHL? (E.g., GC I, Art. 12(4); GC II, Art. 12(4); GC III, Art. 14; GC IV, Arts 14 and 27; P I, Arts 76 and 77; CIHL, Rules 11-13) Did the described attacks violate those provisions?
- c. Under IHL, are oil wells or refineries considered as military objectives that may be attacked? Are power plants? (HR, Arts 25 and 27; P I, Arts 48, 52 and 85(3); CIHL, Rules 7-10) If a party to a conflict knows when attacking a military objective that a civilian object might be hit, what, if any, prior action must be taken? (GC IV, Art. 19; P I, Art. 57(2)(c); CIHL, Rule 20) May any means be used to disable a military objective that is determined as such, or to subdue the opposing forces? Including the use of cluster and fragmentation bombs, rockets and machine-guns, as well as napalm and booby-traps in civilian areas, as Iraqi authorities claimed were used in Kirkuk? (HR, Art. 22) Under IHL, are a certain number of civilian casualties permitted in an attack on military objectives? If so, how many constitute a permissible loss? (P I, Art. 57(2)(a)(ii)-(iii); CIHL, Rules 14 and 17-18)
2. a. Is Security Council Resolution 540, para. 2, referring to violations of any of the above-mentioned IHL provisions? Which attacks and what destruction described in the report fall under “the Geneva Conventions”?
- b. Was the destruction of the areas of Khorramshahr which were completely levelled by high-explosive demolition charges and engineering equipment while under Iraqi control a clear violation of Convention IV? Even if the destruction happened just before those areas were retaken by Iranian forces? Even if the destruction occurred while fighting was going on in Khorramshahr? Under which conditions could such destruction be compatible with IHL? (GC IV, Art. 53)
3. a. Is it clear that such violations actually occurred in the towns visited by the UN Mission? In all cases? Are such violations of IHL easy to determine? Are some IHL violations, e.g., torture, easier than others to assess? Is it easier to establish violations of the Law of Geneva than of the Law of The Hague? Did or could the UN Mission provide clear conclusions? What explains

the vague language found in its report, e.g., such events “appear plausible” or “the extent of destruction gave the impression that ...”?

- b. What factors make a “fact-finding” mission so difficult in these situations? Is it not particularly difficult because such facts must be assessed subsequent to events (sometimes even years later)? And because of the standards used in evaluating those facts? (P I, Art. 52) How does one really know or determine whether or not a military objective was actually located nearby at the time of attack? And then whether the attack was proportional to the significance of that military objective at that time? Or whether or not the attack was a mistake? Or whether the casualties were really part of the civilian population? On what elements should the fact-finding mission rely to assess the proportionality? To assess the objective importance of the military objective attacked? The exact extent of the civilian losses? The military plans of the attacker? (P I, Arts 51(5)(b) and 57(2)(a)(iii))
  - c. Can general conclusions be drawn from this mission for the possibilities and difficulties of fact-finding, with regard to IHL, on the conduct of hostilities?
4.
    - a. If the facts are accurately stated in Document C., has Iran violated Art. 58(b) of Protocol I? Art. 28 of Convention IV? Are the inhabitants of the said Iranian towns protected persons under Convention IV? (GC IV, Art. 4)
    - b. Is the UN Secretary-General right in stating in Document D. that the use of civilian population centres for the concentration of military forces constitutes a violation of basic standards of warfare? (P I, Arts 51(7) and 58; CIHL, Rules 7-10 and 22-24)
    - c. If the Iranian government used civilian centres as cover for its military forces, is the Iraqi government entitled to bomb those areas? Or at least the military forces situated in those areas? What precautionary measures must Iraq then take? (P I, Arts 50(3), 51(7) and (8), 57 and 58; CIHL, Rules 7-10 and 15-24) Are Iran and Iraq bound by these provisions of Protocol I although they are not party to the Protocol? Which of these provisions can be considered customary international law and hence applicable to both parties?
  5. If civilians and civilian objectives in Iran and Iraq were attacked, what obligations do States party to the Conventions have with regard to such violations of IHL? Does the action taken by the UN fulfil the obligations of the States Parties? (GC I-IV, Art. 1, Arts 49/50/129/146 respectively; P I, Art. 86; CIHL, Rules 139 and 158)

## Case No. 172, Iran/Iraq, 70,000 Prisoners of War Repatriated

**A. UN Security Council Resolution 598 (1987)**

[Source: UN Doc. S/RES/598 (July 20, 1987), available at <http://www.un.org/documents/scres.htm>]

*The Security Council,*

[...]

*Deeply concerned* that, despite its calls for a cease-fire, the conflict between Iran and Iraq continues unabated, with further heavy loss of human life and material destruction, [...]

*Determining* that there exists a breach of the peace as regards the conflict between Iran and Iraq,

*Acting under Articles 39 and 40 of the Charter of the United Nations,*

1. *Demands* that, as a first step towards a negotiated settlement, Iran and Iraq observe an immediate cease-fire, discontinue all military actions on land, at sea and in the air, and withdraw all forces to the internationally recognized boundaries without delay;
2. *Requests* the Secretary-General to dispatch a team of United Nations Observers to verify, confirm and supervise the cease-fire and withdrawal and further requests the Secretary-General to make the necessary arrangements in consultation with the Parties and to submit a report thereon to the Security Council;
3. *Urges* that prisoners of war be released and repatriated without delay after the cessation of active hostilities in accordance with the Third Geneva Convention of 12 August 1949;
4. *Calls upon* Iran and Iraq to cooperate with the Secretary-General in implementing this resolution and in mediation efforts to achieve a comprehensive, just and honourable settlement, acceptable to both sides, of all outstanding issues in accordance with the principles contained in the Charter of the United Nations; [...]
6. *Requests* the Secretary-General to explore, in consultation with Iran and Iraq, the question of entrusting an impartial body with inquiring into responsibility for the conflict and to report to the Security Council as soon as possible; [...]

## **B. Letter of July 17, 1989 from Iran**

[Source: UN Doc. S/20740 (July 19, 1989)]

### **ANNEX**

#### **Statement dated July 17, 1989 by the Foreign Ministry of the Islamic Republic of Iran**

Exactly one year ago, on July 17, 1988, the Islamic Republic of Iran removed the only remaining excuse concocted by Iraq to prevent the implementation of Security Council resolution 598 (1987). The highest authority of the Islamic Republic of Iran officially and unconditionally accepted resolution 598 (1987), and, in response to the invitation of the United Nations Secretary-General, a high-level delegation was dispatched to New York to consult with the Secretary-General about the procedures for the full and rapid implementation of the resolution.

Unfortunately, what the Islamic Republic of Iran had always warned the international community about materialized. Iraq, which had declared, time and again, that the only obstacle for the implementation of the resolution was lack of official acceptance by the Islamic Republic of Iran – refused to implement the resolution by insisting on pre-conditions which were illogical, unacceptable and contradictory to the letter and spirit of resolution 598 (1987) and the plans of the Secretary-General. [...]

The legal and practical prominence and priority of withdrawal to the internationally recognized boundaries is also manifested in Security Council resolution 598 (1987). Acting under Articles 39 and 40 of Chapter VII of the Charter of the United Nations, the Security Council, in paragraph 1 of resolution 598 (1987), demanded the cease-fire followed by withdrawal of forces to the internationally recognized boundaries without delay as a “first step towards a negotiated settlement”. Therefore, withdrawal, which is an inseparable part of this mandatory first step, is prior to and independent of any negotiation.

However, since the beginning of direct talks on 25 August 1988, Iraq has used every conceivable method to evade its commitment under the resolution as well as those under general principles of international law. The introduction of pre-conditions for the implementation of the resolution started with direct talks as a pre-condition for cease-fire and developed into continuously evolving conditions for implementation of other provisions, the most prominent and urgent of which is withdrawal. [...]

[...]

However, from the very first meeting of direct talks, the Foreign Minister of Iraq called for the necessity of reaching a common understanding with regard to the cease-fire itself, and used this pretext to introduce extraneous elements which by no extension of logic could be considered as a part of regulations for cease-fire.

It is interesting to note that both the Secretary-General [...] and Iraq [...] had excluded a cease-fire from the agenda of direct talks. The statement of the President of Iraq is even more direct than that of the Secretary-General in doing so. [...]

It is clear that the President of Iraq not only excludes all issues related to the cease-fire from direct talks, but also concedes that withdrawal is the first subject on the agenda of direct talks. Yet, to this date Iraq has refused even to comment on what it itself considered the first agenda item, and has prevented the implementation of the resolution by introducing elements which it claimed related to the observance of the cease-fire. [...]

[...]

While Iraq has failed to comply with the prominent element of the resolution and withdraw to the internationally recognized boundaries and refused to accept any proposal of the Secretary-General, it has selected one element of the resolution – namely the question of prisoners of war (POWs) – and with a view to undermining the resolution itself, has called for its implementation outside the framework of the resolution. However, what has actually occurred in the past year proves the lack of good will on the part of Iraq even regarding this issue. The timetable presented by the Secretary-General and accepted by the Islamic Republic of Iran called for the release and repatriation of all prisoners of war within 90 days. Had Iraq accepted that proposal, all POWs would have been released and repatriated by November 20, 1988. Likewise, had Iraq accepted – like the Islamic Republic of Iran – the four-point plan of October 1, 1988, all POWs would have been released and repatriated by the end of 1988. It is clear, therefore, that Iraq does not seek the release and repatriation of POWs; rather it endeavours to undermine and disintegrate resolution 598 (1987) and sabotage the efforts of the Secretary-General.

Another illustration of the real intention of Iraq with regard to POWs is the number of registered Iranian POWs in Iraq. Iraqi officials claimed during the last days of the war that the number of POWs on two sides had become balanced. Recently, the Governor of Basra claimed that only during the last year of the war did Iraq capture more than 25,000 Iranian prisoners. None of these prisoners have been registered. In fact, while close to 50,000 Iraqi POWs have been registered in the Islamic Republic of Iran by the International Committee of the Red Cross, Iraq has allowed the registration of only about 18,000 prisoners. Therefore, if Iraq has any real humanitarian concern for POWs, it has to bring the number of registered prisoners to a balance, since proportionality with regard to POWs has always been the Iraqi line. The International Committee of the Red Cross bears special responsibility to convince and compel Iraq to register these prisoners and bring the number of registered POWs on the two sides to a balance.

Close to one year after the establishment of the cease-fire, nothing has been achieved in the road to peace between Iran and Iraq. This brief assessment of the underlying reasons behind the stalemate clearly illustrates the fact that Iraq has failed to comply with a mandatory resolution of the Security Council adopted under Articles 39 and 40 of Chapter VII. The Security Council has committed itself [...] [in] resolution 598 (1987) – to take appropriate measures to ensure compliance with the resolution. Failure to do so will not only be a violation of the resolution by its authors, it will also be a violation of the trust the United Nations has placed on the Security Council as the primary organ responsible for maintenance of international peace and security. The institutional implications of political expediency on the part of some members of the Council who

have confused bilateral relations with their official function as members of the Security Council are grave, and the precedent it creates is disastrous. If the Security Council fails to take resolute measures to ensure compliance with a resolution it adopted with massive international fanfare, it cannot expect other Member States to entrust to the Council and United Nations the resolution of conflicts [...].

## C. Letter of July 21, 1989 from Iraq

[Source: UN Doc. S/20744 (July 21, 1989)]

### ANNEX

Commenting on the communiqué issued by the Iranian Ministry of Foreign Affairs on July 17, 1989, a spokesman for the Permanent Mission of Iraq in New York stated as follows:

“On 17 July the Iranian Ministry of Foreign Affairs issued a communiqué concerning the situation between Iraq and Iran and the progress of the negotiations that was full of fallacies and lies. For purposes of clarification, we should like to set forth the following facts:

“1. The communiqué of the Iranian Ministry of Foreign Affairs made it appear that Iran accepted resolution 598 (1987) officially on July 18, 1988 as a diplomatic step taken by the Iranian Government to facilitate the implementation of resolution 598 (1987). The truth, as the members of the international community know, is that Iran did not accept resolution 598 (1987), which was binding after its adoption, but used in dealing with its various kind of stratagems and manoeuvres in an attempt to prolong the war and win time in the hope of achieving its aggressive expansionist goals. [...]

[...]

“3. The agreement reached between Iraq and Iran on 8 August 1988 through the Secretary-General of the United Nations removes all doubts about the topics to be dealt with in the direct negotiations under the auspices of the Secretary-General. These topics are all the provisions of the resolution that have not been implemented so far. [...]

“The one topic that actually does lie outside the scope of the negotiations is the topic of the release of prisoners. Paragraph 3 of resolution 598 (1987) and article 118 of the Geneva Convention relative to the Treatment of Prisoners of War of 1949 and precedents throughout the international community all affirm in a way that admits of no other interpretation the binding obligation to release and exchange prisoners without delay after the cessation of active hostilities and entrust the supervision of this process to the International Committee of the Red Cross. The Iranian side's insistence on not proceeding to release and exchange prisoners after a year has elapsed since the cessation of active hostilities fully demonstrates how incompatible this régime's position is with international law and international humanitarian law and its readiness

to gamble with the lives and suffering of tens of thousands of Iraqi and Iranian human beings in order to achieve political ends. It shows once again the selective approach adopted by this régime throughout the years of conflict with regard to Security Council resolutions and the provisions of international law, taking from them what it will and refusing to be bound by the obligations which they create for it.

“The fallacies contained in the communiqué of the Iranian Foreign Ministry regarding the question of the registration of the prisoners is another proof of the bad intentions of the Iranian régime and its constant inclination to trickery and plays on words at the expense of human beings. The question of the registration of the prisoners is clear and unambiguous in international law; it is incumbent on the parties to the dispute to inform the Red Cross promptly of the number of prisoners and to provide the necessary information concerning them without delay.

“We informed the President of the International Committee of the Red Cross and the Secretary-General of the United Nations officially of our readiness to register all Iranian prisoners who were not registered when the Iranian side showed the same readiness, and the Security Council is cognizant of this. Resorting to percentages on this question is a contravention of international law and a ruse. Indeed, it is an unethical procedure, making human beings into numbers. Iraq rejects it on ethical and legal grounds and reaffirms the obligation on both parties to inform the International Committee of the Red Cross at the same time of the names of all non-registered prisoners. [...]

“5. Iraq once again affirm its will to continue the negotiation process under the auspices of the Secretary-General of the United Nations. if the Iranian side is serious about arriving at a comprehensive and lasting peaceful settlement, it has only to respond to the Secretary-General’s invitation and concur with Iraq’s wish to sit down at the negotiating table under the auspices of the Secretary-General and enter into genuine direct negotiations with a view to arriving at a common understanding of the peace plan and the positioning of the necessary mechanisms for its implementation. [...]

## **D. Iran/Iraq: more than 70,000 POWs repatriated**

[Source: *ICRC Bulletin*, No. 177, October 1990, p. 1]

By 14 September, over 70,000 prisoners had returned home in the operation launched on 17 August to repatriate all prisoners of war captured during the conflict between Iraq and Iran. As reported in the last Bulletin (No. 176, September 1990), about 60 delegates had been sent out from Geneva as of 18 August to reinforce the two ICRC delegations in Baghdad and Teheran. By the end of the month, 77 delegates were at work in the two countries.

During the period from 17 to 31 August, more than 2,000 prisoners of war were released daily overland via the border post at Qasr-e-Shirin, air shuttles were organized as from 22 August. A total of 798 Iranian prisoners of war and 1,193 Iraqi prisoners of war were flown back to their respective countries on three flights by Iran Air Jumbo jet, while the

ICRC chartered an aircraft to repatriate (on four flights) some 500 wounded and sick prisoners (221 Iranians and 257 Iraqis). Two more flights under ICRC auspices were made on 13 September to repatriate another 210 wounded and sick Iranian prisoners of war.

From the end of August, overland operations continued, with a daily flow of 900 prisoners in each direction, rising to a daily figure of 2,000 men both ways from 10 September.

ICRC delegates record each prisoner's identity and make sure they are returning to their countries of their own free will.

The prisoners repatriated include captives whom the ICRC had been unable, both in Iraq and in Iran, to visit during their detention. The delegates took this opportunity to register them.

Throughout the past weeks, the ICRC has maintained a constant dialogue with the Iraqi and Iranian authorities, in order to plan the remaining repatriations as efficiently as possible and arrange for all prisoners of war on both sides to be back home again soon.

## DISCUSSION

1. a. What do the provisions of IHL stipulate regarding the repatriation of prisoners of war "after the cessation of active hostilities"? (GC III, Art. 118; CIHL, Rule 128)
- b. When are active hostilities considered to have ceased? After the establishment of a cease-fire? Only after the withdrawal of all military forces to the internationally recognized borders? Only after Iran and Iraq have reached a final peace treaty? Had active hostilities between Iran and Iraq ceased to such an extent in summer 1989 that prisoners of war should have been repatriated?
- c. Does the fact that Security Council Resolution 598 (1987) provides for the repatriation of prisoners of war in its operative para. (3) thereof mean that the prisoners of war have to be repatriated only once operative paras (1) and (2) have been complied with? If this implication were correct, would it be compatible with IHL? If the Security Council Resolution contradicts IHL, does the resolution take precedence under Art. 103 of the UN Charter? (GC III, Arts 1 and 118; CIHL, Rule 128) [Article 103 of the UN Charter, available on <http://www.un.org/aboutun/charter/>, reads: "In the event of a conflict between the obligations (...) under the present Charter and (...) obligations under any other international agreement, (...) obligations under the present Charter shall prevail".]
- d. Is the Iraqi position correct that the repatriation of prisoners of war lies "outside the scope of the negotiations" between the parties? (GC III, Arts 6 and 118; CIHL, Rule 128)
- e. Is Iraq correct in stating that IHL affirms the "binding obligation to release and exchange prisoners without delay after the cessation of hostilities"? Does Iraq have an obligation to repatriate them even though Iran does not do so? Has Iraq complied with that obligation? (GC III, Arts 1, 13(3) and 118; Vienna Convention on the Law of Treaties, Art. 60(5))
2. a. What are the responsibilities of the parties to the conflict regarding the registration of prisoners of war? (GC III, Arts 70 and 122; CIHL, Rule 123)



- b. Are a party's responsibilities towards its prisoners of war applicable solely on the principle of reciprocity? Is Iran correct in stating that the ICRC has a responsibility to compel Iraq to register prisoners of war? And also that it has "to bring the number of registered POWs on the two sides to a balance"? (GC III, Arts 13(3), 70, 122, 123 and 126; CIHL, Rule 140)
  - c. Is Iraq correct in stating that "it is incumbent on the parties (...) to inform the Red Cross promptly of the number of prisoners and to provide the necessary information"? Is the Iraqi position indicating its "readiness to register all Iranian prisoners (...) when the Iranian side showed the same readiness" acceptable under IHL? (GC III, Arts 13(3), 70 and 122; CIHL, Rule 140)
3. Who has to determine whether a POW objects to his/her repatriation? The ICRC? Is that provided for in IHL? Why does the ICRC insist on visiting prisoners and interviewing them without witnesses? Does the ICRC have a right to insist on the latter condition? (GC III, Art. 126)
4. Do you agree with Iran's statement in the letter's last paragraph concerning the credibility of the Security Council? Can such a conclusion not also extend to the credibility of IHL? Does this situation between Iran and Iraq demonstrate the ineffectiveness of IHL? (GC I-IV, Art. 1; CIHL, Rule 139)
5. Security Council Resolution 598 (1987) addresses both political and humanitarian issues; what kind of problems does such a mixture of elements raise? Should the Security Council have omitted any reference to IHL and prisoners of war? Would that have improved the situation?

**Case No. 173, UN/ICRC, The Use of Chemical Weapons****A. Security Council Resolution 620 (1988)**

[Source: UN Doc. S/RES/620 (August 26, 1988)]

*The Security Council*

*Recalling* its resolution 612 (1988),

*Having considered* the reports of July 20 and 25 and August 19, 1988 (S/20060 and Add.1, S/20063 and Add.1, S/20134) of the missions dispatched by the Secretary-General to investigate allegations of the use of chemical weapons in the conflict between the Islamic Republic of Iran and Iraq,

*Deeply dismayed* by the missions' conclusions that there had been continued use of chemical weapons in the conflict between Iran and Iraq and that such use against Iranians had become more intense and frequent,

*Profoundly concerned* by the danger of possible use of chemical weapons in the future,

*Bearing in mind* the current negotiations in the Conference on Disarmament on the complete and effective prohibition of the development, production and stockpiling of chemical weapons and on their destruction,

*Determined* to intensify its efforts to end all use of chemical weapons in violation of international obligations now and in the future,

1. *Condemns resolutely* the use of chemical weapons in the conflict between Iran and Iraq, in violation of obligations under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on June 17, 1925, and in defiance of its resolution 612 (1988);
2. *Encourages* the Secretary-General to carry out promptly investigations, in response to allegations brought to his attention by any Member State concerning the possible use of chemical and bacteriological (biological) or toxin weapons that may constitute a violation of the 1925 Geneva Protocol or other relevant rules of customary international law, in order to ascertain the facts of the matter, and to report the results;
3. *Calls upon* all States to continue to apply, to establish or to strengthen strict control of the export of chemical products serving for the production of chemical weapons, in particular to parties to a conflict, when it is established or when there is substantial reason to believe that they have used chemical weapons in violation of international obligations;
4. *Decides* to consider immediately, taking into account the investigations of the Secretary-General, appropriate and effective measures in accordance with the

Charter of the United Nations, should there be any future use of chemical weapons in violation of international law, wherever and by whomever committed.

## B. ICRC Press Release of March 23, 1988

[Source: ICRC Press Release, No. 1567, March 23, 1988]

### IRAN-IRAK CONFLICT: THE ICRC CONDEMNS THE USE OF CHEMICAL WEAPONS

Geneva (ICRC) – In a new and tragic escalation of the Iran-Iraq conflict chemical weapons have been used, killing a great number of civilians in the province of Sulaymaniyah.

The use of chemical weapons, whether against military personnel or civilians, is absolutely forbidden by international law and is to be condemned at all times.

The ICRC has therefore once again taken urgent steps to bring to an immediate end the use of chemical weapons. It has also informed the Islamic Republic of Iran of its readiness to provide emergency assistance for the victims.

### DISCUSSION

1. a. Is the absolute prohibition by international law of the use of chemical weapons mentioned above derived from customary international law or purely through conventional law? (The 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare, [See **Document No. 9**, The Geneva Chemical Weapons Protocol], was accepted by Iraq and many other States on condition that they will cease to be bound by it towards any Power not respecting the Protocol.)
- b. Does the IHL of international armed conflicts specifically prohibit the use of chemical weapons? Does the IHL of non-international conflicts prohibit their use? (HR, Art. 23(a) and (e); P I, Arts 35 and 51; CIHL, Rule 74; [See **Document No. 9**, The Geneva Chemical Weapons Protocol])
- c. Why is the IHL of non-international conflicts so vague regarding prohibited weapons? Is it because customary IHL prohibits such weapons? Or is it because this prohibition can be derived from the Martens Clause? Or does Protocol II expect reference to be made to the IHL of international armed conflicts? To all aspects thereof? If only to some aspects, which ones? (Hague Convention IV, paras 8-9; HR, Art. 23(a) and (e); GC I-IV, Arts 63(4)/62(4)/142(4)/158(4) respectively; P I, Arts 1(2) and 35(2); P II, Preamble, para. 4; CIHL, Rules 70-86)
2. If customary and/or conventional IHL prohibits the use of chemical weapons, was the 1993 Chemical Weapons Convention necessary? [See **Document No. 21**, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction] If it was, does it demonstrate that chemical weapons in fact were not prohibited by customary law?
3. Was the statement in the press release correct that the use of chemical weapons was prohibited at all times? Or did many States interpret the prohibition as applying only on a basis of reciprocity? Would this explain the existence of additional treaties expanding prohibitions beyond the use solely of chemical weapons?

4. Who used chemical weapons in this case? Why does neither the UN nor the ICRC mention who used chemical weapons? Do the UN Security Council Resolution and the ICRC press release indirectly clarify whether it was Iraq or Iran which used chemical weapons? Do the principles of neutrality and impartiality bar the ICRC from directly designating who used chemical weapons?

**Case No. 174, UN Security Council, Sanctions Imposed Upon Iraq****A. Security Council Resolution 661 (1990)**

[Source: UN Doc. S/RES/661 (August 6, 1990). Available on <http://www.un.org/documents/scres.htm>]

*The Security Council,*

*Reaffirming its resolution 660 (1990) of August 2, 1990,*

*Deeply concerned that that resolution has not been implemented and that the invasion by Iraq of Kuwait continues with further loss of human life and material destruction, [...]*

*Acting under Chapter VII of the Charter of the United Nations,*

1. *Determines* that Iraq so far has failed to comply with paragraph 2 of resolution 660 (1990) and has usurped the authority of the legitimate Government of Kuwait; [...]
3. *Decides* that all States shall prevent:
  - (a) The import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution;
  - (b) Any activities by their nationals or in their territories which would promote or are calculated to promote the export or trans-shipment of any commodities or products from Iraq or Kuwait; and any dealings by their nationals or their flag vessels or in their territories in any commodities or products originating in Iraq or Kuwait and exported therefrom after the date of the present resolution, including in particular any transfer of funds to Iraq or Kuwait for the purposes of such activities or dealings;
  - (c) The sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait or to any person or body for the purposes of any business carried on in or operated from Iraq or Kuwait, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products;
4. *Decides* that all States shall not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds

or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs;

5. *Calls upon* all States, including States non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into or licence granted before the date of the present resolution; [...]
9. *Decides* that, notwithstanding paragraphs 4 through 8 above, nothing in the present resolution shall prohibit assistance to the legitimate Government of Kuwait, and calls upon all States:
  - (a) To take appropriate measures to protect assets of the legitimate Government of Kuwait and its agencies;
  - (b) Not to recognize any regime set up by the occupying Power; [...]

## **B. Security Council Resolution 665 (1990)**

[Source: UN Doc. S/RES/665 (August 25, 1990). Available on <http://www.un.org/documents/scres.htm>]

*The Security Council,*

[...],

*Having decided* in resolution 661 (1990) to impose economic sanctions under Chapter VII of the Charter of the United Nations, [...]

*Deploing* the loss of innocent life stemming from the Iraqi invasion of Kuwait and determined to prevent further such losses,

*Gravely alarmed* that Iraq continues to refuse to comply with resolutions 660 (1990), 661 (1990), 662 (1990) and 664 (1990) and in particular at the conduct of the Government of Iraq in using Iraqi flag vessels to export oil,

1. *Calls upon* those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990);
2. *Invites* Member States accordingly to co-operate as may be necessary to ensure compliance with the provisions of resolution 661 (1990) with maximum use of political and diplomatic measures, in accordance with paragraph 1 above; [...]

## C. Security Council Resolution 666 (1990)

[Source: UN Doc. S/RES/666 (September 13, 1990). Available on <http://www.un.org/documents/scres.htm>]

*The Security Council,*

*Recalling* its resolution 661 (1990), paragraphs 3(c) and 4 of which apply, except in humanitarian circumstances, to foodstuffs,

*Recognizing* that circumstances may arise in which it will be necessary for foodstuffs to be supplied to the civilian population in Iraq or Kuwait in order to relieve human suffering,

*Noting* that in this respect the Committee established under paragraph 6 of that resolution has received communications from several Member States,

*Emphasizing* that it is for the Security Council, alone or acting through the Committee, to determine whether humanitarian circumstances have arisen, [...]

*Acting* under Chapter VII of the Charter of the United Nations,

1. *Decides* that in order to make the necessary determination whether or not for the purposes of paragraph 3(c) and paragraph 4 of resolution 661 (1990) humanitarian circumstances have arisen, the Committee shall keep the situation regarding foodstuffs in Iraq and Kuwait under constant review; [...]
3. *Requests*, for the purposes of paragraphs 1 and 2 of this resolution, that the Secretary-General seek urgently, and on a continuing basis, information from relevant United Nations and other appropriate humanitarian agencies and all other sources on the availability of food in Iraq and Kuwait, such information to be communicated by the Secretary-General to the Committee regularly;
4. *Requests further* that in seeking and supplying such information particular attention will be paid to such categories of persons who might suffer specially, such as children under 15 years of age, expectant mothers, maternity cases, the sick and the elderly;
5. *Decides* that if the Committee, after receiving the reports from the Secretary-General, determines that circumstances have arisen in which there is an urgent humanitarian need to supply foodstuffs to Iraq or Kuwait in order to relieve human suffering, it will report promptly to the Council its decision as to how such need should be met;
6. *Directs* the Committee that in formulating its decisions it should bear in mind that foodstuffs should be provided through the United Nations in co-operation with the International Committee of the Red Cross or other appropriate humanitarian agencies and distributed by them or under their supervision in order to ensure that they reach the intended beneficiaries;
7. *Requests* the Secretary-General to use his good offices to facilitate the delivery and distribution of foodstuffs to Kuwait and Iraq in accordance with the provisions of this and other relevant resolutions;

8. *Recalls* that resolution 661 (1990) does not apply to supplies intended strictly for medical purposes, but in this connection recommends that medical supplies should be exported under the strict supervision of the Government of the exporting State or by appropriate humanitarian agencies.

## DISCUSSION

1. a. Is the UN Security Council bound to respect IHL?
- b. As it is the individual UN Member States that carry out UN Security Council decisions, are not those individual States party to the Conventions and Protocols bound to respect IHL? Or is obedience first owed to UN Security Council decisions?  

[See UN Charter (available on <http://www.un.org/aboutun/charter>), Art. 25: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."]

Do the obligations under the UN Charter not take precedence?

[See UN Charter, Art. 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."]

Yet must it not be presumed that measures under the UN Charter, which are part of *jus ad bellum*, are to be implemented consistently with *jus in bello*?
2. Does an armed conflict even exist in this case to such an extent that IHL applies? Which are the parties to the conflict? Is the UN a party to the conflict?
3. a. Does international law regulate the imposition of sanctions? Assuming that IHL applies, does it limit the use of sanctions? (GC IV, Art. 23; P I, Art. 70)
- b. Are the sanctions here consistent with IHL? Is your reply the same if, as a result of the long-term imposition, the sanctions financially weaken the State so much that it cannot provide for the food and medical needs of its people?
- c. Should not an attempt be made to first interpret Security Council resolutions in a manner consistent with IHL? Was the language of Resolution 661 sufficiently clear and comprehensive to avoid any violation of IHL? Was the clarification in Resolution 666 necessary?
4. a. Are such sanctions an effective means of achieving the objectives of the UN Security Council? Will it influence the authorities? What are the advantages and drawbacks of such sanctions?
- b. Even if effective, are the sanctions not a form of collective punishment imposed upon innocent people? Does IHL prohibit such collective punishment? (GC IV, Art. 33) Should such types of collective punishment be prohibited? Yet are not individuals always going to be affected when action is taken at the international level, i.e., between States? Does the implementation of *jus ad bellum* not necessarily occur at inter-State level? Which alternatives would you propose?
5. a. Are the restrictions on shipping imposed by UN Security Council Resolution 665 permitted under international law? Specifically under IHL? (GC IV, Art. 23; P I, Art. 70; San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Arts 93-104 [See **Document No. 83**, San Remo Manual on International Law Applicable to Armed Conflicts at Sea])
- b. Does UN Security Council Resolution 665 create a blockade? If so, what limitations are there on blockades? Do the UN Security Council directives in the above resolutions violate these limitations? (San Remo Manual on International Law Applicable to Armed Conflicts at Sea,



Arts 103-104 [See **Document No. 83**, San Remo Manual on International Law Applicable to Armed Conflicts at Sea])

- c. Is the proportionality referred to in para. 1 of Resolution 665 the same as understood in *jus in bello*? In *jus ad bellum*? Or is it a mixture of both?
- 6. a. Should humanitarian organizations such as the ICRC provide the information requested in para. 3 of Resolution 666?
- b. Under IHL should “foodstuffs (...) be provided through the United Nations in co-operation with the International Committee of the Red Cross or other appropriate humanitarian agencies and distributed by them or under their supervision in order to ensure that they reach the intended beneficiaries”, as stated in para. 6 of Resolution 666? (GC IV, Art. 23; P I, Art. 70)

**Case No. 175, UN, Detention of Foreigners**

[Source: UN Doc. S/RES/664 (August 18, 1990), Available on <http://www.un.org/documents/scres.htm>]

*The Security Council,*

*Recalling* the Iraqi invasion and purported annexation of Kuwait, and its resolutions 660, 661 and 662,

*Deeply concerned* for the safety and well-being of third-state nationals in Iraq and Kuwait,

*Recalling* the obligations of Iraq in this regard under international law,

*Welcoming* the efforts of the Secretary-General to pursue urgent consultations with the Government of Iraq following the concern and anxiety expressed by the members of the Council on August 17, 1990,

*Acting* under Chapter VII of the United Nations Charter:

1. *Demands* that Iraq permit and facilitate the immediate departure from Kuwait and Iraq of the nationals of third countries and grant immediate and continuing access of consular officials to such nationals;
2. *Further demands* that Iraq take no action to jeopardize the safety, security or health of such nationals;
3. *Reaffirms* its decision in resolution 662 (1990) that annexation of Kuwait by Iraq is null and void, and therefore demands that the Government of Iraq rescind its orders for the closure of diplomatic and consular missions in Kuwait and the withdrawal of the immunity of their personnel, and refrain from any such actions in the future; [...].

**DISCUSSION**

1.
  - a. According to IHL, which individuals have the right to leave Kuwait, and under which conditions? To leave Iraq? (GC IV, Arts 35 and 48) Do those nationals mentioned in para. 1 of the resolution have the right to leave?
  - b. Who are protected persons under the IHL of international armed conflicts? Are the individuals mentioned in para. 1 of the resolution protected persons as defined by IHL? In making such a determination, is it necessary to know whether the nationals referred to in this resolution are from a neutral State or a co-belligerent State? Why, or why not? Does an Iraqi decision to close diplomatic and consular missions in Kuwait affect the status of these nationals as protected persons under Convention IV? Of what significance is it whether the States of these nationals continue normal diplomatic relations with Iraq? (GC IV, Art. 4)
2. Must Iraq allow all protected persons to leave? If not, why may their departure be prohibited? Who assesses the validity of the justifications for prohibiting departure? What does “contrary to the national interests of the State” mean? (GC IV, Art. 35)
3. Which rules of IHL set out in detail the requirements of para. 2 of the resolution?

**Case No. 176, Saudi Arabia, Use of the Red Cross Emblem by United States Forces**

[Source: Tisdall, S. with the 44<sup>th</sup> US Medical Brigade, Saudi Arabia, *The Guardian*, September 8, 1990]

**Hospitals Appear on Desert Sands**

US FORCES in eastern Saudi Arabia are rapidly establishing an elaborate network of field hospitals, forward clearing stations and mobile medical evacuation units capable of dealing with thousands of American casualties in the event of war with Iraq. [...]

The Saudi government is providing separate medical facilities for its troops. The US hospitals are not allowed to display the Red Cross to signify their presence to an enemy. In a country where Christian emblems are banned, they have been asked to use the Red Crescent.

**DISCUSSION**

1. Who may use the emblem? In which circumstances and under what conditions? What is the purpose of the emblem? May military forces use it? (GC I, Arts 42 and 44; GC II, Art. 44; P I, Art. 18)
2.
  - a. Are emblems other than the red cross protected by the Geneva Conventions and the Additional Protocols? Which ones? Who may use these other emblems? (GC I, Art. 38; GC II, Art. 41; P I, Art. 8(I); P I, Annex I, Arts 4-5; P II, Art. 12; P III)
  - b. May US military medical facilities lawfully use the red crescent emblem? May they use the red cross even in a country using the red crescent? Only with the permission of that country? Could US medical facilities, if in the service of Saudi Arabia, then use the red crescent emblem? (GC I, Arts 27, 38, 42(4) and 43; P II, Art. 12)
  - c. If the US military medical facilities here are prohibited from displaying either emblem, how are they to indicate their presence to an enemy? If they do not display the emblem, do the medical facilities still retain their protected status under IHL?
3.
  - a. Why has the International Red Cross and Red Crescent Movement encountered problems arising from a plurality of protective emblems? Are they related to a perception of the red cross emblem as a Christian symbol? Is the non-religious connotation of the red cross emblem harder to claim since acceptance of the second emblem, the red crescent? What effect does this have on the principle of universality? [See **Case No. 44**, ICRC, *The Question of the Emblem*]
  - b. What dangers to the emblem's authority arise from the use of several different emblems? Could a plurality of emblems not undermine the protection it provides? Particularly its essential neutrality?

**Case No. 177, UN, Security Council Resolution 688 on Northern Iraq**

[Source: UN Doc. S/RES/688 (April 5, 1991). Available on <http://www.un.org/documents/scres.htm>]

*The Security Council,*

*Mindful* of its duties and its responsibilities under the Charter of the United Nations for the maintenance of international peace and security,

*Recalling* of Article 2, paragraph 7, of the Charter of the United Nations,

*Gravely concerned* by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region,

*Deeply disturbed* by the magnitude of the human suffering involved, [...]

*Reaffirming* the commitment of all Member States to the sovereignty, territorial integrity and political independence of Iraq and of all States in the area,

*Bearing in mind* the Secretary-General's report of March 20, 1991 (S/22366),

1. *Condemns* the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region;
2. *Demands* that Iraq, as a contribution to remove the threat to international peace and security in the region, immediately end this repression, and expresses the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected;
3. *Insists* that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations; [...]
6. *Appeals* to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts;
7. *Demands* that Iraq cooperate with the Secretary-General to these ends; [...].

**DISCUSSION**

1.
  - a. Was the situation referred to in the present case an armed conflict? A non-international armed conflict? Is the repression of the Iraqi civilian population a violation of IHL?
  - b. Is the Council of the opinion that international peace and security are threatened by the non-international armed conflict, or by violations of IHL?
2. Has Iraq an obligation under IHL to allow access by international humanitarian organizations to all those in need? Under which conditions? (GC IV, Art. 23; P I, Art. 70; P II, Art. 18)
3. Is the resolution binding on Iraq? Is it based on Chapter VII of the UN Charter?

4. Was this resolution a sufficient legal basis for Operation Provide Comfort, in which American, British, and French armed forces established “safe havens” in northern Iraq over which military flights were forbidden, and where Kurds could remain without fear of attack by Iraqi forces? Was this operation based on *jus ad bellum* or on IHL? Were those “safe havens” protected zones under IHL?

**Case No. 178, United States/United Kingdom,  
Report on the Conduct of the Persian Gulf War****A. Department of Defense Report to Congress on the Conduct of the Persian Gulf War**

[Source: ILM, vol. 31 (3), 1992, pp. 612-644. Available on <http://www.globalsecurity.org/military/library/report/1992>]

[...]

**TARGETING, COLLATERAL DAMAGE AND CIVILIAN CASUALTIES**

The law of war with respect to targeting, collateral damage and collateral civilian casualties is derived from the principle of discrimination; that is, the necessity for distinguishing between combatants, who may be attacked, and noncombatants, against whom an intentional attack may not be directed, and between legitimate military targets and civilian objects. Although this is a major part of the foundation on which the law of war is built, it is one of the least codified portions of that law.

As a general principle, the law of war prohibits the intentional destruction of civilian objects not imperatively required by military necessity and the direct, intentional attack of civilians not taking part in hostilities. The United States takes these proscriptions into account in developing and acquiring weapons systems, and in using them in combat. Central Command (CENTCOM) forces adhered to these fundamental law of war proscriptions in conducting military operations during Operation Desert Storm through discriminating target selection and careful matching of available forces and weapons systems to selected targets and Iraqi defenses, without regard to Iraqi violations of its law of war obligations toward the civilian population and civilian objects.

Several treaty provisions specifically address the responsibility to minimize collateral damage to civilian objects and injury to civilians. Article 23(g) of the Annex to Hague IV prohibits destruction not “imperatively demanded by the necessities of war,” while Article 27 of that same annex offers protection from intentional attack to “buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.” Similar language is contained in Article 5 of Hague IX, while [...] in the 1954 Hague Cultural Property Convention [...] cultural and civilian objects are protected from direct, intentional attack unless they are used for military purposes, such as shielding military objects from attack.

While the prohibition contained in Article 23(g) generally refers to intentional destruction or injury, it also precludes collateral damage of civilian objects or injury to noncombatant civilians that is clearly disproportionate to the military advantage gained in the attack of military objectives, as discussed below. As previously indicated,

Hague IV was found to be part of customary international law in the course of war crimes trials following World War II, and continues to be so regarded.

An uncodified but similar provision is the principle of proportionality. It prohibits military action in which the negative effects (such as collateral civilian casualties) clearly outweigh the military gain. This balancing may be done on a target-by-target basis, as frequently was the case during Operation Desert Storm, but also may be weighed in overall terms against campaign objectives. CENTCOM conducted its campaign with a focus on minimizing collateral civilian casualties and damage to civilian objects. Some targets were specifically avoided because the value of destruction of each target was outweighed by the potential risk to nearby civilians or, as in the case of certain archaeological and religious sites, to civilian objects.

Coalition forces took several steps to minimize the risk of injury to noncombatants. To the degree possible and consistent with allowable risk to aircraft and aircrews, aircraft and munitions were selected so that attacks on targets within populated areas would provide the greatest possible accuracy and the least risk to civilian objects and the civilian population. Where required, attacking aircraft were accompanied by support mission aircraft to minimize attacking aircraft aircrew distraction from their assigned mission. Aircrews attacking targets in populated areas were directed not to expend their munitions if they lacked positive identification of their targets. When this occurred, aircrews dropped their bombs on alternate targets or returned to base with their weapons.

One reason for the maneuver plan adopted for the ground campaign was that it avoided populated areas, where Coalition and Iraqi civilian casualties and damage to civilian objects necessarily would have been high. This was a factor in deciding against an amphibious assault into Kuwait City.

The principle of proportionality acknowledges the unfortunate inevitability of collateral civilian casualties and collateral damage to civilian objects when noncombatants and civilian objects are mingled with combatants and targets, even with reasonable efforts by the parties to a conflict to minimize collateral injury and damage.

This proved to be the case in the air campaign. Despite conducting the most discriminate air campaign in history, including extraordinary measures by Coalition aircrews to minimize collateral civilian casualties, the Coalition could not avoid causing some collateral damage and injury.

There are several reasons for this. One is the fact that in any modern society, many objects intended for civilian use also may be used for military purposes. A bridge or highway vital to daily commuter and business traffic can be equally crucial to military traffic, or support for a nation's war effort. Railroads, airports, seaports, and the interstate highway system in the United States have been funded by the Congress in part because of US national security concerns, for example; each proved invaluable to the movement of US military units to various ports for deployment to Southwest Asia (SWA) for Operations Desert Shield and Desert Storm. Destruction of a bridge, airport, or port facility, or interdiction of a highway can be equally important in impeding an enemy's war effort.

The same is true with regard to major utilities; for example, microwave towers for everyday, peacetime civilian communications can constitute a vital part of a military command and control (C<sup>2</sup>) system, while electric power grids can be used simultaneously for military and civilian purposes. Some Iraqi military installations had separate electrical generators; others did not. Industries essential to the manufacturing of CW, BW and conventional weapons depended on the national electric power grid.

Experience in its 1980-1988 war with Iran caused the Government of Iraq to develop a substantial and comprehensive degree of redundancy in its normal, civilian utilities as back-up for its national defense. Much of this redundancy, by necessity, was in urban areas. Attack of these targets necessarily placed the civilian population at risk, unless civilians were evacuated from the surrounding area. Iraqi authorities elected not to move civilians away from objects they knew were legitimate military targets, thereby placing those civilians at risk of injury incidental to Coalition attacks against these targets, notwithstanding efforts by the Coalition to minimize risk to innocent civilians.

When objects are used concurrently for civilian and military purposes, they are liable to attack if there is a military advantage to be gained in their attack. ("Military advantage" is not restricted to tactical gains, but is linked to the full context of a war strategy, in this instance, the execution of the Coalition war plan for liberation of Kuwait.)

Attack of all segments of the Iraqi communications system was essential to destruction of Iraqi military C<sup>2</sup>. C<sup>2</sup> was crucial to Iraq's integrated air defense system; it was of equal importance for Iraqi ground forces. Iraqi C<sup>2</sup> was highly centralized. With Saddam Hussein's fear of internal threats to his rule, he has discouraged individual initiative while emphasizing positive control. Iraqi military commanders were authorized to do only that which was directed by highest authority. Destruction of its C<sup>2</sup> capabilities would make Iraqi combat forces unable to respond quickly to Coalition initiatives.

Baghdad bridges crossing the Euphrates River contained the multiple fiber-optic links that provided Saddam Hussein with secure communications to his southern group of forces. Attack of these bridges severed those secure communication links, while restricting movement of Iraqi military forces and deployment of CW and BW warfare capabilities. Civilians using those bridges or near other targets at the time of their attack were at risk of injury incidental to the legitimate attack of those targets.

Another reason for collateral damage to civilian objects and injury to civilians during Operation Desert Storm lay in the policy of the Government of Iraq, which purposely used both Iraqi and Kuwaiti civilian populations and civilian objects as shields for military objects. Contrary to the admonishment against such conduct contained in Article 19, GWS, Articles 18 and 28, GC, Article 4(1), 1954 Hague, and certain principles of customary law codified in Protocol I (discussed below), the Government of Iraq placed military assets (personnel, weapons, and equipment) in civilian populated areas and next to protected objects (mosques, medical facilities, and cultural sites) in an effort to protect them from attack. For this purpose, Iraqi military helicopters were dispersed into residential areas; and military supplies were stored in mosques, schools, and hospitals in Iraq and Kuwait. Similarly, a cache of Iraqi Silkworm surface-to-surface missiles was found inside a school in a populated area in Kuwait City. UN inspectors



uncovered chemical bomb production equipment while inspecting a sugar factory in Iraq. The equipment had been moved to the site to escape Coalition air strikes. This intentional mingling of military objects with civilian objects naturally placed the civilian population living nearby, working within, or using those civilian objects at risk from legitimate military attacks on those military objects.

The Coalition targeted specific military objects in populated areas, which the law of war permits; at no time were civilian areas as such attacked. Coalition forces also chose not to attack many military targets in populated areas or in or adjacent to cultural (archaeological) sites, even though attack of those military targets is authorized by the law of war. The attack of legitimate Iraqi military targets, notwithstanding the fact it resulted in collateral injury to civilians and damage to civilian objects, was consistent with the customary practice of nations and the law of war.

The Government of Iraq sought to convey a highly inaccurate image of indiscriminate bombing by the Coalition through a deliberate disinformation campaign. Iraq utilized any collateral damage that occurred including damage or injury caused by Iraqi surface-to-air missiles and antiaircraft munitions falling to earth in populated areas in its campaign to convey the misimpression that the Coalition was targeting populated areas and civilian objects. This disinformation campaign was factually incorrect, and did not accurately reflect the high degree of care exercised by the Coalition in attack of Iraqi targets.

For example, on February 11, a mosque at Al-Basrah was dismantled by Iraqi authorities to feign bomb damage; the dome was removed and the building dismantled. US authorities noted there was no damage to the minaret, courtyard building, or dome foundation which would have been present had the building been struck by Coalition munitions. The nearest bomb crater was outside the facility, the result of an air strike directed against a nearby military target on 30 January. Other examples include use of photographs of damage that occurred during Iraq's war with Iran, as well as of prewar earthquake damage, which were offered by Iraqi officials as proof of bomb damage caused by Coalition air raids.

Minimizing collateral damage and injury is a responsibility shared by attacker and defender. Article 48 of the 1977 Protocol I provides that:

in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Paragraph one of Article 49 of Protocol I states that "'Attacks' means acts of violence against the adversary, whether in offense or defense." Use of the word "attacks" in this manner is etymologically inconsistent with its customary use in any of the six official languages of Protocol I. Conversely, the word "attack" or "attacks" historically has referred to and today refers to offensive operations only.

Article 49(1) otherwise reflects the applicability of the law of war to actions of both attacker and defender, including the obligation to take appropriate measures to minimize injury to civilians not participating in hostilities.

As previously indicated, the United States in 1987 declined to become a party to Protocol I; nor was Protocol I in effect during the Persian Gulf War, since Iraq is not a party to that treaty. However, the language of Articles 48 and 49(1) (except for the erroneous use of the word “attacks”) is generally regarded as a codification of the customary practice of nations, and therefore binding on all.

In the effort to minimize collateral civilian casualties, a substantial responsibility for protection of the civilian population rests with the party controlling the civilian population. Historically, and from a common sense standpoint, the party controlling the civilian population has the opportunity and the responsibility to minimize the risk to the civilian population through the separation of military objects from the civilian population, evacuation of the civilian population from near immovable military objects, and development of air-raid precautions. Throughout World War II, for example, both Axis and Allied nations took each of these steps to protect their respective civilian populations from the effects of military operations.

The Government of Iraq elected not to take routine air-raid precautions to protect its civilian population. Civilians were not evacuated in any significant numbers from Baghdad, nor were they removed from proximity to legitimate military targets. There were air-raid shelters for less than 1 percent of the civilian population of Baghdad. The Government of Iraq chose instead to use its civilians to shield legitimate military targets from attack, exploiting collateral civilian casualties and damage to civilian objects in its disinformation campaign to erode international and US domestic support for the Coalition effort to liberate Kuwait.

The presence of civilians will not render a target immune from attack; legitimate targets may be attacked wherever located (outside neutral territory and waters). An attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population or damage to civilian objects, consistent with mission accomplishment and allowable risk to the attacking forces. The defending party must exercise reasonable precautions to separate the civilian population and civilian objects from military objectives, and avoid placing military objectives in the midst of the civilian population. As previously indicated, a defender is expressly prohibited from using the civilian population or civilian objects (including cultural property) to shield legitimate targets from attack.

The Government of Iraq was aware of its law of war obligations. In the month preceding the Coalition air campaign, for example, a civil defense exercise was conducted, during which more than one million civilians were evacuated from Baghdad. No government evacuation program was undertaken during the Coalition air campaign. As previously indicated, the Government of Iraq elected instead to mix military objects with the civilian population. Pronouncements that Coalition air forces would not attack populated areas increased Iraqi movement of military objects into populated areas

in Iraq and Kuwait to shield them from attack, in callous disregard of its law of war obligations and the safety of its own civilians and Kuwaiti civilians.

Similar actions were taken by the Government of Iraq to use cultural property to protect legitimate targets from attack; a classic example was the positioning of two fighter aircraft adjacent to the ancient temple of Ur as depicted in the photograph in Volume II, Chapter VI, "Off Limits Targets" section on the theory that Coalition respect for the protection of cultural property would preclude the attack of those aircraft. While the law of war permits the attack of the two fighter aircraft, with Iraq bearing responsibility for any damage to the temple, Commander-in-Chief, Central Command (CINCCENT) elected not to attack the aircraft on the basis of respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple. Other cultural property similarly remained on the Coalition no-attack list, despite Iraqi placement of valuable military equipment in or near those sites.

Undoubtedly, the most tragic result at this intentional commingling of military objects with the civilian population occurred in the February 13 attack on the Al-Firdus Bunker (also sometimes referred to as the Al-'Amariyah bunker) in Baghdad. Originally constructed during the Iran-Iraq War as an air raid shelter, it had been converted to a military C<sup>2</sup>, bunker in the middle of a populated area. While the entrance(s) to a bomb shelter permit easy and rapid entrance and exit, barbed wire had been placed around the Al-Firdus bunker, its entrances had been secured to prevent unauthorized access, and armed guards had been posted. It also had been camouflaged. Knowing Coalition air attacks on targets in Baghdad took advantage of the cover of darkness, Iraqi authorities permitted selected civilians apparently the families of officer personnel working in the bunker to enter the Al-'Amariyah Bunker at night to use the former air raid shelter part of the bunker, on a level above the C<sup>2</sup> center. Coalition authorities were unaware of the presence of these civilians in the bunker complex. The February 13 attack of the Al-'Amariyah bunker a legitimate military target resulted in the unfortunate deaths of those Iraqi civilians who had taken refuge above the C<sup>2</sup> center.

An attacker operating in the fog of war may make decisions that will lead to innocent civilians' deaths. The death of civilians always is regrettable, but inevitable when a defender fails to honor his own law of war obligations or callously disregards them, as was the case with Saddam Hussein. In reviewing an incident such as the attack of the Al-'Amariyah bunker, the law of war recognizes the difficulty of decision making amid the confusion of war. Leaders and commanders necessarily have to make decisions on the basis of their assessment of the information reasonably available to them at the time, rather than what is determined in hindsight.

Protocol I establishes similar legal requirements. Articles 51(7) and 58 of the 1977 Protocol I expressly prohibit a defender from using the civilian population or individual civilians to render certain points or areas immune from military operations, in particular in an attempt to shield military objectives from attack or to shield, favor or impede military operations; obligate a defender to remove the civilian population,

individual civilians and civilian objects under the defender's control from near military objectives; avoid locating military objectives within or near densely populated areas; and to take other necessary precautions to protect the civilian population, individual civilians and civilian objects under its control against the dangers resulting from military operations.

It is in this area that deficiencies of the 1977 Protocol I become apparent. As correctly stated in Article 51(8) to Protocol I, a nation confronted with callous actions by its opponent (such as the use of "human shields") is not released from its obligation to exercise reasonable precaution to minimize collateral injury to the civilian population or damage to civilian objects. This obligation was recognized by Coalition forces in the conduct of their operations. In practice, this concept tends to facilitate the disinformation campaign of a callous opponent by focusing international public opinion upon the obligation of the attacking force to minimize collateral civilian casualties and damage to civilian objects a result fully consistent with Iraq's strategy in this regard. This inherent problem is worsened by the language of Article 52(3) of Protocol I, which states:

In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

This language, which is not a codification of the customary practice of nations, causes several things to occur that are contrary to the traditional law of war. It shifts the burden for determining the precise use of an object from the party controlling that object (and therefore in possession of the facts as to its use) to the party lacking such control and facts, i.e., from defender to attacker. This imbalance ignores the realities of war in demanding a degree of certainty of an attacker that seldom exists in combat. It also encourages a defender to ignore its obligation to separate the civilian population, individual civilians and civilian objects from military objectives, as the Government of Iraq illustrated during the Persian Gulf War.

In the case of the Al-Firdus bunker, for example repeatedly and incorrectly referred to by the Government of Iraq and some media representatives as a "civilian bomb shelter" the Coalition forces had evidence the bunker was being used as an Iraqi command and control center and had no knowledge it was concurrently being used as a bomb shelter for civilians. Under the rule of international law known as military necessity, which permits the attack of structures used to further an enemy's prosecution of a war, this was a legitimate military target. Coalition forces had no obligation to refrain from attacking it. If Coalition forces had known that Iraqi civilians were occupying it as a shelter, they may have withheld an attack until the civilians had removed themselves (although the law of war does not require such restraint). Iraq had an obligation under the law of war to refrain from commingling its civilian population with what was an obviously military target. Alternatively, Iraq could have designated the location as a hospital, safety zone, or a neutral zone, as provided for in Articles 14 and 15, GC. [...]

## **B. Minutes of evidence taken before the Defence Committee – House of Commons UK – on Wednesday, March 6, 1991**

[Source: House of Commons Defence Committee Report on "Preliminary Lessons of Operation Granby", Minutes of evidence taken before the Defence Committee, March 6, 1991, p. 38]

### **Mr Home Robertson** (Former Secretary of State for Defence)

274. Can I come back to a question which I should have asked at the very beginning when we were talking about joint command structure? I apologize for coming back at the far end on this important question of the allocation of missions and selection of targets. Was there always consensus between yourself and your counterparts on that subject or was there any occasion when you decided, for whatever reason, that it would not be appropriate for the Royal Air Force to attack a particular target?

### **Air Vice Marshal Wratten** (Air Vice Marshal W. J. Wratten, CB, CBE)

Yes, there were such occasions. In particular, when we were experiencing collateral damage, such as it was, and some of the targets were in locations where with any weapon system malfunction severe collateral damage would have resulted inevitably, then there were one or two occasions but I chose not to go against those targets, but they were very few and far between and they were not – and this is the most important issue – in my judgment and in the judgment of the Americans of a critical nature, that is to say, they were not fundamental to the timely achievement of the victory. Had that been the case, then regrettably, irrespective of what collateral damage might have resulted, one would have been responsible and had a responsibility for accepting those targets and for going against them. But towards the end there were, I think, two occasions when I chose not to, when I chose to go against alternative targets. [...]

## **DISCUSSION**

1. Do you accept the US definition with regard to targeting?
2. Which measures said to have been taken by the US correspond to Protocol I? Which ones go beyond what is required by Protocol I? And which ones are below the standards set by Protocol I?
3. Under IHL, which reasons given by the report in relation to collateral damage and injury are pertinent? And which one is unacceptable? (P I, Arts 51, 52 and 57)
4. a. Neither the Conventions nor the Protocols mention the principle of proportionality as such. From which source is this principle derived? Are the consequences of the principle of proportionality codified in IHL? Does this concept allow some attacks which would be normally prohibited by IHL? Could the concept of military necessity be used by one party to the conflict to justify collateral damage? (P I, Arts 51(5)(b) and 57(2)(a)(iii))
- b. Is the report correct when it states that IHL “precludes collateral damage of civilian objects or injury to noncombatant civilians that is clearly disproportionate to the military advantage gained in the attack of military objectives”? (P I, Arts 51(5)(b) and 57(2)(a)(iii))

- c. Can a factor weighed in the proportionality test be the overall campaign objective, as stated in the report, such as the liberation of Kuwait? (P I, Arts 51(5)(b) and 57(2)(a)(iii))
5. In international armed conflict, which precautionary measures must be taken by the parties before launching an attack? (P I, Arts 48, 50, 51, 57 and 58)
6. Does a military objective become immune from attack if it is situated among the civilian population? (P I, Art. 57) According to US officials, Iraq systematically used this tactic. What was the reaction of the Coalition towards this situation? Did the Coalition forces target some military objectives although they expected disproportionate civilian losses? Did the Coalition forces always reach a consensus on the targets chosen for attack in Iraq?
7.
  - a. Can it rightly be argued that the Iraqi electric power grid was a legitimate military objective? (P I, Preamble, para. 5, and Art. 52(2))
  - b. Does the concept of military advantage allow the Coalition forces to determine if an object is a military objective for the sole purpose of the Coalition war plan, namely the liberation of Kuwait? Would the advantage be assessed differently if the aim of the Coalition forces was not to liberate Kuwait, but to occupy a territory in violation of the UN Charter? (P I, Art. 52(2))
  - c. Would an attack on the two fighter aircraft located next to the temple of Ur have been lawful even though the temple risked being destroyed? (P I, Arts 52(2) and 53)
  - d. Was the Al-'Amariyah bunker a legitimate military objective if its description in the report is accurate? What should the US forces have done if they had known that there were civilians in the bunker? (P I, Arts 52(2) and 57)
8.
  - a. Is the alleged commingling of military objectives and civilian objects by Iraq a violation of Protocol I? Which examples of commingling of military objectives and civilian objects violate IHL and which ones do not? Does the reference to Art. 28 of Convention IV in the report concern attacks on Iraq, Kuwait, or both? Are only Kuwaiti civilians or also Iraqi civilians protected persons under Arts 4 and 28 of Convention IV? What are the legal responsibilities for the attacker if the defender uses civilians or civilian objects to shield military objectives? When is the attack prohibited? Which additional precautionary measures have to be taken? (GC IV, Arts 18(5) and 28; P I, Art. 51(7) and (8))
  - b. Is "minimizing collateral damage and injury" a responsibility shared by the attacker and the defender? Do the defender and the attacker have a responsibility not to position military objectives among the civilian population? Do they have to build air-raid shelters for the civilian population if there are military objectives among them? Should the Iraqi government have evacuated the inhabitants of Baghdad to protect the civilian population? (P I, Arts 48, 51, 57 and 58)
  - c. Are Arts 51(7) and 58 of Protocol I customary international law? Do these two provisions entail the same level of obligations? [See **Case No. 43**, ICRC, Customary International Humanitarian Law]
  - d. Does Art. 58 of Protocol I compel the defender to remove the civilian population from places near military objectives?
9. If the presumption in Art. 52(3) of Protocol I did not exist, what would an attacker do in case of doubt about a military objective? In such a situation, may he attack this objective? Does the defender have "the burden for determining the precise use of the objective"? If military objectives are disguised as civilian objects, would this be a violation of IHL? Which forms of camouflage are unlawful? (P I, Arts 52(1) and (2) and 57)

10. If the targets discarded by Air Vice Marshall Wratten had been “fundamental to the timely achievement of the victory” could he really have accepted them, as he stated, “irrespective of what collateral damage might have resulted”? (P I, Arts 51(4) and (5), 52(2) and 57)
11. Does the fact that neither the US nor Iraq have ratified Additional Protocol I imply that its provisions referred to above were irrelevant? Did the US and UK simply apply pre-existing customary law? Or was their assessment of customary law influenced by Protocol I?

**Case No. 179, United States, Surrendering in the Persian Gulf War**

[Source: "United States: Defense Department Report to Congress on the Conduct of the Persian Gulf War – Appendix O on the Role of the Law of War" (April 10, 1992) in *ILM*, vol. 31, 1992, p. 612, pp. 641-44. Available on <http://www.ndu.edu/library/epubs/cpgw.pdf>]

**THE CONCEPT OF "SURRENDER" IN  
THE CONDUCT OF COMBAT OPERATIONS**

The law of war obligates a party to a conflict to accept the surrender of enemy personnel and thereafter treat them in accordance with the provisions of the 1949 Geneva Conventions for the Protection of War Victims. Article 23(d) of Hague IV prohibits the denial of quarter, that is the refusal to accept an enemy's surrender, while other provisions in that treaty address the use of flags of truce and capitulation.

However, there is a gap in the law of war in defining precisely when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party (a unit or an individual soldier) and an ability to accept on the part of his opponent. The latter may not refuse an offer of surrender when communicated, but that communication must be made at a time when it can be received and properly acted upon – an attempt at surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.

A combatant force involved in an armed conflict is not obligated to offer its opponent an opportunity to surrender before carrying out an attack. To minimize Iraqi and Coalition casualties, however, the Coalition engaged in a major psychological operations campaign to encourage Iraqi soldiers to surrender before the Coalition ground offensive. Once that offensive began, the Coalition effort was to defeat Iraqi forces as quickly as possible to minimize the loss of Coalition lives. In the process, Coalition forces continued to accept legitimate Iraqi offers of surrender in a manner consistent with the law of war. The large number of Iraqi prisoners of war is evidence of Coalition compliance with its law of war obligations with regard to surrendering forces.

Situations arose in the course of Operation Desert Storm that have been questioned by some in the post-conflict environment. Two specific cases involve the Coalition's breach of the Iraqi defensive line and attack of Iraqi military forces leaving Kuwait City. Neither situation involved an offer of surrender by Iraqi forces, but it is necessary to discuss each in the context of the law of war concept of surrender.

[R]apid breach of the Iraqi defense in depth was crucial to the success of the Coalition ground campaign. When the ground campaign began, Iraq had not yet used its air force or extensive helicopter fleet in combat operations, the Iraqi Scud capability had not been eliminated, and most importantly, chemical warfare by Iraq remained a distinct possibility. It was uncertain whether the Coalition deception plan had worked or whether the Coalition effort had lost the element of surprise and there was also no definitive information about the strength and morale of the defending Iraqi soldiers. Because of these uncertainties, and the need to minimize loss of US and other Coalition



lives, military necessity required that the assault through the forward Iraqi defensive line be conducted with maximum speed and violence.

The VII Corps main effort was the initial breaching operation through Iraqi defensive fortifications. This crucial mission was assigned to the 1<sup>st</sup> Infantry Division (Mechanized). The Division's mission was to conduct a deliberate breach of the Iraqi defensive positions as quickly as possible to expand and secure the breach site, and to pass the 1<sup>st</sup> UK Armored Division through the lines to continue the attack against the Iraqi forces.

To accomplish the deliberate breaching operation, the 1<sup>st</sup> Infantry Division (Mechanized) moved forward and plowed through the berms and mine fields erected by the Iraqis. Many Iraqis surrendered during this phase of the attack and were taken prisoner. The division then assaulted the trenches containing other Iraqi soldiers. Once astride the trench lines, the division turned the plow blades of its tanks and combat earthmovers along the Iraqi defense line and, covered by fire from its M-2/-3 armored infantry fighting vehicles, began to fill in the trench line and its heavily bunkered, mutually supporting fighting positions.

In the process, many more Iraqi soldiers surrendered to division personnel; others died in the course of the attack and destruction or bulldozing of their defensive positions.

By nightfall, the division had breached the Iraqi defenses, consolidated its position, and prepared to pass the 1<sup>st</sup> UK Armoured Division through the lines. Hundreds of Iraqi soldiers had been taken prisoner; US casualties were extremely light.

The tactic, used by the 1<sup>st</sup> Infantry Division (Mechanized) resulted in a number of Iraqi soldiers dying in their defensive positions as those positions were bulldozed. Marine Corps breaching operations along its axis of attack into Kuwait used different, but also legally acceptable, techniques of assault by fire, bayonet, and the blasting of enemy defensive positions. Both tactics were entirely consistent with the law of war.

Tactics involving the use of armored vehicles against dug-in infantry forces have been common since the first use of armored vehicles in combat. The tactic of using armored vehicles to crush or bury enemy soldiers was briefly discussed in the course of the UN Conference on Certain Conventional Weapons, conducted in Geneva from 1978 to 1980 and attended by the United States and more than 100 other nations. It was left unregulated, however, as it was recognized by the participants to be a common long-standing tactic entirely consistent with the law of war.

In the case in point, military necessity required violent, rapid attack. Had the breaching operation stalled, the VII Corps main effort would have been delayed or, at worst, blunted. This would have had an adverse effect on the entire ground campaign, lengthening the time required to liberate Kuwait, and increasing overall Coalition casualties.

As first stated in US Army General Orders No. 100 (1863), otherwise known as the Lieber Code, military necessity "consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war...[It] admits of all direct destruction of life or limb of armed enemies." As developed by the practice of nations since that time, the law of

war has placed restrictions on the application of force against enemy combatants in very few circumstances (e.g., the first use of chemical or biological weapons). None of these restrictions were at issue during the breaching operations during Operation Desert Storm.

The law of war principle complementary to military necessity is that of unnecessary suffering (or superfluous injury). That principle does not preclude combat actions that otherwise are lawful, such as that used by the 1<sup>st</sup> Infantry Division (Mechanized).

In the course of the breaching operations, the Iraqi defenders were given the opportunity to surrender, as indicated by the large number of EPWs taken by the division. However, soldiers must make their intent to surrender clear and unequivocal, and do so rapidly. Fighting from fortified emplacements is not a manifestation of an intent to surrender, and a soldier who fights until the very last possible moment assumes certain risks. His opponent either may not see his surrender, may not recognize his actions as an attempt to surrender in the heat and confusion of battle, or may find it difficult (if not impossible) to halt an onrushing assault to accept a soldier's last-minute effort at surrender.

It was in this context that the breach of the Iraqi defense line occurred. The scenario Coalition forces faced and described herein illustrates the difficulty of defining or effecting "surrender." Nonetheless, the breaching tactics used by US Army and Marine Corps forces assigned this assault mission were entirely consistent with US law of war obligations.

In the early hours of 27 February, CENTCOM received a report that a concentration of vehicles was forming in Kuwait City. It was surmised that Iraqi forces were preparing to depart under the cover of darkness. CINCCENT was concerned about the redeployment of Iraqi forces in Kuwait City, fearing they could join with and provide reinforcements for Republican Guard units west of Kuwait City in an effort to stop the Coalition advance or otherwise endanger Coalition forces.

The concentration of Iraqi military personnel and vehicles, including tanks, invited attack. CINCCENT decided against attack of the Iraqi forces in Kuwait City, since it could lead to substantial collateral damage to Kuwaiti civilian property and could cause surviving Iraqi units to decide to mount a defense from Kuwait City rather than depart. Iraqi units remaining in Kuwait City would cause the Coalition to engage in military operations in urban terrain, a form of fighting that is costly to attacker, defender, innocent civilians, and civilian objects.

The decision was made to permit Iraqi forces to leave Kuwait City and engage them in the unpopulated area to the north. Once departed, the Iraqi force was stopped by barricades of mines deployed across the highway in front of and behind the column. Air attacks on the trapped vehicles began about 0200. The following morning, CENTCOM leadership viewed the resulting damage. More than two hundred Iraqi tanks had been trapped and destroyed in the ambush, along with hundreds of other military vehicles and various forms of civilian transportation confiscated or seized by Iraqi forces for the redeployment. The vehicles in turn were full of property pillaged from Kuwaiti

civilians: appliances, clothing, jewelry, compact disc players, tape recorders, and money, the last step in the Iraqi looting of Kuwait.

Throughout the ground campaign Coalition leaflets had warned Iraqi soldiers that their tanks and other vehicles were subject to attack, but that Iraqi soldiers would not be attacked if they abandoned their vehicles – yet another way in which the Coalition endeavored to minimize Iraqi casualties while encouraging their defection and/or surrender. When the convoy was stopped by the mining operations that blocked the Iraqi axis of advance, most Iraqi soldiers in the vehicles immediately abandoned their vehicles and fled into the desert to avoid attack.

In the aftermath of Operation Desert Storm, some questions were raised regarding this attack, apparently on the supposition that the Iraqi force was retreating. The attack was entirely consistent with military doctrine and the law of war. The law of war permits the attack of enemy combatants and enemy equipment at any time, wherever located, whether advancing, retreating, or standing still. Retreat does not prevent further attack. At the small-unit level, for example, once an objective has been seized and the position consolidated, an attacking force is trained to fire upon the retreating enemy to discourage or prevent a counterattack.

Attacks on retreating enemy forces have been common throughout history. Napoleon suffered some of his worst losses in his retreat from Russia, as did the German Wehrmacht more than a century later. It is recognized by military professionals that a retreating force remains dangerous. The 1<sup>st</sup> Marine Division and its 4,000 attached US Army forces and British Royal Marines, in the famous 1950 march out of the Chosin Reservoir in North Korea, fighting outnumbered by a 4:1 margin, turned its “retreat” into a battle in which it defeated the 20<sup>th</sup> and 26<sup>th</sup> Chinese Armies trying to annihilate it, much as Xenophon and his “immortal 10,000” did as they fought their way through hostile Persian forces to the Black Sea in 401 BC.

In the case at hand, neither the composition, degree of unit cohesiveness, nor intent of the Iraqi military forces engaged was known at the time of the attack. At no time did any element within the formation offer to surrender. CENTCOM was under no law of war obligation to offer the Iraqi forces an opportunity to surrender before the attack.

## DISCUSSION

1. Which provisions of IHL concern the surrender of enemy personnel? Who is considered *hors de combat*? Under which circumstances? (HR, Art. 23(c) and (d); GC III, Arts 4 and 13; P I, Art. 41(2))
2. a. Why does the US Defense Department Report mention the Geneva Conventions and Hague Regulations, but not Protocol I?
- b. Even without application of Protocol I, are not the same rules applicable to the US actions in these two cases? (GC III, Arts 4 and 13; P I, Arts 41(2), 43 and 44) Is Art. 41(2) of Protocol I even necessary?
3. a. Do you agree with the two-part definition given by the US Department of Defense that “[s]urrender involves an offer by the surrendering party (...) and an ability to accept on the part of his opponent”? What kind of offer must be made? What kind of communication? Who

- decides when there exists the ability to accept? Which factors are used in reaching such a decision? Are there clear, objective criteria for such a determination?
- b. Is the issue of surrender really a matter of reasonableness? How is reasonableness to be defined? From whose perspective? And under which circumstances? Does it require the balancing of unnecessary suffering – and superfluous injury – against military necessity? Are the criteria used to assess these factors clear? Could military necessity ever outweigh an unconditional surrender? (P I, Art. 41(2)(b))
  4. Is the tactic of crushing and burying enemy combatants considered as causing unnecessary suffering? [See **Case No. 80**, United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons] In comparison to the suffering caused by lawful artillery fire on the same position? In relation to which factors can the necessity and the extent of the suffering be evaluated? (P I, Art. 35(2))
  5.
    - a. If a military method logistically makes it almost impossible to surrender, is that in effect not equivalent to denying quarter, in violation of IHL? Could that describe the situation in the first case discussed in the above report?
    - b. Must an attacker constantly give enemy soldiers an opportunity to surrender?
    - c. Must any surrender that is clearly indicated and of which the enemy has become aware be accepted?
    - d. Must an attack on a military objective, for instance military barracks, made with collective weapons, e.g., by aerial or artillery bombardment, stop as soon as some enemy soldiers surrender? [See **Case No. 91**, British Military Court at Hamburg, The Peleus Trial [Section 6]] As soon as some enemy soldiers are wounded? As soon as all enemy soldiers concerned surrender? Is there a difference relevant for IHL between artillery fire and bulldozing enemy positions?
    - e. If some wounded and sick Iraqi soldiers were in the bulldozed trench, was the bulldozing not an unlawful attack on wounded and sick? (GC I, Arts 12 and 50)
    - f. Should US forces have searched the bulldozed Iraqi positions for casualties as soon as fighting ended at the site? (GC I, Art. 15)
  6. Must combatants make a formal gesture to indicate surrender, e.g., raising their hands or dropping their weapons, before being considered *hors de combat*? Must combatants always do so? Even the sick and wounded and the shipwrecked? What if they are already defenceless? Is a formal surrender always realistically possible? (P I, Art. 41(2))
  7.
    - a. Do you agree with the US assessment of the historical facts regarding attacks on retreating enemy forces? Does it establish that such attacks are still permissible today? If so, does that make it permissible to attack the Iraqi forces leaving Kuwait?
    - b. In the second incident discussed in the report, did the situation change once the soldiers concerned became trapped? Were the Iraqis then *hors de combat*? If so, did the air attacks constitute a grave breach of IHL? A war crime? (GC III, Art. 130; PI, Art. 85)
  8. Does the large number of POWs demonstrate that the US complied with IHL provisions concerning persons *hors de combat*? But could there not perhaps have been even more POWs?

**Case No. 180, UN Compensation Commission, Recommendations**

[Source: UN Doc. S/AC.26/1994/1 (May 26, 1994); footnotes omitted. Available on <http://www.unog.ch/uncc>]

**RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS  
CONCERNING INDIVIDUAL CLAIMS  
FOR SERIOUS PERSONAL INJURY OR DEATH (CATEGORY “B” CLAIMS)**

[...]

**II. LEGAL ISSUES**

[...]

**A. Jurisdiction**

The claims before this Panel are claims for fixed amounts by individuals who have suffered serious personal injury or whose spouse, child or parent died, as a direct result of Iraq's unlawful invasion and occupation of Kuwait.

[...]

**2. *Ratione personae* (eligible claimants)**

[...]

*b) Claims submitted by/for members of the Kuwaiti Armed Forces or the Allied Coalition Armed Forces*

Decision 11 of the Governing Council states that

“ ...members of the Allied Coalition Armed Forces are not eligible for compensation for loss or injury arising as a consequence of their involvement in Coalition military operations against Iraq, except if the following three conditions are met:

- (a) the compensation is awarded in accordance with the general criteria already adopted; and
- (b) they were prisoners of war as a consequence of their involvement in Coalition military operations against Iraq in response to its unlawful invasion and occupation of Kuwait; and
- (c) the loss or injury resulted from mistreatment in violation of international humanitarian law (including the Geneva Conventions of 1949)”.

The organization of the Allied Coalition Armed Forces began a few days after the occupation of Kuwait by Iraq, and continued with the placement of armed forces and air and naval military units from 28 countries, including Kuwait, in the Persian Gulf region.

Among the claims submitted for serious personal injury or death suffered by members of the Kuwaiti Armed Forces, several were put forward for events that occurred during the day of the invasion (August 2, 1990) or during the days immediately following. The Panel concludes that the exclusion from compensation stated in Decision 11 is not applicable to these claimants because the Allied Coalition Armed Forces did not exist at that time. In the Panel's view, these claims are compensable since the serious personal injury or death was the direct consequence of Iraq's invasion and occupation of Kuwait.

Claims were also submitted with respect to serious personal injury or death suffered by Kuwaiti military personnel, including members of the Kuwaiti resistance, at the end of the relevant time period. The Panel considers that the exclusion from compensation stated in Decision 11 of the Governing Council is applicable only to members of the Kuwaiti Armed Forces that were integrated as units under the command of the Allied Coalition Armed Forces. For this reason, Decision 11 is not applicable to Kuwaiti members of the resistance or other military personnel who remained within Kuwaiti territory and suffered personal injury or death due to the Iraqi invasion and occupation of Kuwait. Therefore, the Panel recommends the payment of compensation also in these cases. [...]

#### *d) Missing persons*

Some death claims were submitted by families for relatives who seemingly disappeared during the invasion and occupation of Kuwait by Iraq. These families made inquiries or tracing requests to the International Committee of the Red Cross, but were unable to locate their relatives. The Panel recommends that compensation be awarded where from the documentation submitted it could be presumed that the "missing" person is deceased.

In instances where it could not conclude that the "missing" person is deceased, the Panel holds that compensation cannot be recommended at this stage and that a new claim can be submitted if the family ever receives confirmation of the death. [...]

### **B. Attribution of Losses and Damages to Iraq [...]**

#### **5. Injury or death related to authorities other than Iraqi**

The Panel had before it a number of claims submitted by persons who were allegedly arrested in Kuwait by Kuwaitis during the days immediately preceding March 2, 1991 and were then interned in Saudi Arabia in camps for Iraqi prisoners of war. Some of these claimants were allegedly tortured by those who were in control of the camps. All such claimants had Jordanian passports.

A number of other claims were from Jordanian nationals who had been living in Kuwait before Iraq's invasion and whose personal statements indicated that the injuries or death suffered were the result of actions by Kuwaiti nationals or authorities, in particular mistreatment during detention. The issue was raised in article 16 reports in the following terms:

“A substantial number of claimants in category ‘B’ have put forward claims in which they assert that they were kept in detention or mistreated in Kuwait after March 2, 1991”.

The Panel considered comments made on this issue by several Governments, including the Government of Iraq.

All these claims raise the issue as to whether the losses and damages can be considered as a “direct” result of Iraq’s invasion and occupation of Kuwait, or in other words, are attributable to Iraq.

The Panel determines that in such cases there is no “direct” link to the invasion and occupation of Kuwait because these acts were accomplished by authorities or persons and in places out of the control of the Iraqi authorities.

Moreover, in the view of the Panel, these acts are not covered by para. 18 of Decision 1 which states that claimants may be compensated for serious personal injuries suffered as a result “of military operations or threat of military action by either side during the period August 2, 1990 to March 2, 1991,” since the acts that caused the injuries cannot be considered “military operations.”

Therefore, while the Panel recognizes that the claimants in this group presented well-substantiated claims, and that under general principles of law these claimants would be entitled to claim for compensation for the injuries or death suffered, the Panel cannot recommend the payment of compensation from the Compensation Fund for them. [...]

## DISCUSSION

1. According to IHL, who must provide compensation and when? Who is entitled to receive compensation? (Hague Convention IV, Art. 3; GC I-IV, Arts 51/52/131/148 respectively; P I, Art. 91)
2.
  - a. According to the UN Compensation Commission, who must provide compensation and when? Who is entitled to receive compensation? Is Decision 11 consistent with IHL?
  - b. Should compensation be paid to families for the death of a relative but not for a missing relative? Have not families in both situations suffered a loss? What if no proof of the death of a missing relative ever emerges? Should a family in such a situation thus never receive compensation? (P I, Arts 32 and 33)
3.
  - a. According to IHL, is compensation due only for those IHL violations committed by the aggressor State? Are not all States party to a conflict (and to the Conventions) bound to respect IHL and liable to pay compensation for violations thereof?
  - b. Do you agree with the Commission that no “direct” link exists between the injuries of Jordanians and the invasion and occupation of Kuwait? Would e.g. the camps for Iraqi prisoners, where the Jordanians were interned and suffered injuries, have existed if Iraq had not invaded Kuwait?
  - c. Is para. 18 of Decision 1, cited by the Commission, consistent with IHL? What constitutes a “military operation”? Do IHL provisions only cover “military operations”?
  - d. The Commission recognized the Jordanians’ claims as well-substantiated, so does not IHL entitle them to compensation? If so, from whom?

4. Does compensation appropriately redress the wrongful taking of life? How does one assess a just and appropriate amount?



**Case No. 181, United States/United Kingdom, Conduct of the 2003 War in Iraq**

[Source: Human Rights Watch, "Off Target: The Conduct of the War and Civilian Casualties in Iraq," 2003, footnotes omitted, online <http://www.hrw.org>]

[...]

**II. CONDUCT OF THE AIR WAR**

Many of the civilian casualties from the air war occurred during U.S. attacks targeting senior Iraqi leaders. [...]

Coalition forces took significant steps to protect civilians during the air war, including increased use of precision-guided munitions when attacking targets situated in populated areas and generally careful target selection. The United States and United Kingdom recognized that employment of precision-guided munitions alone was not enough to provide civilians with adequate protection. They employed other methods to help minimize civilian casualties, such as bombing at night when civilians were less likely to be on the streets, using penetrator munitions and delayed fuzes to ensure that most blast and fragmentation damage was kept within the impact area, and using attack angles that took into account the locations of civilian facilities such as schools and hospitals. [...]

**Synopsis of the Air War**

The war in Iraq started at 3:15 a.m. on March 20, 2003, with an attempt to "decapitate" the Iraqi leadership by killing Saddam Hussein. This unsuccessful air strike was not part of long-term planning but was instead a "target of opportunity" based on late-breaking intelligence, which ultimately proved incorrect.

The major air war effort began at approximately 6:00 p.m. on the same day with an aerial bombardment of Baghdad and the Iraqi integrated air defense system. During the early morning hours of March 21, Coalition air forces attacked targets in Basra, Mosul, al-Hilla, and elsewhere in Iraq. On the night of March 21, precision-guided munitions began destroying government facilities in the Iraqi capital. The air war shifted to attacks on Republican Guard divisions south of Baghdad after the sandstorms of March 25 stalled the ground offensive, but the bombardment of Baghdad continued. U.S. forces hit telecommunications facilities on the night of March 27.

Daylight bombing in Baghdad began on March 31, and elements of the Republican Guard around the city bore the brunt of the aerial assault aimed at paving the way for U.S. ground forces. The bombing of government facilities largely ceased by the morning of April 3 when the airport was taken, but attacks on Republican Guard units continued. On April 5, close air support missions flew over Baghdad to support ground combat. The same day, the United States bombed the reported safe house of Ali Hassan al-Majid (known as "Chemical Ali") in Basra. On April 7, air attacks targeted Saddam Hussein and other Iraqi leaders in Baghdad. On April 9, Baghdad fell.

## Collateral Damage Estimates

The U.S. military uses the term “collateral damage” when referring to harm to civilians and civilian structures from an attack on a military target. Collateral damage estimates [CDE] are part of the U.S. military’s official targeting process and are usually prepared for targets well in advance. Since the CDE influences target selection, weapon selection, and even time and angle of attack, it is the military’s best means of minimizing civilian casualties and other losses in air strikes. [...]

U.S. air forces carry out a collateral damage estimate using a computer model designed to determine the weapon, fuze, attack angle, and time of day that will ensure maximum effect on a target with minimum civilian casualties. Defense Secretary Donald Rumsfeld reportedly had to authorize personally all targets that had a collateral damage estimate of more than thirty civilian casualties.

Asked how carefully the U.S. Air Force reviewed strikes in Iraq for collateral damage, a senior U.S. Central Command official responded, “with excruciating pain.” He told Human Rights Watch,

[T]he primary concern for the conduct of the war was to do it with absolutely minimum civilian casualties...The first concern is having the desired effect on a target. . . . Next is to use the minimum weapon to achieve that effect. In the process, collateral damage may become one of the considerations that would affect what weapon we had to choose... All of the preplanned targets had a CDE done very early in the process, many months before the war was actually fought... For emerging target strikes, we still do a CDE, but do it very quickly. The computer software was able to rapidly model collateral effects.

Strikes with high collateral damage estimates received extra review. According to another senior CENTCOM official,

CENTCOM came up with a list of twenty-four to twenty-eight high CDE targets that we were concerned about... They had a direct relationship to command and control of Iraqi military forces. These [high CDE targets] were briefed all the way to Bush. He understood the targets, what their use was, and that even under optimum circumstances, there would still be as many as X number of civilian casualties. This was the high CD target list. There were originally over 11,000 aim points when we started the high collateral targeting. Many were thrown out, many were mitigated. We hit twenty of these high collateral damage targets.

Strikes against emerging targets also received review although the process was done much more quickly. U.S. Army Major General Stanley McChrystal, vice director for operations on the Joint Chiefs of Staff, explained the situation in this way:

There tends to be a careful process where there is plenty of time to review that [the targets]. . . . [T]hen we put together certain processes like time-sensitive targeting. And those are when you talk about the crush of an emerging target that might come up, that doesn’t have time to go through a complicated vetting process... [T]here still is a legal review, but it is all at a much accelerated

process because there are some fleeting targets that require a very time-sensitive engagement, but they all fit into pre-thought out criteria. [...]

### **Emerging Targets [...]**

Emerging targets develop as a war progresses instead of being planned prior to the initiation of hostilities. They include time-sensitive targets (TSTs) that are fleeting in nature (such as leadership), enemy forces in the field, mobile targets, and other targets of opportunity. [...]

### ***Flawed Targeting Methodology***

[...] The United States identified and targeted some Iraqi leaders based on GPS coordinates derived from intercepts of Thuraya satellite phones. Thuraya satellite phones are used throughout Iraq and the Middle East. They have an internal GPS chip that enabled American intelligence to track the phones. The phone coordinates were used as the locations for attacks on Iraqi leadership.

Targeting based on satellite phone-derived geo-coordinates turned a precision weapon into a potentially indiscriminate weapon. According to the manufacturer, Thuraya's GPS system is accurate only within a one-hundred-meter (328-foot) radius. Thus the United States could not determine from where a call was originating to a degree of accuracy greater than one-hundred meters radius; a caller could have been anywhere within a 31,400-square-meter area. This begs the question, how did CENTCOM know where to direct the strike if the target area was so large? In essence, imprecise target coordinates were used to program precision-guided munitions.

Furthermore, it is not clear how CENTCOM connected a specific phone to a specific user; phones were being tracked, not individuals. It is plausible that CENTCOM developed a database of voices that could be computer matched to a phone user.

The Iraqis may have employed deception techniques to thwart the Americans. It was well known that the United States used intercepted Thuraya satellite phone calls in their search for members of al-Qaeda. CENTCOM was so concerned about the possibility of the Iraqis turning the Thuraya intercept capability against U.S. forces that it ordered its troops to discontinue using Thuraya phones in early April 2003. It announced, "Recent intelligence reporting indicates Thuraya satellite phone services may have been compromised. For this reason, Thuraya phone use has been discontinued on the battlefields of Iraq. The phones now represent a security risk to units and personnel on the battlefield." It is highly likely the Iraqi leaders assumed that the United States was attempting to track them through the Thuraya phones and therefore possible that they were spoofing American intelligence.

The United States undoubtedly attempted to use corroborating sources for satellite phone coordinates. Based on the results, however, accurate corroborating information must have been difficult if not impossible to come by and additional methods of tracking the Iraqi leadership just as unreliable as satellite phones.

Satellite imagery and signals intelligence (communications intercepts) apparently yielded little to no useful information in terms of targeting leadership. Detection of common indicators such as increased vehicular activity at particular locations seems not to have been meaningful. Human sources of information were likely the main means of corroborating the satellite phone information in tracking the Iraqi leadership. A human intelligence source was reportedly used to verify the Thuraya data acquired in the attack on Saddam Hussein in al-Mansur, described below. But the source was proven wrong. Human sources were also reportedly used to verify the attack on Ali Hassan al-Majid in Basra, as well as the strike on al-Dura that opened the war. Given the lack of success, it seems human intelligence was completely unreliable. [...]

### ***Ineffective Battle Damage Assessment***

The U.S. military's targeting methodology includes assessing the effectiveness of an attack after it is completed. Battle damage assessment (BDA) is considered necessary to evaluate the success or failure of an attack so that lessons learned can be applied and improvements made to future missions. BDA is carried out during a conflict as well as at the cessation of hostilities. Effective BDA can reduce the danger to civilians in war by allowing corrective actions to be taken.

Although air strikes on Iraqi leadership repeatedly failed to hit their target and caused many civilian casualties, no decision was made during major combat operations to stop this practice. [...]

### ***Case Studies of Attacks on Leadership Targets [...]***

#### ***Al-Tuwaisi, Basra***

U.S. aircraft bombed a building in al-Tuwaisi, a residential area in downtown Basra at approximately 5:20 a.m. on April 5, 2003, in an attempt to kill Lieutenant General 'Ali Hassan al-Majid. Al-Majid, known as "Chemical Ali" because of his role in gassing the Kurds in the 1988 Anfal Campaign, was in charge of southern Iraq during the recent war. Initial British reports indicated that al-Majid was killed in the attack. CENTCOM later reversed this claim and changed al-Majid's status back to "at large." Coalition forces ultimately captured al-Majid on August 21, 2003.

U.S. weapons hit the targeted building in the densely populated section of Basra, but the buildings surrounding the bomb strike – filled with civilian families – were also destroyed. Human Rights Watch investigators found that seventeen civilians were killed in this attack.

The homes of the Hamudi and al-Tayyar families sat on either side of the building bombed by American forces. The homeowners gave Human Rights Watch conflicting reports of possible Iraqi government activity in the targeted building. 'Abd al-Hussain Yunis al-Tayyar said there were members of the Iraqi Intelligence Service, or *Mukhabarat*, staying there, while 'Abid Hassan Hamudi said it was vacant. Both denied any Iraqi leadership presence, as did all others interviewed. Al-Tayyar, Hamudi, and their families never saw al-Majid in the area.

In the early morning hours of Saturday, April 5, al-Tayyar, a 50-year-old laborer, went to his garden to get water. Moments later an American bomb slammed into the targeted house next door, destroying his house as well. He picked himself up and immediately began to search the debris. He spent the rest of the day working to pull the dead bodies of his family from the rubble of his home, finally reaching his dead son at 4:00 p.m. [...]

'Abid Hamudi told Human Rights Watch that there were two bombs in the attack. The first bomb missed its target and slammed into the road a few hundred meters away, while the second hit the targeted home, also reducing his home to rubble. Hamudi was able to save three people, his daughter and her two sons, a five-year-old and six-year-old, all of whom were injured in the blast. The other ten people in his house perished. [...]

The size of the crater suggests that the weapon used in the April 5 attack was a 500-pound laser-guided bomb, the smallest PGM available. A second crater in the street a few hundred meters away, which is consistent with the crater found in the home, supports the assertion that the first bomb missed and was soon followed by another.

The collateral damage estimate done on the target appears to have allowed for a high level of civilian damage. This attack may have been approved due to the perceived military value of al-Majid. Had smaller weapons been used, however, many civilian lives may have been spared. A senior CENTCOM official told Human Rights Watch that the U.S. military needs smaller munitions with lower yields that will reduce collateral damage.

### **Al-Karrada, Baghdad**

On April 8, Sa'dun Hassan Salih lifted his nephew's two-month-old daughter, Dina, from the grass in front of the smoking hole that had been her home. She was alive, both arms and legs broken, but she was orphaned. Her family had been staying in Salih's home in the affluent al-Karrada neighborhood of Baghdad, secure in the belief that such a densely populated area of the city would not be targeted. But they would often return to their home, one mile (1.6 kilometers) away, to get some clothes or other things they needed. "That night they went home to get some belongings," said Salih. "We all felt safer together as a family. If we were going to die, we would die together. But no one would bomb a home. My nephew was the last to leave the house, around 9:00 p.m., in his car. That is the last time I ever saw him."

Minutes later, two bombs, seconds apart, destroyed Zaid Ratha Jabir's home and those inside. Incredibly, Dina survived. She was blown out of the home by the blast and now lives with Salih and his wife, 'Imad Hassun Salih. At first they were filled with grief, but now they are angry. "The Americans said no civilians were targeted," said 'Imad. "I don't understand how this could happen."

According to Salih, there were no obvious military targets in the area. He speculated that a bitter family rival lied to the Americans. He said, "Perhaps someone wanted to kill them because of jealousy and told them [the Americans] Saddam or one of his men were there. But my family had no dealings with the regime. We hate Saddam." A Department of Defense official told Human Rights Watch that Saddam Hussein's half-brother Watban was the intended target of this air strike, and that he was identified through poor

communications security. This was likely a Thuraya intercept. Watban was eventually captured near the Syrian-Iraqi border near the end of the war almost a week later.

[...]

### **Al-Mansur, Baghdad**

On April 7, a U.S. Air Force B-1B Lancer aircraft dropped four 2,000-pound satellite-guided Joint Direct Attack Munitions (JDAMs) on a house in al-Mansur district of Baghdad. The attack killed an estimated eighteen civilians.

U.S. intelligence indicated that Saddam Hussein and perhaps one or both of his sons were meeting in al-Mansur. The information was reportedly based on a communications intercept of a Thuraya satellite phone. Forty-five minutes later the area was rubble. [...]

Pentagon officials admitted that they did not know precisely who was at the targeted location. "What we have for battle damage assessment right now is essentially a hole in the ground, a site of destruction where we wanted it to be, where we believe high-value targets were. We do not have a hard and fast assessment of what individual or individuals were on site," said Major General McChrystal. [...]

This strike shows that targeting based on satellite phones is seriously flawed. Even if the targeted individual is actually determined to be on the phone, the person could be far from the impact point. The GBU-31s dropped on al-Mansur have a published accuracy of thirteen meters (forty-three feet) circular error probable (CEP), while the phone coordinates are accurate only to a one-hundred-meter (328-foot) radius. The weapon was inherently more accurate than the information used to determine its target, which led to substantial civilian casualties with no military advantages. U.S. military leaders defended these attacks even after revelations that the strikes resulted in civilian deaths instead of the deaths of the intended targets. One said that the strikes "demonstrated U.S. resolve and capabilities." [...]

### **Preplanned Targets [...]**

#### ***Dual-Use Targets [...]***

##### **Electrical Power Facilities**

The United States targeted electrical power distribution facilities, but not generation facilities, throughout Iraq, according to a senior CENTCOM official. He told Human Rights Watch that instead of using explosive ordnance, the majority of the attacks were carried out with carbon fiber bombs designed to incapacitate temporarily rather than to destroy. Nevertheless, some of the attacks on electrical power distribution facilities in Iraq are likely to have a serious and long-term detrimental impact on the civilian population.

Electrical power was out for thirty days after U.S. strikes on two transformer facilities in al-Nasiriyya. Al-Nasiriyya 400 kV Electrical Power Transformer Station was attacked on March 22 at 6:00 a.m. using three U.S. Navy Tomahawk cruise missiles outfitted with variants of the BLU-114/B graphite bombs. These dispense submunitions with

spools of carbon fiber filaments that short-circuit transformers and other high voltage equipment upon contact.

The transformer station is the critical link between al-Nasiriyya Electrical Power Production Plant and the city of al-Nasiriyya. When the transformer station went off-line it removed the southern link to all power in the city, which was then totally reliant on the North Electrical Station 132. Although the carbon fiber is supposed to incapacitate temporarily, three transformers were completely destroyed by a fire from a short circuit caused by the carbon fiber. The station's wires seemed to have been melted by the intense fire. Human Rights Watch was told that the transformers would have to be replaced and the entire facility rewired.

On March 23 at 10:00 a.m., the United States attacked North Electrical Station 132. Hassan Dawud, an engineer at the station when it was attacked, said a U.S. aircraft strafed the facility, destroying three transformers, gas pipes, and the air conditioning, which brought the entire facility down as components that were not damaged by the attack overheated. Damage to the transformers and air conditioning were clearly visible, including large holes in the walls consistent with aircraft cannon fire. Further north in Rafi on Highway 7, Human Rights Watch found a transformer station with significant damage from air strikes, including at least one destroyed transformer.

From its investigations, it is unclear to Human Rights Watch what effective contribution to Iraqi military action these facilities were making and why attacking them offered a definite military advantage to the United States, and in particular how they supported the ground operations in al-Nasiriyya. [...]

[...] No one died as a direct result of the power loss, but the hospital's generators were taxed to their limit and it had to do away with some non-critical services to ensure the wounded were given basic treatment. [The director of al-Nasiriyya hospital] also stated that the loss of power created a water crisis in the city.

[...] [T]he water was often contaminated because the power outage prevented water purification. This led to what Dr. 'Abd al-Sayyid termed "water-born diarrheal infections."

[...]

### **Cluster Bomb Strikes**

[...] These munitions are area weapons that spread their contents over a large field, or footprint. Because of the dispersal of their submunitions, they can destroy broad, relatively soft targets, like airfields and surface-to-air missile sites. They are also effective against targets that move or do not have precise locations, such as enemy troops or vehicles. [...]

The majority of the Coalition's cluster bombs were CBU-103s, which had been deployed for the first time in Afghanistan. This bomb consists of a three-part green metal casing about five-and-a-half feet (1.7 meters) long with a set of four fins attached to the rear. The casing, which contains 202 bomblets packed in yellow foam, opens at a pre-set altitude or time and releases the bomblets over a large oval area. The CBU-103 adds



a Wind Corrected Munitions Dispenser (WCMD) to the rear of the unguided CBU-87, which is designed to improve accuracy by compensating for wind encountered during its fall. It also narrows the footprint to a radius of 600 feet (183 meters).

The CBU-103's bomblets, known as BLU-97s, are soda can-sized yellow cylinders. Each one of these "combined effects munitions" represents a triple threat. The steel fragmentation core targets enemy troops with 300 jagged pieces of metal. The shaped charge, a concave copper cone that turns into a penetrating molten slug, serves as an anti-armor weapon. A zirconium wafer spreads incendiary fragments that can burn nearby vehicles. This type of bomblet was the payload for 78 percent of the reported U.S. cluster bombs; CBU-87s and CBU-103s both contain 202 BLUs. When used as cluster munitions, the AGM-154 JSOW contains 145 BLUs and the TLAM carries 166 BLUs.

In Iraq, the Coalition used cluster bombs largely for their area effect and anti-armor capabilities. A CENTCOM official explained that common targets included armored vehicles or, when used with time-delay explosives, the path of thin-skinned vehicles. "I know that some were used in more built-up areas, but in most cases they were used against targets where there were those kinds of equipment – guns, tanks," he said. [...]

The U.S. Air Force reduced the danger to civilians from clusters by modifying its targeting and improving technology. Apparently learning a lesson from previous conflicts, the Air Force dropped fewer cluster bombs in or near populated areas. While Human Rights Watch found extensive use of ground-launched cluster munitions in Iraq's cities, it found only isolated cases of air-dropped cluster bombs. As a result, the civilian casualties from cluster bomb strikes were relatively limited. According to a senior CENTCOM official, air commanders received guidance that one of their objectives was to minimize civilian casualties. "In the case of preplanned cluster munition strikes, I am more confident that concern for collateral damage was very high," he said. Less care went into strikes on emerging targets in support of ground troops. The CENTCOM official explained that B-52 bombers would carry a variety of munitions and loiter over the battlefield. If a ground commander called for support and cluster bombs were the only option left, the commander might accept them for his target. "As the battlefield unfolds and the sense of urgency on the ground goes up, my personal opinion is the urgency of the ground commander may be more for protection of his forces. Therefore choosing the optimal weapon is less important than getting a weapon on target," the official said.

When the Air Force did not avoid populated areas, cluster bomb strikes caused civilian casualties. The Baghdad date grove was located immediately across the street, on at least two sides, from Hay Tunis, a densely populated, residential neighborhood. Nihad Salim Muhammad was washing his car when the bombs hit. During the strike, the bomblets injured several people on his street, including four children. Around midnight on April 24, the U.S. Air Force dropped at least one CBU-103 on al-Hadaf girls' primary school in al-Hilla. The strike killed school guard Hussam Hussain, 65, and neighbor Hamid Hamza, 45, and injured thirteen others, according to Hamid Mahdi, a 30-year-old butcher who lived across the street. The manager of the school said there were dozens of paramilitary troops in the neighborhood at the time of the strike. While the Air Force minimized civilian harm by dropping the bombs at night, the incident shows the dangers of dropping clusters in populated areas. [...]



Despite some improvements in technology, one of the Coalition's major failings with cluster bombs was use of outdated cluster bombs. Both the United States and United Kingdom continued to drop older models that are highly inaccurate and unreliable. [...]

### III. CONDUCT OF THE GROUND WAR

[...]

#### ***Ground-Launched Cluster Munitions*** [...]

Coalition use of ground-launched cluster munitions far outstripped the use of air-dropped models. CENTCOM reported in October that it used a total of 10,782 cluster munitions, which could contain between 1.7 and 2 million submunitions. [...]

#### **Civilian Harm**

Al-Hilla endured the most suffering from the use of ground-launched cluster munitions. Dr. Sa'ad al-Falluji, director and chief surgeon of al-Hilla General Teaching Hospital, said 90 percent of the injuries his hospital treated during the war were from submunitions. In the neighborhood of Nadir, a slum on the south side of the city, every household Human Rights Watch visited suffered personal injury or property damage during a March 31 cluster attack. On the day of the strike, the hospital treated 109 injured civilians from that neighborhood, including thirty children. According to local elders, the attack killed thirty-eight civilians and injured 156. During a visit on May 19, Human Rights Watch found dozens of mud brick homes with pockmarked walls and holes in the roof from shrapnel. Male residents pointed to wounds on their legs and pulled up their shirts to reveal chest and abdominal wounds. In the house of Falaya Fadl Nasir, for example, the strike injured three people, his two children, Mahdi, 18, and Marwa, 10, as well as Imam Hassan 'Abdullah. One grenade pierced the roof of his home, causing a fire inside. Hamid Turki Hamid, 36, a dresser in the hospital, said his son and a friend were in the street when the attack began. After bringing in his son, he returned to gather his neighbor's child. "That's when the bomb exploded, when I was injured," Hamid said. [...]

U.K. forces caused dozens of civilian casualties when they used ground-launched cluster munitions in and around Basra. A trio of neighborhoods in the southern part of the city was particularly hard hit. At noon on March 23, a cluster strike hit Hay al-Muhandissin al-Kubra (the engineers' district) while 'Abbas Kadhim, 13, was throwing out the garbage. He had acute injuries to his bowel and liver, and a fragment that could not be removed lodged near his heart. On May 4, he was still in Basra's al-Jumhuriyya Hospital. Three hours later, submunitions blanketed the neighborhood of al-Mishraq al-Jadid about two-and-a-half kilometers (one-and-a-half miles) northeast. Iyad Jassim Ibrahim, a 26-year-old carpenter, was sleeping in the front room of his home when shrapnel injuries caused him to lose consciousness. He later died in surgery. Ten relatives who were sleeping elsewhere in the house suffered shrapnel injuries. Across the street, the cluster strike injured three children. Ahmad 'Aidan Malih Hoshon, 12, and his sister Fatima, 4, both had serious abdominal injuries; their cousin Muhammad, 13, had injuries to his feet. Hay al-Zaitun, just east of al-Mishraq al-Jadid, suffered casualties from cluster munitions that

landed there on the evening of March 25. Jamal Kamil Sabir, a 25-year-old laborer, lost his leg to a submunition blast while crossing a bridge near his home with his family. He spent eleven days in the hospital. His nephew, Jabal Kamil, 22, took shrapnel in his knee. Jamal's pregnant wife, Zainab Nasir 'Abbas, still had shrapnel in her left leg in May because doctors were afraid to remove it during her pregnancy. A neighbor, Zaitun Zaki Abu lyad, 40, was killed when cluster grenades landed on her home. [...]

It appears that most if not all of the strikes described above were directed at legitimate military targets. Human Rights Watch saw tanks and artillery positions located in neighborhoods, and witnesses described the presence of Iraqi forces. Nevertheless, the United States and United Kingdom made poor weapons choices when they used cluster munitions in populated areas. Such strikes almost always caused civilian casualties, in the case of al-Hilla numbering more than one hundred, because the weapons blanketed areas occupied by soldier and civilian alike with deadly submunitions that could not distinguish between the two. [...]

### **Targeting and Technology**

U.S. forces screened ground cluster strikes through a computer and human vetting system. The Third Infantry Division's artillery batteries were programmed with a no-strike list of 12,700 sites that could not be fired upon without manual override. The list included civilian buildings such as schools, mosques, hospitals, and historic sites.

Officers of the Second Brigade said they strove to keep strikes at least 500 meters (547 yards) away from such targets although sometimes they cut the buffer zone to 300 meters (328 yards). In general, they also required visual confirmation of a target before firing, but in the case of counter-battery fire, they considered radar acquisition sufficient. The latter detects incoming fire and determines its location, but it cannot determine if civilians occupy an area.

The Third Infantry Division established another layer of review by sending lawyers to the field to review proposed strikes, a relatively recent addition to the vetting process. "Ten years ago, JAGs [judge advocate general attorneys] weren't running around [the battlefield]," said Captain Chet Gregg, Second Brigade's legal advisor. The division assigned sixteen lawyers to divisional headquarters and each brigade. Lead lawyer Colonel Cayce, who served at the tactical headquarters, reviewed 512 missions, and brigade JAGs approved additional attacks, which were often counter-battery strikes. Although less controversial strikes, such as those on forces in the desert, were not reviewed, Cayce said, "I would feel pretty confident a lawyer was involved in strikes in populated areas." Commanders had the final say, but lawyers provided advice about whether a strike was legal under IHL. Cayce said his commander never overruled his advice not to attack and sometimes rejected targets he said were legal.

While the review process involved a careful weighing of military necessity and potential harm to civilians, limited information and the subjectivity of such an analysis meant it was "not a scientific formula." The first challenge was to determine the risk to their forces. "The hard part is how many casualties we will take. It's a gut level, fly by the seat of your pants. There's no standard that says one U.S. life equals X civilian lives," Cayce

said. Then lawyers had to evaluate the threat to civilians. In the case of counter-battery fire, they had to make the judgment without knowing if civilians were present in the target area at the time of the strike; they relied instead on pre-war population figures. Cayce acknowledged the danger of cluster strikes on populated areas and said that he tried to limit them to nighttime. "I was hoping kids were hunkered down, hoping with artillery fire they were not out watching," he said. [...]

The no-strike lists included certain civilian structures but not residential neighborhoods. Forward observers either ignored or failed to see civilians in populated areas. U.S. military lawyers did not challenge the proposed strikes although they raise serious concerns under IHL's proportionality test. [...]

### DISCUSSION

1. How do you qualify the conflict? Are the rules of Protocol I on the protection of the civilian population against the effects of hostilities applicable? Are the same rules applicable to air- and ground-launched attacks against land targets in Iraq? (GC I-IV, Art. 2; P I, Arts 1 and 49(3))
2.
  - a. What rules of IHL could be violated by the described targeting based on satellite phone-derived geo-coordinates? Is firing weapons based on such targeting perforce indiscriminate? Are the precautionary measures an attacker must take respected? (P I, Arts 51 and 57; CIHL, Rules 11-21)
  - b. What are the legal ramifications of the suggestion the Iraqis may have been using deception techniques to thwart Americans attempting to use satellite phone coordinates for targeting? May such a deception violate IHL if it leads to civilian casualties? Should the U.S. be absolved from its responsibility for casualties if such deception led to civilian casualties? (P I, Arts 51(7) and (8) and 58; CIHL, Rule 97)
  - c. Were the measures the United States used to corroborate satellite phone coordinates sufficient to meet its obligations under IHL? What constitute "feasible" measures to verify a target? What factors have to be taken into account when evaluating the feasibility of verification measures? If the attacking party attempts to corroborate but its sources are wrong, does that affect your assessment of the legality of the strikes? (P I, Art. 57; CIHL, Rules 15-21)
  - d. Given repeated failures to hit the intended targets using satellite phone coordinates and corroboration, does IHL impose an obligation to refrain from this practice? What if corroboration is improved? What would be reliable information for such attacks? (P I, Art. 57; CIHL, Rules 15-21)
  - e. Do you agree with Human Rights Watch that targeting based on satellite phones is "seriously flawed"? Why or why not?
3.
  - a. Are electrical power facilities legitimate targets? Is there a definite military advantage to incapacitating electrical transformer stations for a period of a few hours? Why would the Coalition target distribution facilities rather than generating facilities? Was the method used to incapacitate electrical power facilities appropriate? (P I, Arts 52 and 57; CIHL, Rules 7-10 and 15-21)
  - b. Is it material to the legality of the strikes whether anyone died as a direct consequence of the attacks? Must the fact that hospitals could not treat some cases because of power shortage be taken into account? The risk of "diarrheal infections" due to the impossibility of water purification stations to function without electricity? (P I, Arts 51(5)(b) and 57(2)(a)(ii) and (iii))

4. a. Regarding the attack at al-Tuwaisi, Basra: if there were members of the Iraqi Intelligence Service in the targeted building, would that make the building a legitimate military objective? (P I, Art. 52(2))
  - b. Would the proportionality evaluation be affected if there were intelligence officials, but no “high value leadership targets” in the building? Must the proportionality evaluation be based upon the actual or the expected use of the target? What rules govern the possibility that the expected use does not correspond to the actual use of the objective? (P I, Arts 51(5)(b) and 57(2)(a))
5. What rules of IHL are material in evaluating the legality of the attack at al-Karrada, Baghdad?
6. a. Was the planning of the attack on the house in al-Mansur, Baghdad, sufficient to satisfy an attacking party’s obligations under the principle of distinction and its obligation to take precautionary measures? (P I, Arts 51 and 57)
  - b. Was the main question whether the target was a military objective, whether expected civilian casualties were excessive or whether precautions in attack were taken? What precautionary measures were relevant? (P I, Arts 51, 52 and 57)
  - c. If the attacking party is targeting an individual (who is a combatant), but is unsure which individual is at the targeted location, is the attacking party in a position to properly evaluate the proportionality of the attack? (P I, Arts 51(5)(b) and 57(2)(a)(iii))
7. Is it lawful to drop older models of a bomb when a more accurate and reliable model exists? Is there an obligation under IHL to acquire smaller munitions that will reduce collateral damage? More precise weapons? If a party has them, must it use them? Is it sufficient to use the smallest weapon available that can meet the objectives of the attack, or is an attacker precluded from making an attack if the damage would be excessive? (P I, Art. 57(2)(a)(ii) and (iii))
8. a. Are cluster bombs indiscriminate weapons by their nature? Are there instances in which cluster bombs may be used without violating IHL? In which circumstances might it be appropriate to use cluster bombs? (P I, Arts 51(4), (5)(b) and 57(2)(a)(ii) and (iii))
  - b. If, as Human Rights Watch states, “most if not all” of the ground-launched cluster bomb strikes were directed at legitimate military objectives, may those strikes nonetheless have violated IHL? If so, how? As a precautionary measure, is it sufficient to use cluster bombs only at night to comply with IHL? Even in densely populated areas? (P I, Arts 51(4), (5)(b) and 57(2)(a)(ii) and (iii))
  - c. Does the U.S. procedure for screening ground cluster bomb strikes as described conform to the obligations IHL imposes on an attacker? Why may U.S. military lawyers not have challenged some proposed strikes that Human Rights Watch suggests “raise serious concerns” under the proportionality test? What precautions did the Coalition take to minimize the effects of attacks in general? Are such precautions sufficient?
9. What are the advantages and the risks of involving lawyers in battlefield targeting decisions as described in this case?
10. Would a “standard that says one U.S. life equals X civilian lives” be necessary? Would such a standard concern the evaluation whether an attack must be expected to lead to excessive civilian casualties or the evaluation whether (additional) precautionary measures are feasible? Do the risks for U.S. soldiers matter at all when evaluating respect for IHL? (P I, Arts 51(5)(b) and 57)

**Document No. 182, United States, Populated Area Targeting Record in Iraq**

[N.B.: Model cards filled out by US army (Third Infantry Division), annexed to "Strengthening Measures for the Respect and Implementation of International Humanitarian Law and Other Rules Protecting Human Dignity in Armed Conflicts," 2-4 September, 2004, San Remo, Italy, *The Military Lawyer Nuisance or Necessity*, by Lt. Colonel Mike Newton Judge Advocate General's Corps, United States Army.]

Commanders are responsible for assessing proportionality before authorizing indirect fire into a populated area or protected place (NFA/RFA). Refer to ROE; seek legal advice; copy SJA, G5 and FSE.

**POPULATED AREA TARGETING RECORD****(Military Necessity – Collateral Damage – Proportionality Assessment)****I. MILITARY NECESSITY – What are we shooting at and why?**

1. DTG of mission: \_\_\_\_\_
2. Location – Grid Coordinates: \_\_\_\_\_
3. Enemy Target (WMD, CHEM, SCUD, ARTY, ARMOR, C2, LOG)
  - a. Type and Unit: \_\_\_\_\_
  - b. Importance to Mission: \_\_\_\_\_
4. Target Intel:
  - a. How Observed: UAV, FIST, SOF, other: \_\_\_\_\_
  - b. Unobserved: Q36, Q37, ELINT, other: \_\_\_\_\_
  - c. Last Known DTG of Observation or Detection: \_\_\_\_\_
5. Other Concerns as applicable:
  - a. US Casualties: Number: \_\_\_\_\_ Location \_\_\_\_\_
  - b. Receiving Enemy Fire: Unit \_\_\_\_\_ Location \_\_\_\_\_

**II. COLLATERAL DAMAGE – Who or what is there now?**

6. City: \_\_\_\_\_ Original Population: \_\_\_\_\_
7. Estimated Population Now in Target Area (if known):  
\_\_\_\_\_
8. Cultural, Economic, or Other Significance and Effects:  
\_\_\_\_\_

**III. MUNITIONS SELECTION – Mitigate civilian casualties and civilian property destruction**

9. Available Delivery Systems Within Range: \_\_\_\_\_  
155 MLRS, ATACMS, AH64, CAS, other: \_\_\_\_\_
10. Munitions: DPICM, Precision-Guided Munitions (PGM), other: \_\_\_\_\_

**IV. COMMANDER'S AUTHORIZATION TO FIRE – Proportionality analysis**

11. Legal Advisors' Rank and Name: \_\_\_\_\_
12. Civil Affairs/G5 Advisor: \_\_\_\_\_
13. Is the anticipated loss of life and damage to civilian property acceptable in relation to the military advantage expected to be gained?  
Yes/No
14. Commander or Representative's Rank, Name, and Position: \_\_\_\_\_
15. Optional Comments: \_\_\_\_\_
16. DTG or Decision: \_\_\_\_\_
17. TARGET NUMBER: \_\_\_\_\_

**Case No. 183, Iraq, Use of Force by United States Forces in Occupied Iraq**

[Source: Human Rights Watch, "Hearts and Minds: Post-war Civilian Deaths in Baghdad Caused by U.S. Forces," 2003, footnotes omitted, online: [www.hrw.org](http://www.hrw.org)]

**I. SUMMARY**

This report documents and analyzes civilian deaths caused by U.S. military forces in Baghdad since U.S. President George W. Bush declared an end to hostilities in Iraq on May 1, 2003. [...]

The U.S. military with responsibility for security in Baghdad is not deliberately targeting civilians. Neither is it doing enough to minimize harm to civilians as required by international law. Iraq is clearly a hostile environment for U.S. troops, with daily attacks by Iraqis or others opposed to the U.S. and coalition occupation. But such an environment does not absolve the military from its obligations to use force in a restrained, proportionate and discriminate manner, and only when strictly necessary. [...]

The individual cases of civilian deaths documented in this report reveal a pattern by U.S. forces of over-aggressive tactics, indiscriminate shooting in residential areas and a quick reliance on lethal force. In some cases, U.S. forces faced a real threat, which gave them the right to respond with force. But that response was sometimes disproportionate to the threat or inadequately targeted, thereby harming civilians or putting them at risk.

In Baghdad, civilian deaths can be categorized in three basic incident groups. First are deaths that occur during U.S. military raids on homes in search of arms or resistance fighters. The U.S. military says it has begun using less aggressive tactics, and is increasingly taking Iraqi police with them on raids. But Baghdad residents still complained of aggressive and reckless behavior, physical abuse, and theft by U.S. troops. When U.S. soldiers encountered armed resistance from families who thought they were acting in self-defense against thieves, they sometimes resorted to overwhelming force, killing family members, neighbors or passers-by.

Second are civilian deaths caused by U.S. soldiers who responded disproportionately and indiscriminately after they have come under attack at checkpoints or on the road. Human Rights Watch documented cases where, after an improvised explosive device detonated near a U.S. convoy, soldiers fired high caliber weapons in multiple directions, injuring and killing civilians who were nearby.

Third are killings at checkpoints when Iraqi civilians failed to stop. U.S. checkpoints constantly shift throughout Baghdad, and are sometimes not well marked, although sign visibility is improving. A dearth of Arabic interpreters and poor understanding of Iraqi hand gestures cause confusion, with results that are sometimes fatal for civilians. [...]

In general, U.S. military police in Baghdad seem better suited for the post-conflict law enforcement tasks required by military occupation. More problematic were combat

units [...], who have been called upon to provide services for which they are not adequately trained or attitudinally prepared. [...] Many of these soldiers fought their way into Iraq, and are now being asked to switch without proper preparation from warriors to police who control crowds, pursue thieves and root out insurgents. [...]

A central problem is the lack of accountability for U.S. soldiers and commanders in Iraq. According to CPA Regulation Number 17, Iraqi courts cannot prosecute coalition soldiers, so it is the responsibility of the participating coalition countries to investigate allegations of excessive force and unlawful killings, and to hold accountable soldiers and commanders found to have violated domestic military codes or international humanitarian law. The lack of timely and thorough investigations into many questionable incidents has created an atmosphere of impunity, in which many soldiers feel they can pull the trigger without coming under review. [...]

At the same time, some steps have been taken to reduce civilian deaths. Checkpoints are more clearly marked and some combat troops have received additional training for police tasks. [...]

The rules of engagement are not made public due to security concerns. But Iraqi civilians have a right to know the guidelines for safe behavior. The coalition should mark all checkpoints clearly, for instance, and inform Iraqis through a public service campaign of how to approach checkpoints and how to behave during raids.

[...]

### **Checkpoint in al-Mansur [...]**

On July 27, U.S. soldiers from Task Force 20, a special operations team searching for Saddam Hussain and other former ruling elite, conducted a raid on the home of Shaikh Abdul Karim al-Gubair in the upscale al-Mansur neighborhood. Soldiers set up checkpoints in the area while the operation took place [...].

According to the witness interviewed by Human Rights Watch, four or five U.S. Humvees blocked a small street near the al-Sa'ah Restaurant at 5:00 p.m. One vehicle was parked in the road and soldiers were diverting traffic. The soldiers left after five minutes, leaving no sign other than the vehicle that cars should not pass, but local shop owners were warning drivers to stay away. A man who worked in an optician's shop across the street, Ahmad Ibrahim al-Shaikh al-Jaburi, told Human Rights Watch what happened next:

A gray Chevrolet Malibu appeared from the other side of the alley, not from the main street. The Americans started waving for the car to stop, but it did not stop. One of the soldiers who was sitting on top of one of the Humvees turned his machine gun mounted on top of the Humvee and started shooting at the Chevrolet with the machine gun. There was more shooting, probably from one of the [other] soldiers. They hit the car from a distance of fifty meters. The front windshield of the car was full of bullet holes. As a result, the driver of the car lost control and the car stopped slowly after colliding with a Humvee. After the car stopped and the shooting ended, the driver got



out of the car raising his hands, and seconds later he collapsed. The soldiers surrounded the car and took out the other passenger and they began to drag him in the street. This was done by one soldier who was pulling him by his shoulder, his legs were being dragged. They put him on the pavement next to a house under construction which belonged to Fahd al-Shajra, the former minister of education.

The driver of that car was Muhanad 'Imad Ghazal Ibrahim al-Ruba'i, seventeen years old. He told Human Rights Watch that he was driving with his younger brother Zaid, fourteen, and their cousin Fahd Ahmad, sixteen, to pick up food rations. U.S. soldiers were blocking the road with bricks and told him to turn around, so he took another street to the main road which seemed open. He asked some young Iraqi men if the road was clear and they said it was, as long as Muhanad drove slowly and stopped when ordered. He told Human Rights Watch what happened next:

We started driving slowly towards the Americans preparing to stop, abiding by what the young men had informed us to do. But the soldiers were hidden on both sides of the street – we could not see them. We could see two Humvees a long way from us. One was parked on the pavement and the other was nearer to us but the road was not blocked. While we were driving slowly, and as we were approaching the Humvee nearer to us, there was an intensive shooting at our car from all sides and directions. When the shooting started I lowered my head so I lost control of the car. The car continued to move very slowly until it collided with a Humvee and stopped.[...]

According to Muhanad al-Ruba'i, he and his cousin Fahd were dragged from the car and forced to sit on the pavement. He was given some bandages, he said, but also beaten every time he tried to ask about his brother Zaid. After approximately thirty minutes, he said, two U.S. soldiers in civilian clothes with beards, machine guns and pistols in their belts arrived in a pick-up truck. Muhanad and Fahd were put in the back together with a uniformed soldier.

At this point, Muhanad said, a Toyota Corona turned onto the alley from the main street. The two soldiers in civilian clothes got out of the truck and, together with the soldier in the back, opened fire on the car. Muhanad told Human Rights Watch:

They were all shooting at the Toyota; the shooting lasted for three to five minutes. When shooting stopped the two American civilians with other soldiers went to the car and took the two passengers out of the car, they only took out the wounded and they left the driver inside the car because he was dead.

The witness from the optician's shop, Ahmad al-Jaburi, confirmed this account. He told Human Rights Watch:

I saw a Toyota Corona driving from a side street on the right side of the alley. The side street was open, there were no soldiers there or even a checkpoint. As soon as the car reached the intersection where the side street connects to the alley, there was intensive shooting at the car which led to the death of all the passengers. I think there were either three or four passengers. I saw an

old woman with gray hair opening the door of the car. She started walking towards the soldiers for a few meters and then she collapsed. She was covered with blood.

Soldiers brought the elderly woman and another injured person from the car to the pick-up truck, and put them in the back with Muhanad and Fahd. The driver of the Corona was dead and stayed in the car. Muhanad recalled:

They brought the two wounded to the pick-up. One was an old woman with gray hair and another was a young man. When they brought the lady she started asking about her sons and she was screaming in pain. There was blood all over her body, her body was full of blood. She begged them for some water but one of the soldiers started hitting her in the stomach and she kept quiet. After that a soldier came and sat with us in the back of the pick-up. [...]

As for [two others from the Corona], however, the family had no information until September 28, two months and one day after the incident. "On that day, Americans came to our house and asked us to come to the airport to receive their corpses," she said.

In addition to these deaths, the witness al-Jaburi said he saw soldiers shoot at a third car, a Toyota Landcruiser that had driven down the alley and parked. One person in the car was wounded in the stomach, he said, and Iraqis took this person to the hospital. From all the shooting, two parked cars also caught fire and were destroyed, one of them belonging to a worker in al-Jaburi's shop. They received \$4,500 in compensation from the U.S. Army. Negotiations for compensation were conducted with Lt. Col. Richard Bowyer from the 1<sup>st</sup> Armored Division, who apologized for the incident.

The U.S. military issued a press statement on July 29 that acknowledged two deaths in one car. "The forces fired on the vehicle when it did not slow down at the checkpoint and started to run the barriers, appearing to be hostile," the statement said. "Coalition forces were not involved in any other incident in the area." On the day of the incident, a military spokesman, Staff Sgt. J.J. Johnson, told the press "there are rules of engagement when somebody approaches a checkpoint .... The soldiers have a right to defend themselves."

The U.S. military maintains the secrecy of its rules of engagement for security reasons. But soldiers and commanders should not hide behind the secrecy of its rules to tolerate the beating of detainees and the denial of medical care to the wounded.

### **A Bomb and Shooting on Haifa Street**

On July 3, around 9:15 a.m., a group of school children was walking home on Baghdad's central Haifa Street. Six children around the age of twelve stopped in front of one of their friend's apartments, building 74, when a large explosion nearby threw them to the ground. According to family members, two of the children died and seven were wounded. [...]

According to the U.S. military, the explosion was from an RPG fired at a convoy of three military vehicles from a car on the street. "An innocent Iraqi citizen sitting on a street

corner was also killed by the blast, according to reports we are hearing,” Major Scott Patton told the press.

The military did not comment on its response, which witnesses said involved heavy and indiscriminate shooting that killed the driver of the attacking car and wounded civilians in the area. One witness named Majid Sa’di told the press that he saw the car of the alleged attacker riddled with bullets and he thought the driver was dead.

Human Rights Watch found another witness to the incident, a man coincidentally driving down Haifa Street, who was seriously wounded by a gunshot to the leg. [...] Haidar Hussain Karim al-Fitlawi said he was driving his blue Volkswagen Passat down Haifa Street towards the gas station when the explosion took place. Suddenly, he said, he came under fire from U.S. troops. He told Human Rights Watch:

They hit my car with more than ten bullets. Five of them hit the fuel tank but luckily it did not catch fire. I got out of the car and I was lying on the ground. I could just feel my leg bent over my shoulder. I lay there bleeding for ten minutes. People stopped a small bus and put the injured in there. I remember a little child in there. They took us all to al-Karama Hospital.

According to al-Fitlawi, no U.S. soldiers were hurt in the attack, although it is doubtful he would have had a good look given the shooting. “The Americans were very scared,” he said. “That is why they were shooting at everyone and everything.”

[...]

On August 17, U.S. soldiers shot and killed *Reuters* cameraman Mazen Dana, aged forty-three, outside Abu Ghraib prison on the outskirts of Baghdad. Mazen was the twelfth journalist killed since the war began, and the second *Reuters* journalist to die. *Reuters* said Dana and his sound engineer had asked soldiers for permission to film. After the killing, the U.S. military issued an apology and said soldiers thought his camera was an RPG. A military spokesman expressed condolences at the time but said troops would not fire a warning shot if they felt threatened. “I can’t give you details on the rules of engagement, but the enemy is not in formations, they are not wearing uniforms,” Col. Guy Shields told the press asking about the incident. “During war time, firing a warning shot is not a necessity. There is not time for a warning shot if there is potential for an ambush.”

## DISCUSSION

1. Is Iraq an occupied territory within the meaning of IHL? (At least until 30 June 2004)? Even if the United States (according to it) acted in accordance with Security Council resolutions? Even if the United States acted in self-defence? Even after the adoption of Security Council resolution 1483 (2003) [See **Case No. 188**, Iraq, Occupation and Peacebuilding [Part A.]], if that resolution is interpreted as legitimizing the presence of Coalition forces in Iraq? (GC IV, Art. 2; P I, Preamble, para. 5)
2. a. When did the IHL of military occupation begin to apply in Iraq? From the moment when the first American soldier set foot on Iraqi territory? From the moment when the first village was

in fact under American control? As soon as major military operations were completed, which, according to the President of the United States, was on 1 May 2003? (HR, Art. 42; GC IV, Art. 2)

- b. In your response to question a., do you distinguish between the obligation to treat protected persons humanely (GC IV, Art. 27), the obligation to ensure public order and safety (HR, Art. 43) and the obligation to ensure hygiene and public health (GC IV, Art. 56)? If so, how do you justify such distinctions?
3. Was the behaviour of American troops at the “al-Mansur” checkpoint and after the explosion of a bomb in Haifa Street in conformity with IHL? Do you apply the rules on the conduct of hostilities or those on military occupation to those actions? What measures should have been taken in order to avoid such occurrences? (GC IV, Arts 27 and 32; P I, Arts 48, 50(1), 51(2) and (3), 57(2)(a)(i) and (b))
4. In which circumstances did the American troops have the right to shoot a person in July and August 2003 in Baghdad? Were such shootings governed by IHL or by international human rights law? (GC IV, Arts 27 and 32; P I, Arts 48, 50(1), 51(2) and (3), 57(2)(a)(i) and (b))
5. Did the shooting of the *Reuters* cameraman on 17 August 2003 violate IHL? (P I, Art. 57(2)(a)(i))

**Case No. 184, United States, The Taguba Report****United States of America/Iraq, The Taguba Report**

[Source: Executive summary of Article 15-6 investigation of the 800<sup>th</sup> Military Police Brigade by Maj. Gen. Antonio M. Taguba, available on <http://www.msnbc.msn.com/id/4894001>]

**ARTICLE 15-6  
INVESTIGATION OF THE 800<sup>th</sup> MILITARY POLICE BRIGADE****BACKGROUND**

1. (U) On 19 January 2004, Lieutenant General (LTG) Ricardo S. Sanchez, Commander, Combined Joint Task Force Seven (CJTF-7) requested that the Commander, US Central Command, appoint an Investigating Officer (IO) in the grade of Major General (MG) or above to investigate the conduct of operations within the 800<sup>th</sup> Military Police (MP) Brigade. LTG Sanchez requested an investigation of detention and internment operations by the Brigade from 1 November 2003 to present. LTG Sanchez cited recent reports of detainee abuse, escapes from confinement facilities, and accountability lapses, which indicated systemic problems within the brigade and suggested a lack of clear standards, proficiency, and leadership. LTG Sanchez requested a comprehensive and all-encompassing inquiry to make findings and recommendations concerning the fitness and performance of the 800<sup>th</sup> MP Brigade. [...]
3. (U) On 31 January 2004, the Commander, CFLCC [Coalition Forces Land Component Command], appointed MG Antonio M. Taguba, Deputy Commanding General Support, CFLCC, to conduct this investigation. MG Taguba was directed to conduct an informal investigation under AR [Army Regulation] 15-6 into the 800<sup>th</sup> MP Brigade's detention and internment operations. Specifically, MG Taguba was tasked to:
  - a. (U) Inquire into all the facts and circumstances surrounding recent allegations of detainee abuse, specifically allegations of maltreatment at the Abu Ghraib Prison (Baghdad Central Confinement Facility (BCCF));
  - b. (U) Inquire into detainee escapes and accountability lapses as reported by CJTF-7, specifically allegations concerning these events at the Abu Ghraib Prison;
  - c. (U) Investigate the training, standards, employment, command policies, internal procedures, and command climate in the 800<sup>th</sup> MP Brigade, as appropriate;
  - d. (U) Make specific findings of fact concerning all aspects of the investigation, and make any recommendations for corrective action, as appropriate. [...]

## **FINDINGS AND RECOMMENDATIONS**

### **(PART ONE)**

**(U) The investigation should inquire into all of the facts and circumstances surrounding recent allegations of detainee abuse, specifically, allegations of maltreatment at the Abu Ghraib Prison (Baghdad Central Confinement Facility).**

1. (U) The US Army Criminal Investigation Command (CID), led by COL [Colonel] Jerry Mocello, and a team of highly trained professional agents have done a superb job of investigating several complex and extremely disturbing incidents of detainee abuse at the Abu Ghraib Prison. They conducted over 50 interviews of witnesses, potential criminal suspects, and detainees. They also uncovered numerous photos and videos portraying in graphic detail detainee abuse by Military Police personnel on numerous occasions from October to December 2003. Several potential suspects rendered full and complete confessions regarding their personal involvement and the involvement of fellow Soldiers in this abuse. Several potential suspects invoked their rights under Article 31 of the Uniform Code of Military Justice (UCMJ) and the 5<sup>th</sup> Amendment of the U.S. Constitution. [...]

### **REGARDING PART ONE OF THE INVESTIGATION, I MAKE THE FOLLOWING SPECIFIC FINDINGS OF FACT:**

1. (U) That Forward Operating Base (FOB) Abu Ghraib (BCCF) provides security of both criminal and security detainees at the Baghdad Central Correctional Facility, facilitates the conducting of interrogations for CJTF-7, supports other CPA operations at the prison, and enhances the force protection/quality of life of Soldiers assigned in order to ensure the success of ongoing operations to secure a free Iraq.
2. (U) That the Commander, 205<sup>th</sup> Military Intelligence Brigade, was designated by CJTF-7 as the Commander of FOB Abu Ghraib (BCCF) effective 19 November 2003. That the 205<sup>th</sup> MI Brigade conducts operational and strategic interrogations for CJTF-7. That from 19 November 2003 until Transfer of Authority (TOA) on 6 February 2004, COL [...] was the Commander of the 205<sup>th</sup> MI Brigade and the Commander of FOB Abu Ghraib (BCCF).
3. (U) That the 320<sup>th</sup> Military Police Battalion of the 800<sup>th</sup> MP Brigade is responsible for the Guard Force at Camp Ganci, Camp Vigilant, & Cellblock 1 of FOB Abu Ghraib (BCCF). That from February 2003 to until he was suspended from his duties on 17 January 2004, LTC [...] served as the Battalion Commander of the 320<sup>th</sup> MP Battalion. That from December 2002 until he was suspended from his duties, on 17 January 2004, CPT [...] served as the Company Commander of the 372<sup>nd</sup> MP Company, which was in charge of guarding detainees at FOB Abu Ghraib. I further find that both the 320<sup>th</sup> MP Battalion and the 372<sup>nd</sup> MP Company were located within the confines of FOB Abu Ghraib.

4. (U) That from July of 2003 to the present, BG [Brigadier General] [...] was the Commander of the 800<sup>th</sup> MP Brigade.
5. (S) That between October and December 2003, at the Abu Ghraib Confinement Facility (BCCF), numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees. This systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force (372<sup>nd</sup> Military Police Company, 320<sup>th</sup> Military Police Battalion, 800<sup>th</sup> MP Brigade), in Tier (section) 1-A of the Abu Ghraib Prison (BCCF). The allegations of abuse were substantiated by detailed witness statements and the discovery of extremely graphic photographic evidence. Due to the extremely sensitive nature of these photographs and videos, the ongoing CID investigation, and the potential for the criminal prosecution of several suspects, the photographic evidence is not included in the body of my investigation. The pictures and videos are available from the Criminal Investigative Command and the CTJF-7 prosecution team. In addition to the aforementioned crimes, there were also abuses committed by members of the 325<sup>th</sup> MI Battalion, 205<sup>th</sup> MI Brigade, and Joint Interrogation and Debriefing Center (JIDC). Specifically, on 24 November 2003, SPC [Specialist] [...], 205<sup>th</sup> MI Brigade, sought to degrade a detainee by having him strip and returned to cell naked.
6. (S) I find that the intentional abuse of detainees by military police personnel included the following acts:
  - a. (S) Punching, slapping, and kicking detainees; jumping on their naked feet;
  - b. (S) Videotaping and photographing naked male and female detainees;
  - c. (S) Forcibly arranging detainees in various sexually explicit positions for photographing;
  - d. (S) Forcing detainees to remove their clothing and keeping them naked for several days at a time;
  - e. (S) Forcing naked male detainees to wear women's underwear;
  - f. (S) Forcing groups of male detainees to masturbate themselves while being photographed and videotaped;
  - g. (S) Arranging naked male detainees in a pile and then jumping on them;
  - h. (S) Positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture;
  - i. (S) Writing "I am a Rapest" [*sic*] on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked;
  - j. (S) Placing a dog chain or strap around a naked detainee's neck and having a female Soldier pose for a picture;
  - k. (S) A male MP guard having sex with a female detainee;

- l. (S) Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee;
  - m. (S) Taking photographs of dead Iraqi detainees.
- 7. (U) These findings are amply supported by written confessions provided by several of the suspects, written statements provided by detainees, and witness statements. [...]
- 8. (U) In addition, several detainees also described the following acts of abuse, which under the circumstances, I find credible based on the clarity of their statements and supporting evidence provided by other witnesses:
  - a. (U) Breaking chemical lights and pouring the phosphoric liquid on detainees;
  - b. (U) Threatening detainees with a charged 9mm pistol;
  - c. (U) Pouring cold water on naked detainees;
  - d. (U) Beating detainees with a broom handle and a chair;
  - e. (U) Threatening male detainees with rape;
  - f. (U) Allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell;
  - g. (U) Sodomizing a detainee with a chemical light and perhaps a broom stick.
  - h. (U) Using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee. [...]
- 10. (U) I find that contrary to the provision of AR 190-8 [...] Military Intelligence (MI) interrogators and Other US Government Agency's (OGA) interrogators actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses. [...] I find that personnel assigned to the 372<sup>nd</sup> MP Company, 800<sup>th</sup> MP Brigade were directed to change facility procedures to "set the conditions" for MI interrogations. I find no direct evidence that MP personnel actually participated in those MI interrogations.
- 11. (U) I reach this finding based on the actual proven abuse that I find was inflicted on detainees and by the following witness statements:
  - a. (U) **SPC [...], 372<sup>nd</sup> MP Company**, stated in her sworn statement regarding the incident where a detainee was placed on a box with wires attached to his fingers, toes, and penis, "that her job was to keep detainees awake." She stated that MI was talking to CPL [Corporal] [...]. She stated: "**MI wanted to get them to talk. It is [...] and [...]’s job to do things for MI and OGA to get these people to talk.**"
  - b. (U) **SGT [Sergeant] [...], 372<sup>nd</sup> MP Company**, stated in his sworn statement as follows: "**I witnessed prisoners in the MI hold section, wing 1A being made to do various things that I would question morally. In Wing 1A we were told that they had different rules and different SOP [Standing**



**Operating Procedures] for treatment. I never saw a set of rules or SOP for that section just word of mouth. The Soldier in charge of 1A was Corporal [...]. He stated that the Agents and MI Soldiers would ask him to do things, but nothing was ever in writing he would complain [sic].**" When asked why the rules in 1A/B were different than the rest of the wings, SGT [...] stated: **"The rest of the wings are regular prisoners and 1A/B are Military Intelligence (MI) holds."** When asked why he did not inform his chain of command about this abuse, SGT [...] stated: **"Because I assumed that if they were doing things out of the ordinary or outside the guidelines, someone would have said something. Also the wing belongs to MI and it appeared MI personnel approved of the abuse."** SGT [...] also stated that he had heard MI insinuate to the guards to abuse the inmates. When asked what MI said he stated: **"Loosen this guy up for us." "Make sure he has a bad night." "Make sure he gets the treatment."** He claimed these comments were made to CPL [...] and SSG [Staff Sergeant] [...]. Finally, SGT [...] stated that [sic]: **"the MI staffs to my understanding have been giving [...] compliments on the way he has been handling the MI holds."** Example being statements like, **"Good job, they're breaking down real fast. They answer every question. They're giving out good information, finally, and keep up the good work. Stuff like that."**

- c. (U) SPC [...], 372<sup>nd</sup> MP Company, was asked if he were present when any detainees were abused. He stated: **"I saw them nude, but MI would tell us to take away their mattresses, sheets, and clothes."** He could not recall who in MI had instructed him to do this, but commented that, "if they wanted me to do that they needed to give me paperwork." He was later informed that "we could not do anything to embarrass the prisoners."
- d. (U) Mr. [...], a US civilian contract translator was questioned about several detainees accused of rape. He observed [sic]: **"They (detainees) were all naked, a bunch of people from MI, the MP were there that night and the inmates were ordered by SGT [...] and SGT [...] ordered the guys while questioning them to admit what they did. They made them do strange exercises by sliding on their stomach, jump up and down, throw water on them and made them some wet, called them all kinds of names such as "guys" do they like to make love to guys, then they handcuffed their hands together and their legs with shackles and started to stack them on top of each other by insuring that the bottom guys penis will touch the guy on tops butt."**
- e. (U) SPC [...], 109<sup>th</sup> Area Support Medical Battalion, a medic testified that: **"Cell 1A was used to house high priority detainees and cell 1B was used to house the high risk or trouble making detainees. During my tour at the prison I observed that when the male detainees were first brought to the facility, some of them were made to wear female underwear, which I think was to somehow break them down."**

12. (U) **I find that prior to its deployment to Iraq for Operation Iraqi Freedom, the 320<sup>th</sup> MP Battalion and the 372<sup>nd</sup> MP Company had received no training in detention/internee operations.** I also find that very little instruction or training was provided to MP personnel on the applicable rules of the Geneva Convention Relative to the Treatment of Prisoners of War, FM [Field Manual] 27-10, AR 190-8, or FM 3-19.40. Moreover, I find that few, if any, copies of the Geneva Conventions were ever made available to MP personnel or detainees.
13. (U) Another obvious example of the Brigade Leadership not communicating with its Soldiers or ensuring their tactical proficiency concerns the incident of detainee abuse that occurred at Camp Bucca, Iraq, on May 12, 2003. Soldiers from the 223<sup>rd</sup> MP Company reported to the 800<sup>th</sup> MP Brigade Command at Camp Bucca, that four Military Police Soldiers from the 320<sup>th</sup> MP Battalion had abused a number of detainees during inprocessing at Camp Bucca. An extensive CID investigation determined that four soldiers from the 320<sup>th</sup> MP Battalion had kicked and beaten these detainees following a transport mission from Talil Air Base.
14. (U) Formal charges under the UCMJ [Uniform Code of Military Justice] were preferred against these Soldiers and an Article-32 Investigation conducted by LTC Gentry. He recommended a general court martial for the four accused, which BG [...] supported. Despite this documented abuse, there is no evidence that BG [...] ever attempted to remind 800<sup>th</sup> MP Soldiers of the requirements of the Geneva Conventions regarding detainee treatment or took any steps to ensure that such abuse was not repeated. Nor is there any evidence that LTC(P) [...], the commander of the Soldiers involved in the Camp Bucca abuse incident, took any initiative to ensure his Soldiers were properly trained regarding detainee treatment.

#### **RECOMMENDATIONS AS TO PART ONE OF THE INVESTIGATION:**

1. (U) Immediately deploy to the Iraq Theater an integrated multi-discipline Mobile Training Team (MTT) comprised of subject matter experts in internment/resettlement operations, international and operational law, information technology, facility management, interrogation and intelligence gathering techniques, chaplains, Arab cultural awareness, and medical practices as it pertains to I/R activities. This team needs to oversee and conduct comprehensive training in all aspects of detainee and confinement operations.
2. (U) That all military police and military intelligence personnel involved in any aspect of detainee operations or interrogation operations in CJTF-7, and subordinate units, be immediately provided with training by an international/operational law attorney on the specific provisions of The Law of Land Warfare FM 27-10, specifically the Geneva Convention Relative to the Treatment of Prisoners of War, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, and AR 190-8.
3. (U) **That a single commander in CJTF-7 be responsible for overall detainee operations throughout the Iraq Theater of Operations.** I also recommend that

the Provost Marshal General of the Army assign a minimum of two (2) subject matter experts, one officer and one NCO [Non-Commissioned Officer], to assist CJTF-7 in coordinating detainee operations.

4. (U) That detention facility commanders and interrogation facility commanders ensure that appropriate copies of the Geneva Convention Relative to the Treatment of Prisoners of War and notice of protections be made available in both English and the detainees' language and be prominently displayed in all detention facilities. Detainees with questions regarding their treatment should be given the full opportunity to read the Convention.
5. (U) That each detention facility commander and interrogation facility commander publish a complete and comprehensive set of Standing Operating Procedures (SOPs) regarding treatment of detainees, and that all personnel be required to read the SOPs and sign a document indicating that they have read and understand the SOPs.
6. (U) That in accordance with the recommendations of MG Ryder's Assessment Report, and my findings and recommendations in this investigation, all units in the Iraq Theater of Operations conducting internment/confinement/detainment operations in support of Operation Iraqi Freedom be OPCON [Operational Control] for all purposes, to include action under the UCMJ, to CJTF-7.
7. (U) Appoint the C3, CJTF as the staff proponent for detainee operations in the Iraq Joint Operations Area (JOA). (MG Tom Miller, C3, CJTF-7, has been appointed by COMCJTF-7).
8. (U) That an inquiry UP AR 381-10, Procedure 15 be conducted to determine the extent of culpability of Military Intelligence personnel, assigned to the 205<sup>th</sup> MI Brigade and the Joint Interrogation and Debriefing Center (JIDC) regarding abuse of detainees at Abu Ghraib (BCCF).
9. (U) That it is critical that the proponent for detainee operations is assigned a dedicated Senior Judge Advocate, with specialized training and knowledge of international and operational law, to assist and advise on matters of detainee operations.

## FINDINGS AND RECOMMENDATIONS

### (PART TWO)

**(U) The Investigation inquire into detainee escapes and accountability lapses as reported by CJTF-7, specifically allegations concerning these events at the Abu Ghraib Prison:**

**REGARDING PART TWO OF THE INVESTIGATION, I MAKE THE FOLLOWING SPECIFIC FINDINGS OF FACT: [...]**

6. (U) Detainee operations include accountability, care, and well being of Enemy Prisoners of War, Retained Person, Civilian Detainees, and Other Detainees, as well as Iraqi criminal prisoners. [...]
8. (U) There is a general lack of knowledge, implementation, and emphasis of basic legal, regulatory, doctrinal, and command requirements within the 800<sup>th</sup> MP Brigade and its subordinate units.
9. (U) The handling of detainees and criminal prisoners after in-processing was inconsistent from detention facility to detention facility, compound to compound, encampment to encampment, and even shift to shift throughout the 800<sup>th</sup> MP Brigade AOR [Area of Responsibility]. [...]
23. (U) The Abu Ghraib and Camp Bucca detention facilities are significantly over their intended maximum capacity while the guard force is under-manned and under-resourced. This imbalance has contributed to the poor living conditions, escapes, and accountability lapses at the various facilities. The overcrowding of the facilities also limits the ability to identify and segregate leaders in the detainee population who may be organizing escapes and riots within the facility.
24. (U) The screening, processing, and release of detainees who should not be in custody takes too long and contributes to the overcrowding and unrest in the detention facilities. [...]
28. (U) Neither the camp rules nor the provisions of the Geneva Conventions are posted in English or in the language of the detainees at any of the detention facilities in the 800<sup>th</sup> MP Brigade's AOR, even after several investigations had annotated the lack of this critical requirement. [...]
33. (S/NF) The various detention facilities operated by the 800<sup>th</sup> MP Brigade have routinely held persons brought to them by Other Government Agencies (OGAs) without accounting for them, knowing their identities, or even the reason for their detention. The Joint Interrogation and Debriefing Center (JIDC) at Abu Ghraib called these detainees "ghost detainees." On at least one occasion, the 320<sup>th</sup> MP Battalion at Abu Ghraib held a handful of "ghost detainees" (6-8) for OGAs that they moved around within the facility to hide them from a visiting International Committee of the Red Cross (ICRC) survey team. This maneuver was deceptive, contrary to Army Doctrine, and in violation of international law. [...]

**RECOMMENDATIONS REGARDING PART TWO OF THE INVESTIGATION:**

- [...] (U) Develop, staff, and implement comprehensive and detailed SOPs utilizing the lessons learned from this investigation as well as any previous findings, recommendations, and reports. (U) SOPs must be written, disseminated, trained on, and understood at the lowest level. (U) Iraqi criminal prisoners must be held in separate facilities from any other category of detainee. [...] (U) Detention Rules of

Engagement (DROE), Interrogation Rules of Engagement (IROE), and the principles of the Geneva Conventions need to be briefed at every shift change and guard mount. [...] (U) The Geneva Conventions and the facility rules must be prominently displayed in English and the language of the detainees at each compound and encampment at every detention facility [...].

## FINDINGS AND RECOMMENDATIONS

### (PART THREE)

**(U) Investigate the training, standards, employment, command policies, internal procedures, and command climate in the 800<sup>th</sup> MP Brigade, as appropriate:**

*(Names deleted)*

### REGARDING PART THREE OF THE INVESTIGATION, I MAKE THE FOLLOWING SPECIFIC FINDINGS OF FACT:

1. (U) I find that BG [...] took command of the 800<sup>th</sup> MP Brigade on 30 June 2003 from BG [...]. BG [...] has remained in command since that date. The 800<sup>th</sup> MP Brigade is comprised of eight MP battalions in the Iraqi TOR: 115<sup>th</sup> MP Battalion, 310<sup>th</sup> MP Battalion, 320<sup>th</sup> MP Battalion, 324<sup>th</sup> MP Battalion, 400<sup>th</sup> MP Battalion, 530<sup>th</sup> MP Battalion, 724<sup>th</sup> MP Battalion, and 744<sup>th</sup> MP Battalion.
2. (U) Prior to BG [...] taking command, members of the 800<sup>th</sup> MP Brigade believed they would be allowed to go home when all the detainees were released from the Camp Bucca Theater Internment Facility following the cessation of major ground combat on 1 May 2003. At one point, approximately 7,000 to 8,000 detainees were held at Camp Bucca. Through Article-5 Tribunals and a screening process, several thousand detainees were released. Many in the command believed they would go home when the detainees were released. In late May-early June 2003 the 800<sup>th</sup> MP Brigade was given a new mission to manage the Iraqi penal system and several detention centers. This new mission meant Soldiers would not redeploy to CONUS [Continental United States] when anticipated. Morale suffered, and over the next few months there did not appear to have been any attempt by the Command to mitigate this morale problem. [...]
4. (U) I find that the 800<sup>th</sup> MP Brigade was not adequately trained for a mission that included operating a prison or penal institution at Abu Ghraib Prison Complex. As the Ryder Assessment found, I also concur that units of the 800<sup>th</sup> MP Brigade did not receive corrections-specific training during their mobilization period. [...] I found no evidence that the Command, although aware of this deficiency, ever requested specific corrections training from the Commandant of the Military Police School, the US Army Confinement Facility at Mannheim, Germany, the

Provost Marshal General of the Army, or the US Army Disciplinary Barracks at Fort Leavenworth, Kansas. [...]

13. (U) With respect to the 320<sup>th</sup> MP Battalion, I find that the Battalion Commander, LTC (P) [...], was an extremely ineffective commander and leader. [...] The 320<sup>th</sup> MP Battalion was stigmatized as a unit due to previous detainee abuse which occurred in May 2003 at the Bucca Theater Internment Facility (TIF), while under the command of LTC (P) [...]. Despite his proven deficiencies as both a commander and leader, BG [...] allowed LTC (P) [...] to remain in command of her most troubled battalion guarding, by far, the largest number of detainees in the 800<sup>th</sup> MP Brigade. LTC (P) [...] was suspended from his duties by LTG Sanchez, CJTF-7 Commander on 17 January 2004.
14. (U) During the course of this investigation I conducted a lengthy interview with BG [...] that lasted over four hours, and is included *verbatim* in the investigation Annexes. BG [...] was extremely emotional during much of her testimony. What I found particularly disturbing in her testimony was her complete unwillingness to either understand or accept that many of the problems inherent in the 800<sup>th</sup> MP Brigade were caused or exacerbated by poor leadership and the refusal of her command to both establish and enforce basic standards and principles among its soldiers.
15. (U) BG [...] alleged that she received no help from the Civil Affairs Command, specifically, no assistance from either BG [...] or COL [...]. She blames much of the abuse that occurred in Abu Ghraib (BCCF) on MI personnel and stated that MI personnel had given the MPs "ideas" that led to detainee abuse. [...]
19. (U) I find that individual Soldiers within the 800<sup>th</sup> MP Brigade and the 320<sup>th</sup> Battalion stationed throughout Iraq had very little contact during their tour of duty with either LTC (P) [...] or BG [...]. BG [...] claimed, during her testimony, that she paid regular visits to the various detention facilities where her Soldiers were stationed. However, the detailed calendar provided by her Aide-de-Camp, 1LT [First Lieutenant] [...], does not support her contention. Moreover, numerous witnesses stated that they rarely saw BG [...] or LTC (P) [...].
20. (U) In addition I find that psychological factors, such as the difference in culture, the Soldiers' quality of life, the real presence of mortal danger over an extended time period, and the failure of commanders to recognize these pressures contributed to the perverse atmosphere that existed at Abu Ghraib (BCCF) Detention Facility and throughout the 800<sup>th</sup> MP Brigade.
21. [...] Brigade and unit SOPs for dealing with detainees if they existed at all, were not read or understood by MP Soldiers assigned the difficult mission of detainee operations. Following the abuse of several detainees at Camp Bucca in May 2003, I could find no evidence that BG [...] ever directed corrective training for her soldiers or ensured that MP Soldiers throughout Iraq clearly understood the requirements of the Geneva Conventions relating to the treatment of detainees.

22. On 17 January 2004 BG [...] was formally admonished in writing by LTG Sanchez regarding the serious deficiencies in her Brigade. LTG Sanchez found that the performance of the 800<sup>th</sup> MP Brigade had not met the standards set by the Army or by CJTF-7. He found that incidents in the preceding six months had occurred that reflected a lack of clear standards, proficiency and leadership within the Brigade. LTG Sanchez also cited the recent detainee abuse at Abu Ghraib (BCCF) as the most recent example of a poor leadership climate that “permeates the Brigade.” I totally concur with LTG Sanchez’ opinion regarding the performance of BG [...] and the 800<sup>th</sup> MP Brigade.

### **RECOMMENDATIONS AS TO PART THREE OF THE INVESTIGATION:**

1. (U) That BG [...], Commander, 800<sup>th</sup> MP Brigade be Relieved from Command and given a General Officer Memorandum of Reprimand for the following acts which have been previously referred to in the aforementioned findings:
  - Failing to ensure that MP Soldiers at theater-level detention facilities throughout Iraq had appropriate SOPs for dealing with detainees and that Commanders and Soldiers had read, understood, and would adhere to these SOPs.
  - Failing to ensure that MP Soldiers in the 800<sup>th</sup> MP Brigade knew, understood, and adhered to the protections afforded to detainees in the Geneva Convention Relative to the Treatment of Prisoners of War.
  - Making material misrepresentations to the Investigation Team as to the frequency of her visits to her subordinate commands.
  - Failing to obey an order from the CFLCC Commander, LTG [...], regarding the withholding of disciplinary authority for Officer and Senior Non-commissioned Officer misconduct.
  - Failing to take appropriate action regarding the ineffectiveness of a subordinate Commander, LTC (P) [...].
  - Failing to take appropriate action regarding the ineffectiveness of numerous members of her Brigade Staff [...].
  - Failing to ensure that numerous and reported accountability lapses at detention facilities throughout Iraq were corrected.
2. (U) That COL [...], Commander, 205<sup>th</sup> MI Brigade, be given a General Officer Memorandum of Reprimand and Investigated UP Procedure 15, AR 381-10, US Army Intelligence Activities for the following acts which have been previously referred to in the aforementioned findings: [...]
  - Failing to ensure that Soldiers under his direct command knew, understood, and followed the protections afforded to detainees in the Geneva Convention Relative to the Treatment of Prisoners of War.
  - Failing to properly supervise his soldiers working and “visiting” Tier 1 of the Hard-Site at Abu Ghraib (BCCF).

3. (U) That LTC (P) [...], Commander, 320<sup>th</sup> MP Battalion, be Relieved from Command, be given a General Officer Memorandum of Reprimand, and be removed from the Colonel/O-6 Promotion List for the following acts which have been previously referred to in the aforementioned findings: [...]
  - Failing to ensure that Soldiers under his direct command were properly trained in Internment and Resettlement Operations.
  - Failing to ensure that Soldiers under his direct command knew and understood the protections afforded to detainees in the Geneva Convention Relative to the Treatment of Prisoners of War.
  - Failing to properly supervise his soldiers working and “visiting” Tier 1 of the Hard-Site at Abu Ghraib (BCCF).
  - Failing to properly establish and enforce basic soldier standards, proficiency, and accountability. [...]
13. (U) I find that there is sufficient credible information to warrant an Inquiry UP Procedure 15, AR 381-10, US Army Intelligence Activities, be conducted to determine the extent of culpability of MI personnel, assigned to the 205<sup>th</sup> MI Brigade and the Joint Interrogation and Debriefing Center (JIDC) at Abu Ghraib (BCCF). [...]

## **OTHER FINDINGS/OBSERVATIONS**

1. (U) Due to the nature and scope of this investigation, I acquired the assistance of Col (Dr.) Henry Nelson, a USAF Psychiatrist, to analyze the investigation materials from a psychological perspective. He determined that there was evidence that the horrific abuses suffered by the detainees at Abu Ghraib (BCCF) were wanton acts of select soldiers in an unsupervised and dangerous setting. There was a complex interplay of many psychological factors and command insufficiencies. [...]

## **CONCLUSION**

1. (U) Several US Army Soldiers have committed egregious acts and grave breaches of international law at Abu Ghraib/BCCF and Camp Bucca, Iraq. Furthermore, key senior leaders in both the 800<sup>th</sup> MP Brigade and the 205<sup>th</sup> MI Brigade failed to comply with established regulations, policies, and command directives in preventing detainee abuses at Abu Ghraib (BCCF) and at Camp Bucca during the period August 2003 to February 2004.
2. (U) Approval and implementation of the recommendations of this AR 15-6 Investigation and those highlighted in previous assessments are essential to establish the conditions with the resources and personnel required to prevent future occurrences of detainee abuse.



**DISCUSSION**

1.
  - a. How would you qualify the conflict in Iraq at the time of the alleged abuses? Is the international humanitarian law (IHL) of international armed conflicts applicable to all detainees mentioned in the Taguba report?
  - b. Does the report make a difference as to the treatment of the prisoners of war and that of the other detainees? Does it make a legal distinction? What is the status of those not considered as prisoners of war? Are they necessarily protected civilians? Civilian internees? What if they are detained for reasons not linked to the conflict? (GC III, Arts 4 and 5; GC IV, Arts 4, 76, 78 and 79)
  - c. Does the question whether the detainees were prisoners of war, civilians accused of offences or civilian internees, matter when evaluating whether the reported treatment violated IHL?
2. Qualify each of the “abuse” cases mentioned in the Taguba report in terms of IHL (*Part One, paras 6-8*). Which cases described in the report amount to torture? To ill-treatment? Is the distinction between torture and ill-treatment relevant for IHL? (GC III, Arts 17 and 130; GC IV, Arts 31, 32 and 147) Does this report qualify some violations as war crimes? In what circumstances does the report mention IHL or the Geneva Conventions?
3.
  - a. According to the Taguba report, were the reported abuses cases of individual misbehaviour? The result of a lack of training and discipline tolerated by authorities and commanders? Standard interrogation procedure?
  - b. Could the treatment of individuals during interrogation as described be justified under Art. 5 of Convention IV?
  - c. When “interrogators actively requested that MP guards set physical and mental conditions for favourable interrogation of witnesses” (*Part One, para. 10*), is it an incitement to commit abuses? Is the incitement to commit a crime a violation of IHL or of other bodies of law? How does the report deal with the interrogators’ (from Military Intelligence or other agencies) behaviour?
  - d. What are the conditions and procedure of the ICRC for visiting detainees? Do they have a legal basis in IHL? Were they respected by the Coalition? Is the practice of “ghost detainees” (*Part Two, para. 33, Findings and Recommendations*) a violation of IHL? (GC III, Art. 126; GC IV, Art. 143)
4. What do you think about the recommendations made by MG Taguba in his report, following the specific findings he made? Do you think that measures such as the training of guards, displaying the Geneva Conventions in detention facilities, establishing sets of procedures, etc. are adequate and sufficient? What about the sanctions recommended in the report? Do you find them proportionate to the crimes committed? Who should be sanctioned for these abuses? Only the perpetrators? Also the commanders if they knew but did not act on this knowledge? Other higher-ranking officials? People who incited the commission of these abuses?

**Case No. 185, United States, The Schlesinger Report****A. Final Report of the Independent Panel To Review DoD Detention Operations, August 2004**

[Source: Independent Panel to Review DoD Detention Operations, Chairman The Honorable James R. Schlesinger, August 24, 2004, to U.S. Secretary of Defense Donald Rumsfeld, available on: <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>]

**INTRODUCTION-CHARTER AND METHODOLOGY**

The Secretary of Defense chartered the Independent Panel on May 12, 2004, to review Department of Defense (DoD) Detention Operations [...]. In his memorandum, the Secretary tasked the Independent Panel to review Department of Defense investigations on detention operations whether completed or ongoing, as well as other materials and information the Panel deemed relevant to its review. The Secretary asked for the Panel's independent advice in highlighting the issues considered most important for his attention. He asked for the Panel's views on the causes and contributing factors to problems in detainee operations and what corrective measures would be required. [...]

The panel did not conduct a case-by-case review of individual abuse cases. This task has been accomplished by those professionals conducting criminal and commander-directed investigations. Many of these investigations are still on-going. The Panel did review the various completed and on-going reports covering the causes for the abuse. Each of these inquiries or inspections defined abuse, categorized the abuses, and analyzed the abuses in conformity with the appointing authorities' guidance, but the methodologies do not parallel each other in all respects. The Panel concludes, based on our review of other reports to date and our own efforts that causes for abuse have been adequately examined.

The Panel met on July 22<sup>nd</sup> and again on August 16<sup>th</sup> to discuss progress of the report. Panel members also reviewed sections and versions of the report through July and mid-August.

An effective, timely response to our requests for other documents and support was invariably forthcoming, due largely to the efforts of the DoD Detainee Task Force. We conducted reviews of multiple classified and unclassified documents generated by DoD and other sources.

Our staff has met and communicated with representatives of the International Committee of the Red Cross and with the Human Rights Executive Directors' Coordinating Group.

It should be noted that information provided to the Panel was that available as of mid-August 2004. If additional information becomes available, the Panel's judgments might be revised.

### THE CHANGING THREAT [...]

In waging the Global War on Terror, the military confronts a far wider range of threats. In Iraq and Afghanistan, U.S. forces are fighting diverse enemies with varying ideologies, goals and capabilities. American soldiers and their coalition partners have defeated the armoured divisions of the Republican Guard, but are still under attack by forces using automatic rifles, rocket-propelled grenades, roadside bombs and surface-to-air missiles. We are not simply fighting the remnants of dying regimes or opponents of the local governments and coalition forces assisting those governments, but multiple enemies including indigenous and international terrorists. This complex operational environment requires soldiers capable of conducting traditional stability operations associated with peacekeeping tasks one moment and fighting force-on-force engagements normally associated with war-fighting the next moment.

Warfare under the conditions described inevitably generates detainees – enemy combatants, opportunists, trouble-makers, saboteurs, common criminals, former regime officials and some innocents as well. These people must be carefully but humanely processed to sort out those who remain dangerous or possess militarily-valuable intelligence. [...]

General Abizaid himself best articulated the current nature of combat in testimony before the U.S. Senate Armed Services Committee on May 19, 2004:

Our enemies are in a unique position, and they are a unique brand of ideological extremists whose vision of the world is best summed up by how the Taliban ran Afghanistan. If they can outlast us in Afghanistan and undermine the legitimate government there, they'll once again fill up the seats at the soccer stadium and force people to watch executions. If, in Iraq, the culture of intimidation practiced by our enemies is allowed to win, the mass graves will fill again. Our enemies kill without remorse, they challenge our will through the careful manipulation of propaganda and information, they seek safe havens in order to develop weapons of mass destruction that they will use against us when they are ready. Their targets are not Kabul and Baghdad, but places like Madrid and London and New York. While we can't be defeated militarily, we're not going to win this thing militarily alone... As we fight this most unconventional war of this new century, we must be patient and courageous.

In Iraq the U.S. commanders were slow to recognize and adapt to the insurgency that erupted in the summer and fall of 2003. Military police and interrogators who had previous experience in the Balkans, Guantanamo and Afghanistan found themselves, along with increasing numbers of less-experienced troops, in the midst of detention operations in Iraq the likes of which the Department of Defense had not foreseen. As Combined Joint Task Force-7 (CJTF-7) began detaining thousands of Iraqis suspected of involvement in or having knowledge of the insurgency, the problem quickly surpassed the capacity of the staff to deal with and the wherewithal to contain it. [...]

Some individuals seized the opportunity provided by this environment to give vent to latent sadistic urges. Moreover, many well-intentioned professionals, attempting to resolve the inherent moral conflict between using harsh techniques to gain information

to save lives and treating detainees humanely, found themselves in uncharted ethical ground, with frequently changing guidance from above. Some stepped over the line of humane treatment accidentally; some did so knowingly. Some of the abusers believed other governmental agencies were conducting interrogations using harsher techniques than allowed by the Army Field Manual 34-52, a perception leading to the belief that such methods were condoned. In nearly 10 percent of the cases of alleged abuse, the chain of command ignored reports of those allegations. More than once a commander was complicit. [...]

Today, the power to wage war can rest in the hands of a few dozen highly motivated people with cell phones and access to the Internet. Going beyond simply terrorizing individual civilians, certain insurgent and terrorist organizations represent a higher level of threat, characterized by an ability and willingness to violate the political sovereignty and territorial integrity of sovereign nations.

Essential to defeating terrorist and insurgent threats is the ability to locate cells, kill or detain key leaders, and interdict operational and financial networks. However, the smallness and wide dispersal of these enemy assets make it problematic to focus on signal and imagery intelligence as we did in the Cold War, Desert Storm, and the first phase of Operation Iraqi Freedom. The ability of terrorists and insurgents to blend into the civilian population further decreases their vulnerability to signal and imagery intelligence. Thus, information gained from human sources, whether by spying or interrogation, is essential in narrowing the field upon which other intelligence gathering resources may be applied. In sum, human intelligence is absolutely necessary, not just to fill these gaps in information derived from other sources, but also to provide clues and leads for the other sources to exploit. [...]

### **THE POLICY PROMULGATION PROCESS [...]**

In early 2002, a debate was ongoing in Washington on the application of treaties and laws to al Qaeda and Taliban. The Department of Justice, Office of Legal Counsel (OLC) advised DoD General Counsel and the Counsel to the President that, among other things:

- Neither the Federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions of al Qaeda prisoners,
- The President had the authority to suspend the United States treaty obligations applying to Afghanistan for the duration of the conflict should he determine Afghanistan to be a failed state,
- The President could find that the Taliban did not qualify for Enemy Prisoner-of-War (EPW) status under Geneva Convention III.

The Attorney General and the Counsel to the President, in part relying on the opinions of OLC, advised the President to determine the Geneva Conventions did not apply to the conflict with al Qaeda and the Taliban. The Panel understands DoD General Counsel's position was consistent with the Attorney General's and the Counsel to the President's position. Earlier, the Department of State had argued that the Geneva

Conventions in their traditional application provided a sufficiently robust legal construct under which the Global War on Terror could effectively be waged. [...]

Regarding the applicability of the Convention Against Torture and Other Cruel Inhumane or Degrading Treatment, the OLC opined on August 1, 2002 that interrogation methods that comply with the relevant domestic law do not violate the Convention. It held that only the most extreme acts, that were specifically intended to inflict severe pain and torture, would be in violation; lesser acts might be “cruel, inhumane, or degrading” but would not violate the Convention Against Torture or domestic statutes. The OLC memorandum went on to say, as Commander in Chief exercising his wartime powers, the President could even authorize torture, if he so decided. [...]

The Secretary of Defense directed the DoD General Counsel to establish a working group to study interrogation techniques. [...] The study led to the Secretary's promulgation on April 16, 2003 of the list of approved techniques. His memorandum emphasized appropriate safeguards should be in place and, further *“Use of these techniques is limited to interrogations of unlawful combatants held at Guantanamo Bay, Cuba.”* He also stipulated that four of the techniques should be used only in case of military necessity and that he should be so notified in advance. If additional techniques were deemed essential, they should be requested in writing, with “recommended safeguards and rationale for applying with an identified detainee.” [...]

In August 2003, MG Geoffrey Miller arrived to conduct an assessment of DoD counterterrorism interrogation and detention operations in Iraq. He was to discuss current theatre ability to exploit internees rapidly for actionable intelligence. He brought to Iraq the Secretary of Defense's April 16, 2003 policy guidelines for Guantanamo – which he reportedly gave to CJTF-7 as potential model – recommending a command-wide policy be established. He noted, however, the Geneva Conventions did apply to Iraq. In addition to these various printed sources, there was also a store of common lore and practice within the interrogator community circulating through Guantanamo, Afghanistan and elsewhere.

At the operational level, in the absence of more specific guidance from CENTCOM, interrogators in Iraq relied on FM34-52 and on unauthorized techniques that had migrated from Afghanistan. On September 14, 2003, Commander CJTF-7 signed the theater's first policy on interrogation which contained elements of the approved Guantanamo policy and elements of the SOF policy. Policies approved for use on al Qaeda and Taliban detainees who were not afforded the protection of EPW status under the Geneva Conventions now applied to detainees who did fall under the Geneva Convention protections. [...]

## INTERROGATION OPERATIONS

Any discussion of interrogation techniques must begin with the simple reality that their purpose is to gain intelligence that will help protect the United States, its forces and interests abroad. The severity of the post-September 11, 2001 terrorist threat and the escalating insurgency in Iraq make information gleaned from interrogations especially important. When lives are at stake, all legal and moral means of eliciting information

must be considered. Nonetheless, interrogations are inherently unpleasant, and many people find them objectionable by their very nature. [...]

## **INTERROGATION OPERATIONS ISSUES [...]**

### **Interrogation Techniques**

Interrogation techniques intended only for Guantanamo came to be used in Afghanistan and Iraq. Techniques employed at Guantanamo included the use of stress positions, isolation for up to 30 days and removal of clothing. In Afghanistan techniques included removal of clothing, isolating people for long periods of time, use of stress positions, exploiting fear of dogs, and sleep and light deprivation. Interrogators in Iraq, already familiar with some of these ideas, implemented them even prior to any policy guidance from CJTF-7. Moreover, interrogators at Abu Ghraib were relying on a 1987 version of FM 34-52, which authorized interrogators to control all aspects of the interrogation to include light, heating, food, clothing and shelter given to detainees.

A range of opinion among interrogators, staff judge advocates and commanders existed regarding what techniques were permissible. Some incidents of abuse were clearly cases of individual criminal misconduct. Other incidents resulted from misinterpretations of law or policy or confusion about what interrogation techniques were permitted by law or local SOPs. The incidents stemming from misinterpretation or confusion occurred for several reasons: the proliferation of guidance and information from other theatres of operation; the interrogators' experiences in other theatres; and the failure to distinguish between permitted interrogation techniques in other theatre environments and Iraq. Some soldiers or contractors who committed abuse may honestly have believed the techniques were condoned.

### **Use of Contractors and Interrogators**

As a consequence of the shortage of interrogators and interpreters, contractors were used to augment the workforce. Contractors were a particular problem at Abu Ghraib. The Army Inspector General found that 35 percent of the contractors employed did not receive formal training in military interrogation techniques, policy, or doctrine. The Naval Inspector General, however, found some of the older contractors had backgrounds as former military interrogators and were generally considered more effective than some of the junior enlisted military personnel. Oversight of contractor personnel and activities was not sufficient to ensure intelligence operations fell within the law and the authorized chain of command. Continued use of contractors will be required, but contracts must clearly specify the technical requirements and personnel qualifications, experience, and training needed. They should also be developed and administered in such a way as to provide the necessary oversight and management. [...]

## **THE ROLE OF MILITARY POLICE AND MILITARY INTELLIGENCE IN DETENTION OPERATIONS [...]**

### **ABU GHRAIB, IRAQ [...]**

#### **Request for Assistance**

Commander CJTF-7 recognized serious deficiencies at the prison and requested assistance. In response to this request, MG Miller and a team from Guantanamo were sent to Iraq to provide advice on facilities and operations specific to screening, interrogations, HUMINT collection and interagency integration in the short- and long-term. [...]

### **LAWS OF WAR/GENEVA CONVENTIONS [...]**

The United States became engaged in two distinct conflicts, Operation Enduring Freedom (OEF) in Afghanistan and Operation Iraqi Freedom (OIF) in Iraq. As a result of a Presidential determination, the Geneva Conventions did not apply to al Qaeda [sic] and Taliban combatants. Nevertheless, these traditional standards were put into effect for OIF and remain in effect at this writing. Some would argue this is a departure from the traditional view of the law of war as espoused by the ICRC and others in the international community.

#### **Operation Enduring Freedom [...]**

On February 7, 2002 the President issued a memorandum stating, in part,

... the war against terrorism ushers in a new paradigm .... Our nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

Upon this premise, the President determined the Geneva Conventions did not apply to the U.S. conflict with al Qaeda, and that Taliban detainees did not qualify for prisoner-of-war status. Removed from the protections of the Geneva Conventions, al Qaeda and Taliban detainees have been classified variously as “unlawful combatants,” “enemy combatants,” and “unprivileged belligerents”. [...]

The Panel notes the President qualified his determination, directing that United States policy would be “consistent with the principles of Geneva.” Among other things, the Geneva Conventions adhere to a standard calling for a delineation of rights for all persons, and humane treatment for all persons. They suggest that no person is “outlaw”, that is, outside the laws of some legal entity.

The Panel finds the details of the current policy vague and lacking. Justice Sandra Day O'Connor, writing for the majority in *Hamdi v Rumsfeld*, June 28, 2004 points out “the Government has never provided any court with the full criteria that it uses in classifying individuals as (enemy combatants).” Justice O'Connor cites several authorities to support the proposition that detention “is a clearly established principle of the law of

war,” but also states there is no precept of law, domestic or international, which would permit the indefinite detention of any combatant.

As a matter of logic, there should be a category of persons who do not comply with the specified conditions and thus fall outside the category of persons entitled to EPW status. Although there is not a particular label for this category in law of war conventions, the concept of “unlawful combatant” or “unprivileged belligerent” is a part of the law of war.

### **Operation Iraqi Freedom**

Operation Iraqi Freedom is wholly different from Operation Enduring Freedom. It is an operation that clearly falls within the boundaries of the Geneva Conventions and the traditional law of war. From the very beginning of the campaign, none of the senior leadership or command considered any possibility other than that the Geneva Conventions applied.

The message in the field, or the assumptions made in the field, at times lost sight of this underpinning. Personnel familiar with the law of war determinations for OEF in Afghanistan tended to factor those determinations into their decision-making for military actions in Iraq. Law of war policy and decisions germane to OEF migrated, often quite innocently, into decision matrices for OIF. We noted earlier the migration of interrogation techniques from Afghanistan to Iraq. Those interrogation techniques were authorized for OEF. More important, their authorization in Afghanistan and Guantanamo was possible only because the President had determined that individuals subjected to these interrogation techniques fell outside the strict protections of the Geneva Conventions.

One of the more telling examples of this migration centers around CJTF-7’s determination that some of the detainees held in Iraq were to be categorized as unlawful combatants. “Unlawful combatants” was a category set out in the President’s February 7, 2002 memorandum. Despite lacking specific authorization to operate beyond the confines of the Geneva Conventions, CJTF-7 nonetheless determined it was within their command discretion to classify, as unlawful combatants, individuals captured during OIF. CJTF-7 concluded it had individuals in custody who met the criteria for unlawful combatants set out by the President and extended it in Iraq to those who were not protected as combatants under the Geneva Conventions, based on the OLC opinions. While CJTF-7’s reasoning is understandable in respect to unlawful combatants, nonetheless, they understood there was no authorization to suspend application of the Geneva Conventions, in letter and spirit, to all military actions of Operation Iraqi Freedom. In addition, CJTF-7 had no means of discriminating detainees among the various categories of those protected under the Geneva Conventions and those unlawful combatants who were not.

### **THE ROLE OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS**

Since December 2001, the International Committee of the Red Cross (ICRC) has visited US detention operations in Guantanamo, Iraq and Afghanistan numerous times.



Various ICRC inspection teams have delivered working papers and reports of findings to US military leaders at different levels. While ICRC has acknowledged U.S. attempts to improve the conditions of detainees, major differences over detainee status as well as application of specific provisions of Geneva Conventions III and IV remain. If we were to follow the ICRC's interpretations, interrogation operations would not be allowed. This would deprive the U.S. of an indispensable source of intelligence in the war on terrorism. [...]

One important difference in approach between the U.S. and the ICRC is the interpretation of the legal status of terrorists. According to a Panel interview with CJTF-7 legal counsel, the ICRC sent a report to the State Department and the Coalition Provisional Authority in February 2003 citing lack of compliance with Protocol 1. But the U.S. has specifically rejected Protocol 1 stating that certain elements in the protocol, that provide legal protection for terrorists, make it plainly unacceptable. Still the U.S. has worked to preserve the positive elements of Protocol 1. In 1985, the Secretary of Defense noted that "certain provisions of Protocol 1 reflect customary international law, and others appear to be positive new developments. We therefore intend to work with our allies and others to develop a common understanding or declaration of principles incorporating these positive aspects, with the intention they shall, in time, win recognition as customary international law." In 1986 the ICRC acknowledged that it and the U.S. government had "agreed to disagree" on the applicability of Protocol 1. Nevertheless, the ICRC continues to presume the United States should adhere to this standard under the guise of customary international law.

This would grant legal protections to terrorists equivalent to the protection accorded to prisoners of war as required by the Geneva Conventions of 1949 despite the fact terrorists do not wear uniforms and are otherwise indistinguishable from non-combatants. To do so would undermine the prohibition on terrorists blending in with the civilian population, a situation which makes it impossible to attack terrorists without placing non-combatants at risk. For this and other reasons, the U.S. has specifically rejected this additional protocol.

The ICRC also considers the U.S. policy of categorizing some detainees as "unlawful combatants" to be a violation of their interpretation of international humanitarian law. It contends that Geneva Conventions III and IV, which the U.S. has ratified, allow for only two categories of detainees: (1) civilian detainees who must be charged with a crime and tried and (2) enemy combatants who must be released at the cessation of hostilities. In the ICRC's view, the category of "Unlawful combatant" deprives the detainees of certain human rights. It argues that lack of information regarding the reasons for detention and the conditions for release are major sources of stress for detainees.

However, the 1949 Geneva Conventions specify conditions to qualify for protected status. By logic, then, if detainees do not meet the specific requirements of privileged status, there clearly must be a category for those lacking in such privileges. The ICRC does not acknowledge such a category of "unprivileged belligerents", and argues that it is not consistent with its interpretation of the Geneva Conventions. [...]

On balance, the Panel concludes there is value in the relationship the Department of Defense historically has had with the ICRC. The ICRC should serve as an early warning indicator of possible abuse. Commanders should be alert to ICRC observations in their reports and take corrective actions as appropriate. The Panel also believes the ICRC, no less than the Defense Department, needs to adapt itself to the new realities of conflict, which are far different from the Western European environment from which the ICRC's interpretation of Geneva Conventions was drawn. The Department of Defense has established an office of detainee affairs and should continue to reshape its operational relationship with the ICRC.

### **RECOMMENDATIONS [...]**

9. The United States needs to redefine its approach to customary and treaty international humanitarian law, which must be adapted to the realities of the nature of conflict in the 21<sup>st</sup> Century. In doing so, the United States should emphasize the standard of reciprocity, in spite of the low probability that such will be extended to United States Forces by some adversaries, and the preservation of United States societal values and international image that flows from an adherence to recognized humanitarian standards. [...]

### **[APPENDIX C:]**

#### **THE WHITE HOUSE WASHINGTON**

**February 7, 2002**

MEMORANDUM FOR: THE VICE PRESIDENT  
THE SECRETARY OF STATE  
THE SECRETARY OF DEFENSE  
THE ATTORNEY GENERAL  
CHIEF OF STAFF TO THE PRESIDENT  
DIRECTOR OF CENTRAL INTELLIGENCE  
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY  
AFFAIRS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of Al Qaeda and Taliban Detainees

[...]

2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:

- a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.
  - b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.
  - c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."
  - d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.
3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva. [...]

[Signed: G.W. Bush.]

## [APPENDIX H:]

### ETHICAL ISSUES

#### Introduction

For the United States and other nations with similar value systems, detention and interrogation are themselves ethically challenging activities. Effective interrogators must deceive, seduce, incite, and coerce in ways not normally acceptable for members of the general public. As a result, the U.S. places restrictions on who may be detained and the methods interrogators may employ. Exigencies in the Global War on Terror have stressed the normal American boundaries associated with detention and interrogation. In the ensuing moral uncertainty, arguments of military necessity make the ethical foundation of our soldiers especially important.

### **Ethical Foundations of Detention and Interrogation**

Within our values system, consent is a central moral criterion on evaluating our behavior towards others. Consent is the manifestation of the freedom and dignity of the person and, as such, plays a critical role in moral reasoning. Consent *restrains*, as well as *enables*, humans in their treatment of others. Criminals, by not respecting the rights of others, may be said to have consented – in principle – to arrest and possible imprisonment. In this construct – and due to the threat they represent – insurgents and terrorists “consent” to the possibility of being captured, detainees, interrogated, or possibly killed. [...]

### **Permissions and Limits on Interrogation Techniques**

For the U.S., most cases for permitting harsh treatment of detainees on moral grounds begin with variants of the “ticking time bomb” scenario. The ingredients of such scenarios usually include an impending loss of life, a suspect who knows how to prevent it – and in most versions is responsible for it – and a third party who has no humane alternative to obtain the information in order to save lives. Such cases raise a perplexing moral problem: Is it permissible to employ inhumane treatment when it is believed to be the only way to prevent loss of lives? In periods of emergency, and especially in combat, there will always be a temptation to override legal and moral norms for morally good ends. Many in Operations Enduring Freedom and Iraqi Freedom were not well prepared by their experience, education, and training to resolve such ethical problems.

A morally consistent approach to the problem would be to recognize there are occasions when violating norms is understandable but not necessarily correct – that is, we can recognize that a good person might, in good faith, violate standards. In principle, someone who, facing such a dilemma, committed abuse should be required to offer his actions up for review and judgment by a competent authority. An excellent example is the case of a 4<sup>th</sup> Infantry Division battalion commander who permitted his men to beat a detainee whom he had good reason to believe had information about future attacks against his unit. When the beating failed to produce the desired results, the commander fired his weapon near the detainee’s head. The technique was successful and the lives of U.S. servicemen were likely saved. However, his actions clearly violated the Geneva Conventions and he reported his actions knowing he would be prosecuted by the Army. He was punished in moderation and allowed to retire.

In such circumstances interrogators must apply a “minimum harm” rule by not inflicting more pressure than is necessary to get the desired information. Further, any treatment that causes permanent harm would not be permitted, as this surely constitutes torture. Moreover, any pain inflicted to teach a lesson or after the interrogator has determined he cannot extract information is morally wrong.

National security is an obligation of the state, and therefore the work of interrogators carries a moral justification. But the methods employed should reflect this nation’s commitment to our own values. Of course the tension between military necessity and our values will remain. Because of this, military professionals must accept the

reality that during crises they may find themselves in circumstances where lives will be at stake and the morally appropriate methods to preserve those lives may not be obvious. This should not preclude action, but these professionals must be prepared to accept the consequences. [...]

## **B. Reactions of the International Committee of the Red Cross to the Schlesinger Panel Report on Department of Defense Detention Operations**

[Source: Reactions of the International Committee of the Red Cross to the Schlesinger Panel Report on Department of Defence Detention Operations; 8.09.2004, available on <http://www.icrc.org>]

The Schlesinger Panel Report is a significant document and a welcome example of self-examination in the face of trying circumstances. It draws valuable lessons by naming violations, attributing responsibility, and offering recommendations designed to avoid repetition.

At the same time, the Panel Report contains a number of inaccurate assertions, conclusions and recommendations on the legal positions taken by, and the role of, the ICRC, and about the laws of armed conflict.

The ICRC's reactions to them follow. [...]

## **II. ON THE LEGAL POSITIONS OF THE ICRC**

### **A. Page 85: "If we were to follow the ICRC's interpretations, interrogation operations would not be allowed."**

The ICRC has never stated, suggested or intimated that interrogation of any detainee is prohibited, regardless of the detainee's status or lack of status under the Geneva Conventions. The ICRC has always recognized the right of States to take measures to address their security concerns. It has never called into question the right of the US to gather intelligence and conduct interrogations in furtherance of its security interests. Neither the Geneva Conventions, nor customary humanitarian law, prohibit intelligence gathering or interrogation. They do, however, require that detainees be treated humanely and their dignity as human beings protected. More specifically, the Geneva Conventions, customary humanitarian law and the Convention against Torture prohibit the use of torture and other forms of cruel, inhuman or degrading treatment. This absolute prohibition is also reflected in other international legal instruments and in most national laws.

### **B. Page 86: "This [U.S. adherence to legal standards of detention contained in Additional Protocol I to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts] would grant legal protections to terrorists equivalent to the protections accorded to prisoners of war as required**

**by the Geneva Conventions of 1949 despite the fact terrorists do not wear uniforms and are otherwise indistinguishable from combatants.”**

The provisions of Additional Protocol I to which the ICRC refers are the “fundamental guarantees” of Article 75. The U.S. has explicitly accepted these provisions as binding customary international law (see: “The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions”, Michael J. Matheson, 2 Am.U.J.Int’l L.&Pol.” Y419-31 (1987)). [...]

**D. Page 86-7: “[The ICRC] contends that Geneva Conventions III and IV allow for only two categories of detainees: (1) civilian detainees who must be charged with a crime and tried and (2) enemy combatants who must be released at the cessation of hostilities.”**

The ICRC does not make such an assertion. Its reading of this issue is simply based on the Conventions themselves.

- a) Civilians who pose a severe security risk may, indeed, be detained without criminal charge in international armed conflict. Their internment must be reviewed twice a year, but can be extended as long as hostilities continue and they continue to pose a serious security risk. They must be released as soon as possible after the end of the hostilities unless they are being prosecuted or serving a sentence.
- b) All enemy combatants (whether they qualify for prisoner-of-war status or treatment under Geneva Convention III, or are covered by Geneva Convention IV or by the customary provisions of Article 75 Protocol I) may be detained beyond the conflict if they are being prosecuted or are serving a sentence.

**E. Page 87: “[I]f detainees do not meet the specific requirements of privileged status (under the Geneva Conventions), there clearly must be a category for those lacking such privileges. The ICRC does not acknowledge such a category of “unprivileged belligerents”, and argues that it is not consistent with its interpretation of the Geneva Conventions.”**

Although the Panel acknowledges the existence of Geneva Convention IV Relative to the Protection of Civilians, it assumes that if one does not qualify for prisoner-of-war status under Geneva Convention III, one is necessarily outside the entire scheme of the Conventions. This reflects a failure to acknowledge that such persons are entitled to the protections of Geneva Convention IV if they fulfil the nationality criteria set forth by Article 4 of this Convention. The ICRC rejects the concept of a status outside the framework of armed conflict for persons who, in fact, are entitled to the protections of either Geneva Convention III or IV, or by the customary provisions of Article 75 Protocol I. This position is in line with the clear text of both Conventions and with the US position on the customary nature of Article 75 Protocol I.

### III. ON THE LAWS OF ARMED CONFLICT

**A. Page 81: “The Panel accepts the proposition that these terrorists are not combatants entitled to the protections of Geneva Convention III. Furthermore, the Panel accepts the conclusion the Geneva Convention IV and the provisions of domestic criminal law are not sufficiently robust and adequate to provide for the appropriate detention of captured terrorist.”**

1. Geneva Convention III and the relevant U.S. Army Regulations call for status determinations by a “competent tribunal” precisely to determine whether a person, having committed a belligerent act and having fallen into the hands of the enemy in the frame of an international armed conflict, meets the criteria for prisoner-of-war status. Thus, one cannot conclude that a detainee is not entitled to the protections of the Third Convention without first following the procedures set out in the Convention for making such a determination. See also II.E above.
2. The ICRC is concerned about the suggestion that Geneva Convention IV may be ignored because it is “not sufficiently robust”. Geneva Convention IV explicitly acknowledges the existence of circumstances under which persons who fall within its terms may be deprived of their liberty. Such persons may be interned for imperative security reasons and for as long as these imperative reasons exist. They may be charged with criminal conduct, tried, convicted, and sentenced (to terms beyond the end of the conflict and even to death under certain conditions). They should be prosecuted for war crimes, that is, serious violations of the laws and customs of war. They can also be prosecuted for unlawful participation in hostilities (and therefore be called “unlawful combatants”, although this terminology is not used in IHL), but such prosecution does not entail their exclusion from the protection of Geneva Convention IV. Geneva Convention IV does not contain any prohibition of interrogation. Furthermore, the Panel’s suggestion that because Geneva Convention IV would not be “sufficiently robust” it could be waived by decision of individual State parties is a dangerous premise. To accept this argument would mean creating an exception that risks undermining all the humanitarian protections of the law.

**B. Page 82: “As a matter of logic, there should be a category of persons who do not comply with the specified conditions and thus fall outside the category of persons entitled to EPW (enemy prisoner of war) status. Although there is not a particular label for this category in law of war conventions, the concept of ‘unlawful combatant’ or ‘unprivileged belligerent’ is part of the law of war”**

This assertion promotes the argument that persons who fail to qualify for prisoner-of-war status under Geneva Convention III are categorically outside of the protections of the Geneva Conventions. However, Geneva Convention IV, Article 4 provides protected status to persons “who find themselves... in the hands of a party to the conflict”, unless they fail to meet certain nationality criteria or are covered by the other Geneva Conventions. Detainees not protected by those other Conventions, and who do meet the nationality criteria for coverage under Geneva Convention IV, do, indeed, “have a

label in the law of war conventions". That label is "civilian", or "protected person" under Geneva Convention IV – even if they are definitely suspected of activity hostile to the security of the detaining State or of being "unlawful combatants". Persons who do not meet the nationality criteria are covered by Article 75 of Additional Protocol I to the Geneva Conventions. This article forms part of customary international law.

#### IV. ON THE RECOMMENDATIONS

**A. The United States needs to redefine its approach to customary and treaty international humanitarian law, which must be adapted to the realities of the nature of conflict in the 21<sup>st</sup> Century. In doing so, the United States should emphasize the standard of reciprocity... The Panel believes the International Committee of the Red Cross, no less than the Defense Department, needs to adapt itself to the new realities of conflict which are far different from the Western European environment from which the ICRC's interpretation of Geneva Conventions was drawn. (Recommendations 9 and 10).**

The purposes and principles of humanitarian law are of universal origin. The perspective of the ICRC, which has been operating for 140 years and does so today in all corners of the globe, is firmly based on this tradition. The Geneva Conventions codify these principles and are among the most widely ratified international treaties in the world. That said, there is no doubt that the conflicts of today differ markedly from those that led to the Geneva Conventions of 1949, and the ICRC continues to initiate or participate in debates about how the Geneva Conventions can best be applied in contemporary situations of armed conflict.

Nevertheless, a decision to deviate unilaterally from these universally established standards should not be taken lightly. To date, there has been little evidence presented that faithful application of existing law is an impediment in the pursuit of those who violate the same law.

Moreover, the standard of reciprocity cannot apply to fundamental safeguards such as prohibition of torture without accepting the risk of destroying not only the principle of law, but also the very values on which it is built.

#### DISCUSSION

1. For which reasons do you think such a report was commissioned by the US Department of Defence? (GC I-IV, Art. 1)
2. Do you agree on the fact that "... in waging the Global War on Terror, the military confronts a far wider range of threats" than in other conflicts? Was the conflict against Iraq part of the "global war on terror"? Which kind of "new threats" could you think of? Which of those "new threats" raise issues not contemplated/regulated by existing rules of IHL?
3. Do you consider it possible to unilaterally "suspend [...] treaty obligations [...] for the duration of the conflict" if the said conflict takes place in a failed State? Under IHL? Under public international law? At least concerning Convention III? (GC I-IV, Arts 1 and 2; GC III, Art. 4)



4. How far can States party to the Convention against Torture (see <http://www.icrc.org/ihl>) and the Geneva Conventions go in interpreting the definitions of torture and other cruel, inhuman or degrading treatments? How could you justify that “as Commander in Chief exercising [...] wartime powers”, a Head of State could “authorize torture if he so decided?”
5. Do the States party to the treaties of IHL have the power to create new legal categories such as “unlawful combatants”?
6. Do you agree with the theory that Conventions III and IV allow for only two categories of detainees: prisoners of war and detained protected civilians (brought to trial, sentenced or held as civilian internees)? Why do you think that the ICRC is so insistent in excluding other categories? What rules of IHL would apply to such other categories of persons? (GC IV, Art. 4; P I, Art. 75)
7. Can a State reject certain provisions of a treaty and at the same time “work to preserve the positive elements” of the said treaty? On which basis could the latter elements be considered as binding the State concerned?
8. Does the fact that “some incidents or abuse were clearly cases of individual criminal conduct” and that other incidents were the results of “misinterpretation of law or policy or confusion about what interrogation techniques were permitted” have an influence on the legal responsibility of the parties to the conflict? On the individual criminal responsibility of the perpetrators?
9. The report mentions a wide use of private individuals contracted to conduct interrogation operations in detention facilities. Is this recourse to non-military personnel legal? What kind of problems could result from such practice? (GC III, Arts 12, 39 and 127; GC IV, Arts 29, 99 and 144)
10. On which legal basis did the ICRC visit US detention operations in Guantánamo, Iraq and Afghanistan? Is this right to visit absolute? Can it be suspended? What are the purposes of such visits? (GC III, Art. 126; GC IV, Arts 5 and 143)
11. How far could and should the ICRC “adapt itself to the new realities of conflicts”? Is such an adaptation possible? Lawful? Necessary?

## Case No. 186, Iraq, Medical Ethics in Detention

**A. Abu Ghraib: its Legacy for Military Medicine**

[Source: MILES, Steven H., *Abu Ghraib: its legacy for military medicine*, The Lancet, Volume 364, No. 9435, 21 August 2004; footnotes omitted]

The complicity of US military medical personnel during abuses of detainees in Iraq, Afghanistan, and Guantanamo Bay is of great importance to human rights, medical ethics, and military medicine. Government documents show that the US military medical system failed to protect detainees' human rights, sometimes collaborated with interrogators or abusive guards, and failed to properly report injuries or deaths caused by beatings. An inquiry into the behaviour of medical personnel in places such as Abu Ghraib could lead to valuable reforms within military medicine.

**The policies**

As the Bush administration planned to retaliate against al-Qaeda's terrorist attacks on the USA, it was reluctant to accept that the Geneva Convention Relative to the Treatment of Prisoners of War would apply to al-Qaeda detainees. In January, 2002, a memorandum from the US Department of Justice to the Department of Defense concluded that since al-Qaeda was not a national signatory to international conventions and treaties, these obligations did not apply. It also concluded that the Convention did not apply to Taliban detainees because al-Qaeda's influence over Afghanistan's government meant that it could not be a party to treaties. In February, 2002, the US president signed an executive order stating that although the Geneva Conventions did not apply to al-Qaeda or Taliban detainees, "our nation ... will continue to be a strong supporter of Geneva and its principles ... the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity in a manner consistent with the principles of Geneva." This phrasing subordinates US compliance to the Geneva Convention to undefined "military necessity."

An August, 2002 Justice Department memorandum to the President and a March, 2003 Defense Department Working Group distinguished cruel, inhumane, or degrading treatment, which could be permitted in US military detention centres, from torture, which was ordinarily banned except when the President set aside the US commitment to the Convention in exercising his discretionary war-making powers. These memoranda semantically analysed the words "harm" or "profound disruption of the personality" in legal definitions of torture without grounding the terms on references to research showing the prevalence, severity, or duration of harm from abusing detainees. Also, the memoranda do not distinguish between coercive interrogation involving soldiers from those employing medical personnel or expertise. For example, both documents excuse the use of drugs during interrogation. Neither document

mentions medical ethics codes or the history of medical or psychiatric complicity with torture or inhumane treatment.

[...]

The Interrogation Rules of Engagement posted at Abu Ghraib stated: “[Interrogation] Approaches must always be humane ... Detainees will NEVER be touched in a malicious or unwanted manner ... the Geneva Conventions apply.” These rules were imported from the US operation in Afghanistan and echoed the 2003 memo by the Secretary of Defense. They stated: “Wounded or medically burdened detainees must be medically cleared prior to interrogation” and approved “Dietary manipulation (monitored by med)” for interrogation. Defense Department memoranda define the latter as substituting hot meals to cold field rations rather than food deprivation but there are credible reports of food deprivation.

Although US military personnel receive at least 36 minutes of basic training on human rights, Abu Ghraib military personnel did not receive additional human rights training and did not train civilian interrogators working there. Military medical personnel in charge of detainees in Iraq and Afghanistan denied being trained in Army human rights policies. Local commanding officers were unfamiliar with the Geneva Convention or Army Regulations regarding abuses. [...]

### **The offences**

Confirmed or reliably reported abuses of detainees in Iraq and Afghanistan include beatings, burns, shocks, bodily suspensions, asphyxia, threats against detainees and their relatives, sexual humiliation, isolation, prolonged hooding and shackling, and exposure to heat, cold, and loud noise. These include deprivation of sleep, food, clothing, and material for personal hygiene, and denigration of Islam and forced violation of its rites. Detainees were forced to work in areas that were not demined and seriously injured. Abuses of women detainees are less well documented but include credible allegations of sexual humiliation and rape.

US Army investigators concluded that Abu Ghraib’s medical system for detainees was inadequately staffed and equipped. The International Committee of the Red Cross (ICRC) found that the medical system failed to maintain internment cards with medical information necessary to protect the detainees’ health as required by the Geneva Convention; this reportedly was due to a policy of not officially processing (i.e. recording their presence in the prison) new detainees. Few units in Iraq and Afghanistan complied with the Geneva obligation to provide monthly health inspections. The medical system also failed to assure that prisoners could request proper medical care as required by the Geneva Convention. For example, an Abu Ghraib detainee’s sworn document says that a purulent hand injury caused by torture went untreated. The individual was also told by an Iraqi physician working for the US that bleeding of his ear (from a separate beating) could not be treated in a clinic; he was treated instead in a prison hallway.

The medical system failed to establish procedures, as called for by Article 30 of the Geneva Convention, to ensure proper treatment of prisoners with disabilities. An Abu Ghraib prisoner's deposition reports the crutch that he used because of a broken leg was taken from him and his leg was beaten as he was ordered to renounce Islam. The same detainee told a guard that the prison doctor had told him to immobilise a badly injured shoulder; the guard's response was to suspend him from the shoulder. The medical system collaborated with designing and implementing psychologically and physically coercive interrogations. Army officials stated that a physician and a psychiatrist helped design, approve, and monitor interrogations at Abu Ghraib. This echoes the Secretary of Defense's 2003 memo ordering interrogators to ensure that detainees are "medically and operationally evaluated as suitable" for interrogation plans. In one example of a compromised medically monitored interrogation, a detainee collapsed and was apparently unconscious after a beating, medical staff revived the detainee and left, and the abuse continued. There are isolated reports that medical personnel directly abused detainees. Two detainees' depositions describe an incident where a doctor allowed a medically untrained guard to suture a prisoner's laceration from *[sic]* being beaten.

The medical system failed to accurately report illnesses and injuries. Abu Ghraib authorities did not notify families of deaths, sicknesses, or transfers to medical facilities as required by the Convention. A medic inserted an intravenous catheter into the corpse of a detainee who died under torture in order to create evidence that he was alive at the hospital. In another case, an Iraqi man, taken into custody by US soldiers was found months later by his family in an Iraqi hospital. He was comatose, had three skull fractures, a severe thumb fracture, and burns on the bottoms of his feet. An accompanying US medical report stated that heat stroke had triggered a heart attack that put him in a coma; it did not mention the injuries.

Death certificates of detainees in Afghanistan and Iraq were falsified or their release or completion was delayed for months. Medical investigators either failed to investigate unexpected deaths of detainees in Iraq and Afghanistan or performed cursory evaluations and physicians routinely attributed detainee deaths on death certificates to heart attacks, heat stroke, or natural causes without noting the unnatural aetiology of the death. In one example, soldiers tied a beaten detainee to the top of his cell door and gagged him. The death certificate indicated that he died of "natural causes during his sleep." After news media coverage, the Pentagon revised the certificate to say that the death was a "homicide" caused by "blunt force injuries and asphyxia." [...]

### **The legacy**

Pentagon officials offer many reasons for these abuses including poor training, understaffing, overcrowding of detainees and military personnel, anti-Islamic prejudice, racism, pressure to procure intelligence, a few criminally-inclined guards, the stress of war, and uncertain lengths of deployment. Fundamentally however, the stage for these offences was set by policies that were lax or permissive with regard to human rights abuses, and a military command that was inattentive to human rights.

Legal arguments as to whether detainees were prisoners of war, soldiers, enemy combatants, terrorists, citizens of a failed state, insurgents, or criminals miss an essential point. The US has signed or enacted numerous instruments including the UN Universal Declaration of Human Rights, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Standard Minimum Rules for the Treatment of Prisoners, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and US military internment and interrogation policies, collectively containing mandatory and voluntary standards barring US armed forces from practicing torture or degrading treatments of all persons. [...]

The Geneva Convention states: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction ... The following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; ... Outrages upon personal dignity, in particular, humiliating and degrading treatment ... No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." [...]

Pentagon leaders testified that military officials did not investigate or act on reports by Amnesty International and the ICRC of abuses at Abu Ghraib and other coalition detention facilities throughout 2002 and 2003. The command at Abu Ghraib and in Iraq was inattentive to human rights organisations' and soldiers' oral and written reports of abuses. [...]

The role of military medicine in these abuses merits special attention because of the moral obligations of medical professionals with regard to torture and because of horror at health professionals who are silently or actively complicit with torture. Active medical complicity with torture has occurred throughout the world. Physicians collaborated with torture during Saddam Hussein's regime. Physicians' and nurses' professional organisations have created codes against participation in torture [See *infra C., The Tokyo Declaration*]. [...] Numerous non-medical groups have asserted that healers must be advocates for persons at risk of torture. [...]

At the operational level, medical personnel evaluated detainees for interrogation, and monitored coercive interrogation, allowed interrogators to use medical records to develop interrogation approaches, falsified medical records and death certificates, and failed to provide basic health care.

Which medical professionals were responsible for this misconduct? The US Armed Forces deploy physicians, physicians' assistants, nurses, medics (with several months of training), and various command and administrative staff. International statements assert that every health-care worker has an ethical duty to oppose torture. For example, the UN Principles of Medical Ethics Relevant to the Protection of Prisoners

Against Torture refers to “health personnel,” “particularly physicians” but it also names physicians’ assistants, paramedics, physical therapists and nurse practitioners. Likewise, the Geneva Convention refers to the duties of physicians, surgeons, dentists, nurses, and medical orderlies. Furthermore, the US Armed Forces medical services are under physician commanders and each medic, as with civilian physicians’ assistants, is personally accountable to a physician. Thus, physicians are responsible for the policies of the medical system; military medical personnel should abide by the ethics of medicine regarding torture.

Abu Ghraib will leave a substantial legacy. Medical personnel prescribed antidepressants to and addressed alcohol abuse and sexual misconduct in US soldiers in the psychologically destructive prison milieu. The reputation of military medicine, the US Armed Forces, and the USA was damaged. The eroded status of international law has increased the risk to individuals who become detainees of war since Abu Ghraib because it has decreased the credibility of international appeals on their behalf. [...]

## B. Legal Analysis of Torture by US Medical Personnel

[Source: Physicians for Human Rights, “Broken Laws, Broken Lives, Medical Evidence of Torture by US Personnel and its Impact,” Report, June 2008, available at <http://physiciansforhumanrights.org/>, footnotes omitted]

[...]

### Chapter 4: Patterns of Torture and Ill-Treatment

[...]

#### Health Professional Complicity and Denial of Medical Care

Some of the detainees reported that they received good and appropriate medical care during their detention. However, both the experiences recounted by the detainees and the medical records available in one of the cases show how physicians and other health workers became, at best, ethically compromised in these detention settings. At worst, health professionals at these sites became enablers of torture by providing medical care in an environment where torture was taking place. In fact, in some cases health professionals may have given interrogators the “green light” to continue with abusive techniques and, in other cases, the health professionals effectively patched the detainees up so that they could be abused further. [...]

In Iraq, the availability of professional and humane care was far worse. [...] [T]he detainees reported that even accessing medical care was very difficult.

Questions of quality and access, however, do not fully encompass the very problematic role health professionals played [...]. Even those health professionals who sought to restrict themselves to clinical roles and steered clear of interrogation support became part of the machinery of torture. PHR has no information about whether physicians or other health personnel reported torture to authorities, but they surely did not intervene to stop torture when they were in its midst or were examining those subjected to it. Moreover, in the one case where medical records are available, it is

apparent that the health staff provided pharmacological treatment for suicidal, self destructive, and partly psychotic behavior that is at least partially attributable to the torture – including isolation – the detainee experienced, yet the health providers only marginally intervened to stop his torture.

Nine former detainees evaluated reported that health professionals examined their condition during an episode of torture or physical abuse but, as far as the detainees could tell, made no effort to stop it. One man stated that during his initial interrogation at Baghdad airport someone who seemed to be a doctor was present to monitor his heart and blood pressure. The detainee was suspended in the air, which caused his arm to dislocate. The person whom the detainee surmised to be a doctor put his arm back in its place and then informed the interrogators that they could “continue.” A detainee at Abu Ghraib reported that after having electric shock administered, he passed out on the floor. He remembered gaining consciousness as a person whom he believed was a doctor revived him and appeared to grant permission for the interrogators to continue. He also recalled that despite repeated requests for medical attention for his hand, he was only given one tablet daily for pain.

[...]

Moreover, PHR evaluators concluded that the health professionals clearly failed to adequately evaluate, document, or treat severe psychological symptoms and their behavioral manifestations, particularly post-traumatic stress disorder. Finally, despite multiple incidents of self-injurious behavior and suicide attempts by the individual, including banging his head against a wall, attempted hanging, and participating in hunger strike, psychiatrists list “routine stressors of confinement” as part of their findings in diagnosing the detainee. In doing so, they disregarded cruel or ill-treatment as a likely cause of these symptoms. This is reinforced by the fact that when torture ended in the last years of his confinement, so did his symptoms of mental illness. In sum, the health professionals were complicit in the torture of this detainee.

The medical records do not indicate that the health professionals inquired into or documented any form of ill-treatment perpetrated by US soldiers. Instead, their interventions and documentation obfuscate the relationship between the detainee’s abuse and ill-treatment in confinement and his deteriorating mental and physical condition.

[...]

## **Chapter 6: Legal Analysis**

### **Legal Prohibitions against Torture and Ill-Treatment**

Many of the practices described in this report are torture under the law. [...]

The international agreements promulgated include the International Covenant on Civil and Political Rights (ICCPR) (prohibiting cruel, inhuman or degrading punishment), the Geneva Conventions (including provisions governing prisoners of war and Common Article 3, which prohibits torture and “outrages on personal dignity”), and

the UN Convention Against Torture (prohibiting both torture and cruel, inhuman or degrading treatment in all circumstances). These treaties, to which the United States is a party, absolutely prohibit the use of torture and other cruel, inhuman or degrading treatment.

Further, this prohibition has also long been a part of customary international law and has risen to the level of *jus cogens*, such that it is now a “higher law” that cannot be violated by any State. All countries are bound by the international instruments to which they are a party as well as *jus cogens* norms. [...]

This prohibition against torture is firmly embedded in US law. [...] The War Crimes Act (WCA), which applies to any circumstance “where the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States,” criminalizes “torture” and “other cruel or inhuman treatment.” [See Case No. 70, United States, War Crimes Act]

In response to claims by the Bush Administration that certain laws did not apply to all detainees in US custody, Congress passed the Detainee Treatment Act (DTA) in 2005. Although the DTA was enacted after the events described in this report, it reaffirmed the longstanding US prohibition on cruel, inhuman, or degrading treatment. It clearly states that the prohibition applies extraterritorially, in contrast to the position of the Bush Administration. [...]

Likewise, the Military Commissions Act of 2006 (MCA), which was enacted after the Supreme Court rendered its decision in *Hamdan v. Rumsfeld*, was not in force at the time the detainees evaluated for this report were in custody, but reinforced the already-standing legal prohibition on torture. The MCA amended and narrowed the War Crimes Act to limit the instances in which criminal sanctions could apply to certain “grave breaches” of Common Article 3 of the Geneva Conventions, but includes torture and cruel or inhuman treatment as war crimes.

[...]

Three of these sources of US law are particularly important in assessing the conduct of US personnel against the detainees evaluated for this report.

First, the federal criminal statute prohibiting the commission of torture outside the United States [...].

Second, the Geneva Conventions, which are international treaties that govern the conduct of war, outlaw the conduct described here. [...]

Even in circumstances of armed conflict where other provisions of the Geneva Conventions do not apply, Article 3, common to all the Conventions, (“Common Article 3”) does apply and prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment.” Under the law as it applied during the period covered by this report, that is, prior the enactment of the MCA, all violations of Common Article 3 were deemed war crimes under the War Crimes Act.



Third, US military law also outlaws torture. The Uniform Code of Military Justice (UCMJ) is applicable to US military personnel at all times and in all places throughout the world. It establishes penalties for acts of cruelty, oppression or maltreatment.

[...]

## **Chapter 7: Conclusion and Recommendations**

[...]

This consistent pattern, especially when considered in conjunction with the many other reports about detainee treatment, including those from official investigations by the US government, the International Committee of the Red Cross, first-hand accounts, and the media, as well as government documents, leads to the conclusion that United States systematically employed torture and ill-treatment against detainees during the periods covered by this report.

The abusive practices reported by the detainees in this investigation took place in a context of official authorization, legal justification, and tactical standardization (...). Many of the methods used were officially authorized by civilian and military authorities during at least some of the periods during which the detainees were held in US custody. From evidence available, other abusive practices found in this report, such as routine beatings, electric shocks, and sexual violence, do not appear ever to have been authorized, but were nevertheless tolerated within a permissive command environment. The creation of this environment was neither incidental nor accidental. Rather, it resulted directly from a radical and unjustifiable re-interpretation of US and international law that stripped human rights protections from detainees in U.S custody. Legal opinions issued by the Department of Justice and the Department of Defense dehumanized detainees and encouraged the formulation of policies and practices that inevitably led to widespread abuse.

Congress has taken some steps to end many of these practices and authorizations, although some have been undermined or subverted by the President. The Detainee Treatment Act extends the prohibition on cruel, inhuman or degrading treatment extra-territorially, although a signing statement by the President assumed authority to ignore the law [...].

The Defense Department, too, has both repudiated and prohibited many of the interrogation practices and conditions of detention set out in this report. In September 2006, it issued a new field manual on interrogation that requires compliance with the Geneva Conventions and prohibits the use of torture or cruel, inhuman or degrading treatment. [...] On the other hand, an appendix in the new field manual continues to permit the use of isolation for up to thirty days per authorization and limiting sleep to four hours a night for individuals who are Unlawful Enemy Combatants and are not designated as Prisoners of War. [...]

It must be noted that no independent investigation that includes access to all relevant documents and officials has been conducted of US detainee treatment and interrogation practices during the period covered by this report, and no individuals

other than a few enlisted personnel and one officer at Abu Ghraib have been prosecuted for their actions in performing or authorizing the conduct described here. Furthermore, no effort to provide compensation of any kind to the individuals who have suffered grievous harm as a result of the torture and cruel, inhuman and degrading treatment inflicted on them has been forthcoming.

[...]

"Copyright Physicians for Human Rights, all rights reserved. Used with permission"

## C. The Tokyo Declaration

[Source: The Tokyo Declaration; Adopted by the 29<sup>th</sup> World Medical Assembly Tokyo, Japan, October 1975; available on <http://www.wma.net/e/policy/c18.htm>]

World Medical Association Declaration of Tokyo. Guidelines for Medical Doctors Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment.

Adopted by the 29<sup>th</sup> World Medical Assembly Tokyo, Japan, October 1975.

### PREAMBLE

It is the privilege of the medical doctor to practise medicine in the service of humanity, to preserve and restore bodily and mental health without distinction as to persons, to comfort and to ease the suffering of his or her patients. The utmost respect for human life is to be maintained even under threat, and no use made of any medical knowledge contrary to the laws of humanity.

For the purpose of this Declaration, torture is defined as the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force another person to yield information, to make a confession, or for any other reason.

### DECLARATION

1. The doctor shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offense of which the victim of such procedures is suspected, accused or guilty, and whatever the victim's beliefs or motives, and in all situations, including armed conflict and civil strife.
2. The doctor shall not provide any premises, instruments, substances or knowledge to facilitate the practice of torture or other forms of cruel, inhuman or degrading treatment or to diminish the ability of the victim to resist such treatment.
3. The doctor shall not be present during any procedure during which torture or other forms of cruel, inhuman or degrading treatment is used or threatened.

4. A doctor must have complete clinical independence in deciding upon the care of a person for whom he or she is medically responsible. The doctor's fundamental role is to alleviate the distress of his or her fellow men, and no motive whether personal, collective or political shall prevail against this higher purpose.
5. Where a prisoner refuses nourishment and is considered by the doctor as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent doctor. The consequences of the refusal of nourishment shall be explained by the doctor to the prisoner.
6. The World Medical Association will support, and should encourage the international community, the national medical associations and fellow doctors to support the doctor and his or her family in the face of threats or reprisals resulting from a refusal to condone the use of torture or other forms of cruel, inhuman or degrading treatment.

## DISCUSSION

1. How would you qualify the US military intervention in Iraq? Can the US deny the applicability of IHL? Can the US President set aside his country's commitment to the Geneva Conventions in exercising his discretionary war-making powers? Can the US unilaterally re-interpret international treaties?
2.
  - a. Do detainees in Iraq benefit from POW status? If they do not, are they perforce protected civilians if they are Iraqi nationals? Even if they are "unlawful Enemy Combatants"? Does this category exist under IHL? Does it grant any protection? Is it different from the protection granted to POWs? To protected civilians?
  - b. Does the status of detainees (whether POWs, protected civilians or not) have an impact on the obligations of medical personnel toward them?
3. Are the members of military medical services subject to the same obligations as civilian health care personnel? May military orders or procedures differ from established principles of medical ethics?
4.
  - a. Documents A. and B. of this case state that, in this particular context, a "collaboration" has been established between the medical staff and those in charge of interrogating prisoners and detainees. Is such collaboration possible? Never? Sometimes? If yes, under what conditions and in which circumstances?
  - b. Under IHL, may medical staff refuse to cooperate in interrogating prisoners? In acts of torture? Must they refuse to perform acts equivalent to acts of torture? Must they denounce acts of torture perpetrated by military staff? Can they be punished for refusing to obey? (GC III, Arts 13, 14, 17, 30; GC IV, Arts 16, 27, 29, 31, 32, 91, 92, 129, 137 and 138; P I, Arts 11 and 16; CIHL, Rules 87, 88, 90-93, 104, 118, 121-123, 127)
5.
  - a. Which acts and omissions by medical personnel mentioned in Documents A. and B. violated IHL? In your opinion, do the principles of medical ethics applicable in peacetime differ from those applicable in situations of armed conflict? (GC III, Arts 13, 14, 17, 30, 31, 120, 122(2), (3), (5) and (6); GC IV, Arts 16, 27, 29, 31, 32, 91, 92, 129, 137 and 138; P I Arts 11 and 16; CIHL Rules 87, 88, 90-93, 104, 118, 121-123, 127)

- b. Do these violations amount to grave breaches of IHL? Do they amount to war crimes?
- c. Can physicians, physicians' assistants and/or nurses who collaborated with or tolerated such violations be held accountable for acts ordered by military officials? For acts not specifically authorized? Does the fact that the acts of ill-treatment were authorized or endorsed by medical personnel preclude criminal responsibility of the military or civilian staff who committed them?

**Case No. 187, Iraq, Care for Wounded Enemies**

[Source: Robert Bazell, "A Human Life is a Human Life," in *NBC News*, 2 March 2007, available on <http://www.msnbc.msn.com/id/17406009/from/ET/>]

**At U.S. military field hospitals, care and compassion for wounded enemies**

TIKRIT, Iraq – With almost no warning, three Medevac helicopters touch down at Camp Speicher near Tikrit, Iraq. The medical staff – reservists from a unit based in Boston – quickly determine the men, all Iraqis, are hurt badly.

Two of the Iraqis were seen placing an IED<sup>1</sup> at the side of a road. They had a car full of weapons and video cameras to tape the explosion.

"He's got some open wounds, he has some ortho wounds, and he needs an X-ray," says a doctor as he evaluates the men. "The fourth guy has some back wounds."

It turns out the other two Iraqis were bystanders, caught in the middle when an American helicopter opened fire on the insurgents.

"I need two units of blood!" orders the doctor. "He looks like he has lost plenty of blood."

The worst of the cases – one of the insurgents – goes immediately into surgery, where in less than an hour doctors administer 30 units of blood.

"Right now, we have had five major traumas come in," says Eric Shrye. "We're down to our last 10 percent of our blood supply."

The call goes out at the base for volunteer blood donors, and within minutes dozens of soldiers line up. Brian Suam is at the head of the line. He says it doesn't matter that his blood might be used for insurgents.

"A human life is a human life, sir," Suam says.

The other casualty arrives by ambulance – an Iraqi policeman shot in the head.

Dr. John Allerding leads the team struggling to save him.

"Hold up, guys, his pupils are fixed and dilated," he says.

But this time a human life cannot be saved.

They start to cover the body with a blanket.

"Do we have a chaplain available?" someone asks. "Thanks, everybody. Nice try."

Though the team did all it could, Allerding says it was tough.

"The Iraqi policeman is one of our allies, one of the good guys," he says. "He's one of the guys that is trying to help us do what we can do over here, so I feel a sense of loss with him."

---

1 Improvised Explosive Device (note of the authors)

[...]

### DISCUSSION

1. a. Does IHL provide for an equal treatment between own wounded and enemy wounded? Between a wounded combatant and a wounded insurgent who has not combatant status? Between an insurgent who has committed violations of IHL and an insurgent who has not? What should be known to determine whether the insurgents in this case violated IHL? Who should be taken care of in priority? Does the nature of the conflict (international or non-international armed conflict) influence the answer to these questions? (GC I-IV, Art. 3; GC I, Art.12; P II, Art. 7; CIHL Rule 10)
- b. Would denial of medical attention to the insurgents who have committed violations of IHL be a grave breach? (GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147)
2. What is the medical team supposed to do with the remains of the insurgents who die in the camp?
3. Is it realistic to expect military medical personnel to make the same effort to save the lives of those who tried to kill their comrades and to save those of their comrades?

## Case No. 188, Iraq, Occupation and Peacebuilding

**A. UN Security Council Resolution 1483 (2003)**

[Source: Resolution 1483 (2003) of the United Nations Security Council, 23 May 2003, online: <http://www.un.org/documents/scres.htm>]

*The Security Council*

[...]

*Stressing* the right of the Iraqi people freely to determine their own political future and control their own natural resources, *welcoming* the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and *expressing* resolve that the day when Iraqis govern themselves must come quickly,

*Encouraging* efforts by the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender, and, in this connection, *recalls* resolution 1325 (2000) of 31 October 2000, [...]

*Noting* the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the “Authority”),

*Noting further* that other States that are not occupying powers are working now or in the future may work under the Authority, [...]

4. *Calls upon* the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;
5. *Calls upon* all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907; [...]
8. *Requests* the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction

activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq through: [...]

- (e) promoting economic reconstruction and the conditions for sustainable development, [...]
- (i) encouraging international efforts to promote legal and judicial reform; [...]

9. *Supports* the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority; [...]

## **B. Orders of the Coalition Provisional Authority**

[Source: Preliminary provisions of official documents of the Coalition Provisional Authority (CPA), Coalition Provisional Authority, "CPA Official Documents"]

*Regulations* – are instruments that define the institutions and authorities of the Coalition Provisional Authority (CPA).

*Orders* – are binding instructions or directives to the Iraqi people that create penal consequences or have a direct bearing on the way Iraqis are regulated, including changes to Iraqi law.

*Memoranda* – expand on Orders or Regulations by creating or adjusting procedures applicable to an Order or Regulation.

*Public Notices* – communicate the intentions of the Administrator to the public and may require adherence to security measures that have no penal consequence or reinforces aspects of existing law that the CPA intends to enforce. [...]

### **1) CPA Order number 7: Penal Code (CPA/ORD/9 June2003/07)**

*Pursuant* to my authority as head of the Coalition Provisional Authority (CPA), relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war,

*Reconfirming* the provisions of General Franks' Freedom Message to the Iraqi People of April 16, 2003,

*Recognizing* that the former regime used certain provisions of the penal code as a tool of repression in violation of internationally recognized human rights standards,

*Acting* on behalf, and for the benefit, of the Iraqi people,

I hereby promulgate the following: [...]



(signed) L. Paul Bremer,  
Administrator,  
Coalition Provisional Authority

**1bis) CPA Order number 31: Modifications of Penal Code and Criminal Proceedings Law (CPA/ORD/10 Sep 2003/31)**

*Pursuant* to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

*Recognizing* that instances of kidnapping, rape, and forcible vehicle larceny represent a serious threat to the security and stability of the Iraqi population,

*Understanding* that attacks of looting or sabotage against critical electrical power and oil infrastructure facilities undermine efforts to improve the conditions of the Iraqi people,

*Noting* that the denial of pre-trial bail in certain cases and lengthy jail sentences represent deterrents to such conduct,

I hereby promulgate the following modifications of the Penal Code and Criminal Proceedings Law: [...]

(signed) L. Paul Bremer,  
Administrator,  
Coalition Provisional Authority

**1ter) CPA Memorandum 3: Criminal Procedures (CPA/MEM/18 Jun 2003/03)**

*Pursuant* to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

*Recognizing* the CPA's obligation to restore law and order, provide for the safety of the people of Iraq, and ensure fundamental standards for persons detained,

*Acting*, in particular, consistent, with the Fourth Geneva Convention of 1949 Relative to the Treatment of Civilians in Time of War (hereinafter "The Fourth Geneva Convention"),

*Noting* the deficiencies of the Iraqi Criminal Procedure Code with regard to fundamental standards of human rights,

I hereby promulgate the following: [...]

(signed) L. Paul Bremer,  
Administrator,  
Coalition Provisional Authority

**2) CPA Order number 10: Management of Detention and Prison Facilities (CPA/ORD/8 Jun 2003/10)**

*Pursuant* to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

*Recognizing* the urgent necessity to ensure safe and humane prisons in order to re-establish law and order and provide for the safety of the people of Iraq,

I hereby promulgate the following: [...]

(*signed*) L. Paul Bremer,

Administrator,

Coalition Provisional Authority

**3) CPA Order number 13 (revised): The Central Criminal Court of Iraq (CPA/ORD/11 Jul 2003/13)**

*Pursuant* to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

*Committed* to promoting the development of a judicial system in Iraq that warrants the trust, respect and confidence of the Iraqi people,

*Noting* the continuing need for military support to maintain public order,

*Furthering* the CPA's duty to restore and maintain order and its right to ensure its security and fundamental standards of due process;

*Recognizing* the role that Iraqi jurists and legal systems must assume in addressing those serious crimes that most directly threaten public order and safety,

*Acting* on behalf, and for the benefit, of the Iraqi people,

I hereby promulgate the following: [...]

(*signed*) L. Paul Bremer,

Administrator,

Coalition Provisional Authority

**4) CPA Order number 15: Establishment of the Judicial Review Committee (CPA/ORD/-Jul 2003/-)**

*Pursuant* to my authority as head of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

*Noting* the obligation on the CPA to restore and maintain order and the right of the CPA to take measures for its security, to ensure fundamental standards of due process and to promote the rule of law,

*Noting* that the Iraqi justice system has been subjected to political interferences and corruption over years of Iraqi Ba'ath Party rule,

*Noting* that it is inherent to the stability of any society that the judicial system is independent and impartial but is seen to be so,

*Recognizing* the role that the Judicial Review Committee will have in ensuring as far as possible the highest standards of judicial service in,

*Acting* in accordance with the Administrator's Order Number 1 of May, 16 2003 on the De-Baathification of Iraqi Society (CPA/ORD 16 May 2003/01),

I hereby promulgate the following: [...]

(signed) L. Paul Bremer,

Administrator,

Coalition Provisional Authority

**5) CPA Order No. 39: Foreign Investment (Amended by Order 46)  
(CPA/ORD/19 September 2003/39)**

*Pursuant* to my authority as Administrator of the Coalition Provisional Authority (CPA) and the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003),

*Having* worked closely with the Governing Council to ensure that economic change occurs in a manner acceptable to the people of Iraq,

*Acknowledging* the Governing Council's desire to bring about significant change to the Iraqi economic system,

*Determined* to improve the conditions of life, technical skills, and opportunities for all Iraqis and to fight unemployment with its associated deleterious effect on public security,

*Noting* that facilitating foreign investment will help to develop infrastructure, foster the growth of Iraqi business, create jobs, raise capital, result in the introduction of new technology into Iraq and promote the transfer of knowledge and skills to Iraqis,

*Recognizing* the problems arising from Iraq's legal framework regulating commercial activity and the way in which it was implemented by the former regime,

*Recognizing* the CPA's obligation to provide for the effective administration of Iraq, to ensure the well being of the Iraqi people and to enable the social functions and normal transactions of every day life,

*Acting* in a manner consistent with the Report of the Secretary General to the Security Council of July 17, 2003, concerning the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy characterized by sustainable economic growth through the establishment of a dynamic private sector, and the need to enact institutional and legal reforms to give it effect,

*Having* coordinated with the international financial institutions, as referenced in paragraph 8(e) of the U.N. Security Council Resolution 1483, In close consultation with and acting in coordination with the Governing Council, I hereby promulgate the following: [...]

### **Section 3: Relation to Existing Iraqi Law**

- 1) This Order replaces all existing foreign investment law. [...]

### **Section 4: Treatment of Foreign Investors**

- 1) A foreign investor shall be entitled to make foreign investments in Iraq on terms no less favourable than those applicable to an Iraqi investor, unless otherwise provided herein.
- 2) The amount of foreign participation in newly formed or existing business entities in Iraq shall not be limited. [...]

### **Section 5: Areas of Foreign Investment**

- 1) Foreign investment may take place with respect to all economic sectors in Iraq, except that foreign and direct ownership of the natural resources sector involving primary extraction and initial processing remains prohibited. In addition, this Order does not apply to banks and insurance companies. [...]

*(signed)* L. Paul Bremer,

Administrator,

Coalition Provisional Authority

### **5bis) CPA Order No. 54: Trade Liberalization Policy 2004 (CPA/ORD/24 February 2004/54)**

*Pursuant* to my authority as Administrator of the Coalition Provisional Authority (CPA), and the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolutions 1483 and 1511 (2003),

*Noting* the responsibility of the Department of Border Enforcement, in CPA Order Number 26, to monitor and control the movement of persons and goods into and out of Iraq,

*Further* implementing the Reconstruction Levy imposed by CPA Order Number 38 (CPA/ORD/19 September 2003/38),

*Having* worked closely with the Governing Council, international organizations and relevant Ministries in developing policies that will foster international trade and a free market economy in Iraq,

I hereby promulgate the following: [...]

**Section 1: Suspension of Customs Charges**

All customs tariffs, duties, import taxes [...], and similar surcharges for goods entering or leaving Iraq are suspended until the sovereign transitional Iraqi administration imposes such charges following the CPA's transfer of full governance authority to that administration. [...]

(*signed*) L. Paul Bremer,

Administrator,

Coalition Provisional Authority

**5ter) CPA Order No. 64: Amendment to the Company Law No. 21 of 1997  
(CPA/ORD/29 February 2004/64)**

*Pursuant* to my authority as Administrator of the Coalition Provisional Authority (CPA) and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolutions 1483 and 1511 (2003),

*Having* worked closely with the Governing Council to ensure that economic change as necessary to benefit the people of Iraq occurs in a manner acceptable to the people of Iraq,

[...] *Recognizing* that some of the rules concerning company formation and investment under the prior regime no longer serve a relevant social or economic purpose, and that such rules hinder economic growth,

*Noting* that Iraqi entrepreneurs and businesses will benefit from more streamlined requirements for forming companies and investing in them,

*Recognizing* the CPA's obligation to provide for the effective administration of Iraq, to ensure the well-being of the Iraqi people and to enable the social and economic functions and normal transactions of every day life,

*Acting* in a manner consistent with the Report of the Secretary General to the Security Council of July 17, 2003, concerning the need for the development of Iraq and its transition from a nontransparent centrally planned economy to a free market economy characterized by sustainable economic growth through the establishment of a dynamic private sector, and the need to enact institutional and legal reforms to give it effect, [...]

I hereby promulgate the following: [...]

- 14) Article 12, paragraph First of the Law is amended to read as follows: "A juridical or natural person foreign or domestic has the right to acquire membership in the companies stipulated in this law as founder, shareholder, or partner, unless

such person is banned from such membership under the law, or due to a decision issued by a competent court or authorized governmental body.”

[...]

(signed) L. Paul Bremer,

Administrator,

Coalition Provisional Authority

### C. “Free Market Iraq? Not so fast”

[Source: EVIATAR Daphne, “Free Market Iraq? Not So Fast,” in *New York Times*, 10 January 2004]

There is no doubt about American intentions for the Iraqi economy. As Defense Secretary Donald H. Rumsfeld has said, “Market systems will be favored, not Stalinist command systems.”

And so the American-led coalition has fired off a series of new laws meant to transform the economy. Tariffs were suspended, a new banking code was adopted, a 15 percent cap was placed on all future taxes, and the once heavily guarded doors to foreign investment in Iraq were thrown open.

In a stroke, L. Paul Bremer III, who heads the Coalition Provisional Authority, wiped out longstanding Iraqi laws that restricted foreigners’ ability to own property and invest in Iraqi businesses. The rule, known as Order 39, allows foreign investors to own Iraqi companies fully with no requirements for reinvesting profits back into the country, something that had previously been restricted by the Iraqi constitution to citizens of Arab countries.

In addition, the authority announced plans last fall to sell about 150 of the nearly 200 state-owned enterprises in Iraq, ranging from sulfur mining and pharmaceutical companies to the Iraqi national airline.

But the wholesale changes are unexpectedly opening up a murky area of international law, prompting thorny new questions about what occupiers should and should not be permitted to do. While potential investors have applauded the new rules for helping rebuild the Iraqi economy, legal scholars are concerned that the United States may be violating longstanding international laws governing military occupation.

History provides limited guidance. The United States signed both the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949 and has incorporated their mandates regarding occupation into the Army field manual “The Law of Land Warfare.” But foreign armies, whether the Vietnamese in Cambodia, the Turks in Northern Cyprus or the United States in Panama and Haiti, have rarely declared themselves to be occupying forces. After World War II, for example, the Allies claimed the Hague Regulations did not apply because they had sovereign power in Germany and Japan, which had surrendered. And although most of the world calls Israel’s

control of the West Bank and Gaza since 1967 an occupation, the Israeli government has not accepted that status, although it has said it will abide by occupation law.

Reconstruction and privatization in Kosovo, for example, have been bitterly debated. The United Nations authority over Kosovo, set up by the peace treaty after a war that was unsanctioned by the United Nations, hesitated to privatize what was in essence seized state property, but it decided the economic future of Kosovo was too important to wait for a final peace settlement that would fix Kosovo's legal status.

The government in Belgrade and the much-reduced Serbian community in Kosovo have argued that such sales are specifically forbidden in the United Nations resolution setting up the authority itself. This dispute, though similar, sidesteps questions of occupation law because Kosovo, unlike Iraq, involves United Nations and NATO forces.

In Iraq the latest pronouncements by the Security Council only add to the muddle. Resolution 1483, issued in May, explicitly instructs the occupying powers to follow the Hague Regulations and the Geneva Convention, but in a strange twist it also suggests that the coalition should play an active role in administration and reconstruction, which many scholars say violates those treaties.

The conflict centers on Article 43 of the Hague Regulations, which says an occupying power must "re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

In other words, the occupying power is like a temporary guardian. It is supposed to restore order and protect the population but still apply the laws in place when it arrived, unless those laws threaten security or conflict with other international laws.

"Under the traditional law the local law should be kept unchanged as much as possible," said Eyal Benvenisti, professor of international law at Tel Aviv University and author of "The International Law of Occupation" (Princeton, 1993). Repairing roads, factories and telephone systems, then, is a legitimate way to get the economy running again. But transforming a tightly restricted, centrally planned economy into a free-market one may not be.

In a memo written last March and leaked in May to *The New Statesman*, the British magazine, Lord Goldsmith, Prime Minister Tony Blair's top legal adviser, warned that "the imposition of major structural economic reforms" might violate international law, unless the Security Council specifically authorized it.

Officials of the coalition authority insist the Security Council did that with Resolution 1483. They maintain that wiping out Saddam Hussein's entire economic system falls within Resolution 1483's instructions "to promote the welfare of the Iraqi people through the effective administration of the territory" and assist the "economic reconstruction and the conditions for sustainable development."

So the authority is pressing ahead with most of the plans for economic reform in Iraq and promises to have new laws in Iraq governing, among other things, business ownership, foreign investment, banking, the stock exchange, trade and taxes by June, when power is to be transferred to the Iraqis.

"We believe the C.P.A. can undertake significant economic measures in Iraq particularly where those measures support coalition objectives and the security of coalition forces," said Scott Castle, general counsel to the coalition. "There's a close nexus between the economic health of Iraq and the security of Iraq."

Some experts in international law call that a stretch. "The Security Council cannot require you to comply with occupation law on one hand and on the other give you authority to run the country in defiance of that law," said David Scheffer, a professor of international law at Georgetown University and a former United States ambassador at large for war crimes issues. He added that "1483 is internally inconsistent."

Order 39 "raises the biggest single question about coalition policy as it relates to the laws of war," said Adam Roberts, a professor of international relations at Oxford University and an editor of "Documents on the Laws of War" (Oxford, 2000). "That order embodies a major change not just in human rights or the political situation, but in the economic one. It would appear to go further in a free market direction and in allowing external economic activity in Iraq than what one would expect under the provisions of the 1907 Hague law about occupations."

International business lawyers at a conference of investors in London in October similarly warned that the coalition authority's orders might not be legal.

Part of the problem is that the old occupation law does not seem to fit the realities of modern warfare. As Mr. Benvenisti explains in his book and in a forthcoming article in the Israel Defense Forces law review, when the Hague Regulations were initially drafted, war was understood to be a legitimate contest between professional armies, not a messy attempt to remove a tyrannical leader.

"The Hague law reflects the interests of sovereigns to maintain their basis of power, their property and their institutions," Mr. Benvenisti said. Instead of wholesale transformation of a nation, then, occupation was supposed to be a short, transient state of affairs, with minimal intervention of the occupying authority in the lives of civilians.

But in Iraq the United States' explicit goal is to completely remake Iraqi institutions and society. "Their objectives far exceed the constraints of the law," Mr. Scheffer said, noting that occupation laws were restrictive precisely in order to prevent overzealousness on the part of an occupying power. "We're squeezing transformation into a very tight square box called occupation law, and the two really are not a good match."

In a forthcoming article in the *American Journal of International Law*, he sets forth a dozen possible violations by the occupying powers of international law, including failure to plan for and prevent the looting of hospitals, museums, schools, power plants, nuclear facilities, government buildings and other infrastructure; failure to maintain public order and safety during the early months of the occupation; and excessive civilian casualties.

In the article Mr. Scheffer explains how individuals could use United States laws to sue individual coalition officials in American courts. "This is a rather uncharted field in U.S. jurisprudence," he said in an interview. "But I would not underestimate how far litigation might go."



Ruth Wedgwood, a professor of international law at Johns Hopkins University and a member of the Defense Policy Board, which advises the Pentagon, is not so concerned. In her view the Iraqi laws do not deserve much deference because they were issued by an authoritarian government. “If it’s not a democratically crafted law, it lacks the same legitimacy,” she said.

Coalition officials have recently backtracked on privatization, in part because of the legal concerns. “We recognize that any process for privatizing state-owned enterprises in Iraq ultimately must be developed, adopted, supported and implemented by the Iraqi people,” Mr. Castle said.

Still, some specialists worry that the radical economic changes that are moving forward will lack legitimacy in the eyes of Iraqi citizens. Iraqis may see such wholesale economic transformation as “threatening and potentially exploitative,” said Samer Shehata, professor of Arab politics at Georgetown University. “I think the sensible answer is to leave extremely important decisions like the possibility of complete foreign ownership of firms to a later date, when a legitimate Iraqi government is elected by the Iraqi people in free and fair elections.”

### DISCUSSION

1. In general, what powers, responsibilities and obligations do occupying forces have in relation to maintenance of law and order? May an occupying power introduce changes to legislation and to the political and economic system necessary to consolidate peace? Does it matter whether the local legislation had been democratically adopted? (HR, Art. 43; GC IV, Arts 47 and 64)
2. In this case, do the changes made by the Coalition Provisional Authority (CPA) respect the letter and spirit of the provisions of Convention IV relating to penal legislation in an occupied territory? Are they perhaps even required by IHL? (GC IV, Arts 64, 67, 68 and 71-76)
3.
  - a. Does IHL permit the Coalition not to apply local Iraqi law that contravenes the principles and rules of international law? Which rules? Which principles? (HR, Art. 43; GC IV, Art. 64)
  - b. Does international human rights law apply in an occupied territory? Does IHL prevail in all respects? Do the treaty obligations of the occupying power or those of the occupied power apply? Does IHL permit occupying forces to abolish institutions and rules contrary to human rights? (HR, Art. 43; GC IV, Art. 64)
4.
  - a. What would justify the introduction of fundamental changes, such as the reform of the economic system, administrative structures, or the electoral system, by the Coalition forces?
  - b. Would a Security Council resolution be sufficient to authorize such changes? If so, would this not invoke a *jus ad bellum* argument to respond to an issue arising in *jus in bello* (i.e. in the law of military occupation)?
5. What are the implications of the recognition of the United States and the United Kingdom as occupying powers in Resolution 1483 for the IHL that is applicable?
6. Who or what gives the CPA the right to legislate? The CPA itself? IHL? Security Council resolution 1483?
7. What changes may an occupying power make to the economic system? May the United States introduce a free-market economy in Iraq under IHL? Can the United States argue that IHL obliges it to make such changes?

**Case No. 189, Iraq, The Trial of Saddam Hussein****A. Iraq: Law of Occupation**

[Source: House of Commons Library, Research Paper 03/51, "Iraq: Law of Occupation," 3 June 2003, online: <http://www.parliament.uk/topics/international-law.htm>]

This paper discusses some legal issues surrounding the occupation of Iraq during and after Operation *Iraqi Freedom* in spring 2003. It gives an account of UN Security Council Resolution 1483, of 22 May 2003. [...]

**Summary of main points**

- The USA and the UK have the status of occupying powers in Iraq.
- This started as soon as they took control of portions of Iraqi territory. The status of occupying power is a matter of *de facto* control. It does not matter whether their military campaign was lawful.
- The main laws on occupation are in The Hague Regulations of 1907 and the fourth Geneva Convention of 1949. Other laws are relevant as well.
- Occupying powers have a duty to maintain public order and safety. They have the right to protect themselves. They do not take over sovereignty.
- Occupying powers may make limited changes to institutions, laws and other arrangements, but these must serve the general purposes of maintaining order, safety and security. [...]
- The UN Security Council passed Resolution 1483 on 22 May 2003. This recognises the role of the USA and the UK and calls on them to administer Iraq effectively in order to benefit the Iraqi people. It allows the creation of an interim administration, to be run by Iraqis, until a new government is formed.
- Security Council Resolution 1483 sets up a post of UN Secretary-General's Special Representative for Iraq. Sergio Vieira de Mello, UN High Commissioner for Human Rights, has been appointed. He will coordinate UN activities and liaise with the occupying powers.

[...]

**IV. Justice**

The Saddam Hussein regime was accused of many very serious crimes. These included systematic and widespread torture, arbitrary justice, extrajudicial killing and "disappearances." Crimes against humanity, and possibly genocide, were committed during campaigns against the Kurds, in particular the Anfal campaign of the late 1980s, and against the Marsh Arabs, in particular in the early 1990s. War crimes were

committed during the Iran-Iraq War, and during the invasion, occupation and resistance to the liberation of Kuwait. The brutality of the regime was regarded as a key factor in its survival, and reportedly this plays strongly still in the minds of Iraqis today. There are suggestions that the business of reconstruction may itself be hampered by fear among Iraqis, who have yet to see conclusive proof that the previous regime is wholly unable to return. Justice is likely to be an important issue in practical as well as moral and emotional terms.

Security Council Resolution 1483 [See Case No. 188, Iraq, Occupation and Peacebuilding] does not make detailed provision for the administration of justice. [...]

In the Preamble the Security Council affirms “the need for accountability for crimes and atrocities committed by the previous Iraqi regime.” In Paragraph 3 it appeals to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice. It does not define the membership of “the previous Iraqi regime.”

## **A. Options**

### **a. Geneva provisions**

Geneva Convention IV covers the legal system in Articles 64 to 77. These provisions are not aimed primarily at the trial of serious international offences, but they would apply if members of the previous regime were tried in Iraq by the occupying powers.

The existing penal laws should remain in force, unless they constitute a threat to the security of the occupying power or an obstacle to the application of the Convention itself. In these two cases, the laws of the occupied territory may be repealed or suspended by the occupying power. The occupying power may also introduce new laws if these are essential to enable it to fulfil its obligations under the Convention, to maintain order, and to maintain its own security.

It might appear that the maintenance of existing laws would create the absurdity of coalition forces in Iraq having to uphold the oppressive laws and penalties of the Saddam Hussein regime. However, the provision that they may be varied if they present an obstacle to the application of the Convention would seem to circumvent this difficulty. Beyond this, the occupying powers are bound by their other legal obligations, for instance, for the UK, those arising from the *Rome Statute of the International Criminal Court* 1998, and the strict application of existing law could conflict with these. Equally, as mentioned above, there is a precedent in the case of Nazi Germany for existing laws to be set aside on the grounds of their manifest inhumanity.

Under Article 66 the occupying power may establish “non-political military courts” to try offences against the laws it has promulgated. Under Article 68 it may impose the death penalty for these offences, but only in cases of espionage, serious sabotage against its military installations or intentional acts causing death, and only if these were capital offences in the territory concerned before the occupation.

Civilians may not be prosecuted for acts committed before the occupation, except in the case of breaches of the laws and customs of war.

Under Article 67, the courts shall apply only those provisions of law, applicable prior to an offence, “which are in accordance with general principles of law, in particular the principle that the penalty shall be proportioned to the offence.”

The fair trial provisions for those prosecuted by the occupying power are set out in Articles 71 to 74. They include the right to be charged in a language understood by the accused, and the rights to present evidence, to call witnesses and to choose legal representation. There is also a right of appeal.

### **b. International Criminal Court**

The Prosecutor of the International Criminal Court (ICC) may investigate a situation either on his own initiative, or at the request of a state party to the Rome Statute of the ICC, or at the request of the Security Council in a resolution adopted under Chapter VII of the UN Charter. If he investigates on his own initiative or at the request of a state party, an indictee must either be a national of a state party or have committed the alleged offences in the territory of a state party. Iraq is not a party to the Rome Statute. If the Prosecutor investigates at the request of the Security Council, these restrictions on nationality and territory do not apply.

Iraqis accused of war crimes, crimes against humanity or genocide could be brought before the ICC at the request of the Security Council. Without a Security Council resolution they could be prosecuted only for crimes committed on the territory of a state party to the Rome Statute. They could not be prosecuted at the ICC for crimes committed before the entry into force of the Rome Statute on 1 July 2002.

### **c. *ad hoc* tribunal**

The Security Council could establish an *ad hoc* tribunal to deal with crimes committed by members of the Iraqi regime, armed forces and others, in the same way that it did for the former Yugoslavia and Rwanda. This would be done by means of a resolution setting out the jurisdiction of the tribunal. The Council could define jurisdiction broadly as it saw fit, citing the relevance to international peace and security, for which it has responsibility. The tribunals for former Yugoslavia and Rwanda have retrospective jurisdiction.

Two other methods have been used in the past. The Nuremberg Tribunal was established by agreement of the Allies, embodied in a treaty, and the Tokyo Tribunal was established under US military powers. Today, the latter would be subject to the Geneva provisions mentioned above.

### **d. national courts**

The Iraqi courts could bring to justice those accused of breaking Iraqi law, while third states could seek to prosecute crimes over which they have jurisdiction. Some states claim universal jurisdiction over serious international crimes, such as torture and war crimes.

An alternative model might be found in Sierra Leone. There a Special Court has been established to try those accused of the most serious crimes in the civil war. The Special Court was set up at Sierra Leone's request by means of an agreement between the UN and Sierra Leone. It has a hybrid nature, with jurisdiction over both international crimes and crimes existing under Sierra Leonean law. It is staffed by both local and international judges and prosecutors, appointed partly by the UN and partly by the Sierra Leone Government, after mutual consultation.

## B. Comments

The Foreign Secretary, Jack Straw, made comments on trials for members of the Saddam Hussein regime in response to a question by Douglas Hogg:

I cannot give the right hon. and learned Gentleman a precise, definite answer because these matters are still subject to discussion with the United States Government, and they will not be resolved until a functioning interim authority has been established. We want the Iraqi people, in the main, to take responsibility for ensuring justice in respect of former members of the regime. They had no effective justice system during the 24 years of Saddam Hussein's rule, but historically Iraq had a reasonably well functioning and fair judicial system. I held a discussion last week with British Ministers about how our Government could aid and assist in the creation of a new judicial system in Iraq, and I am happy to write to the right hon. and learned Gentleman about that.

There is a question as to whether an international tribunal should be established to try the leaders of the regime. We have not ruled that out, but I am sceptical because of the vast costs of the international tribunals set up to deal with Yugoslavia and, even worse, Rwanda. The right hon. and learned Gentleman did not mention the International Criminal Court, but let me say that it does not have a direct role because its jurisdiction is only for events that took place after July last year (HC Deb 28 April 2003, cc32-3).

Pierre-Richard Prosper, the US Ambassador for War Crimes, was interviewed by the *Daily Telegraph* in April 2003. The report gave the following account of his arguments:

those accused of war crimes against US troops in recent weeks or during the Gulf war should be tried by military tribunals or civilian courts in America, while offences against Kuwaitis and Iranians should be dealt with by their respective countries.

As for Saddam's crimes, he believes that the Iraqis themselves should take the lead, and that their former president and his henchmen should be tried in Iraq itself. "We really need to allow the Iraqis the opportunity to do this. They are the victims. It is their country that was oppressed and abused. We want them to have a leadership role, and we're there to be supportive." (Daily Telegraph, 21 April 2003).

The *Economist* argued that the model for trying in the USA those accused of crimes against US forces "should not be contentious," but it went on,

America's current plan for the top leaders of Saddam's regime is far more controversial, and almost certainly a mistake. This is to reject the idea of an international tribunal, and instead to hold trials before Iraqi-only courts. The administration's stated goals are laudable. It rightly argues that the worst crimes of Saddam's regime were against the Iraqi people, and so concludes that they themselves should be the ones to judge their

tormentors. Iraqi-controlled trials will also help establish the rule of law in Iraq, claims the administration, providing the cornerstone of a new, sorely-needed legal system.

These are indeed desirable goals, but they are unlikely to be achieved through locally controlled trials of Saddam, if he is caught alive, or his minions. Iraq's judges and lawyers have all been compromised by their own involvement in decades of repression. Returning Iraqi exiles, themselves victims of the regime, would also lack credible impartiality, even in the eyes of most Iraqis. The usual pattern after the fall of dictatorships is the escape of top leaders, revenge killings and kangaroo courts. Such could yet be the turn of events in Iraq. Trials held under American auspices will also be too easy for sceptics, inside as well as outside Iraq, to dismiss as "victors' justice." (*Economist*, 3 May 2003).

The *Economist* went on to advocate either an international tribunal, as in the cases of former Yugoslavia and Rwanda, or a mixed court, as in Sierra Leone. [...]

## B. Iraq: Memorandum on Concerns Relating to Law and Order

[Source: Amnesty International, "Iraq: Memorandum on concerns relating to law and order," (23 July 2003) MDE14/157/2003, online: <http://www.amnesty.org>]

### II. AMNESTY INTERNATIONAL'S CONCERNS

#### 1. Applicable international law

Amnesty International welcomes the fact that the US and UK governments, in exercising their authority as the occupying powers through the CPA, have made use of international human rights standards to inform the formation of new legislation and the suspension of certain provisions of Iraqi law which were inconsistent with such standards. For example, we welcome the use of provisions of the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners as a basis for CPA Memorandum Number 2 on Management of Detention and Prison Facilities. We also welcome the CPA's suspension of the death penalty, a step which is consistent with the internationally recognized desirability of its abolition.

However, we are concerned at the statement in a letter, dated 27 June 2003, to Amnesty International from Ambassador Paul Bremer, the CPA Administrator, that "the only relevant standard applicable to the Coalition's detention practices is the Fourth Geneva Convention of 1949. This Convention takes precedence, as a matter of law, over other human rights conventions."

Amnesty International stresses that, consistent with international humanitarian law, Coalition states are also under an obligation to respect the provisions of the human rights treaties to which they are a party, as well as those to which Iraq is a party, especially given that these treaties have been formally incorporated into Iraqi domestic law. Iraq is a party to the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Elimination of All Forms of Discrimination against Women.

The Human Rights Committee, set up under the ICCPR, and other bodies monitoring the implementation by states of their human rights obligations under the treaties they have ratified, have consistently ruled that such obligations extend to any territory in which a state exercises jurisdiction or control, including territories occupied as a result of military action. International human rights law complements provisions of international humanitarian law, for example by providing content and standards of interpretation, such as on the use of force to respond to disorders outside combat situations or with regard to safeguards for criminal suspects.

Amnesty International also points out that the European Convention for the Protection of Human Rights and Fundamental Freedoms is applicable to the conduct of forces belonging to Coalition states, such as the UK, that are parties to this treaty. Commenting on the extra-territorial application of the Convention in its Decision as to Admissibility in *Bankovic* (Application no. 52207/99), the European Court of Human Rights stated (para 71):

“the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government”.

## **Recommendation**

***Amnesty International urges the CPA to recognize the applicability of international human rights law and standards, as complementary to international humanitarian law, and to abide by all the relevant obligations. [...]***

## **C. Tribunal Established Without Consultation**

[Source: Amnesty International, “Tribunal established without consultation,” Press Release, 10 December 2003, MDE14/181/2003, online: <http://www.amnesty.org>]

### **Iraq: Tribunal established without consultation**

Amnesty International has expressed concern to the Coalition Provisional Authority (CPA) and the Iraqi Governing Council about the decision to establish an Iraqi special tribunal that was taken without prior consultation with the Iraqi civil society or the international community.

“We have been urging that the proposals to establish the tribunal be subject to widespread consultation within Iraqi civil society, especially the legal profession and human rights groups, as well as the international community,” said Amnesty International today. “Unfortunately, the draft statute of the tribunal was not made public before its adoption.”

Under international humanitarian law, the authority of the CPA as an Occupying Power to establish a tribunal of the scope envisaged for the Iraqi special tribunal is doubtful at best. Amnesty International is concerned about reports that the tribunal will use Iraqi criminal code – some aspects of which are inconsistent with international human rights standards – to regulate trial procedures and define crimes and punishments.

“We are particularly concerned that the Iraqi Penal Code provides for the death penalty for crimes under the jurisdiction of the tribunal,” said Amnesty International.

Amnesty International is seeking a copy of the statute that was adopted in order to analyze it in detail.

## **D. Iraqi Special Tribunal: Questions & Answers**

[Source: Human Rights First, “Iraqi Special Tribunal: Questions and Answers,” <http://www.humanrightsfirst.org>]

### **On the basis of what authority was the tribunal established and what is its supervisory body?**

The Statute of the Iraqi Special Tribunal was enacted directly by the Iraqi Governing Council on December 10, 2003. The then-U.S. Administrator for Iraq, Paul Bremer, temporarily ceded legislative authority to the Council for that purpose.

The Interim Government of Iraq has assumed all of the supervisory powers given under the Statute to the Governing Council.

### **Who will the tribunal try?**

The Statute provides the tribunal with jurisdiction over Iraqi nationals or residents of Iraq.

It also includes the principle of command responsibility, according to which not only those who directly commit a crime, but those in the chain of command who order it to be carried out can be held responsible. It further specifies that no one shall have immunity from criminal responsibility, for instance because of any official position including head of state.

At this time, it is unclear how many individuals will be tried by the tribunal or how many trials will take place.

Currently, 12 former high-ranking members of the former Ba’ath regime have appeared before an Iraqi judge and are apparently awaiting indictment. [...]

### **What crimes can the tribunal prosecute?**

The tribunal has jurisdiction over crimes against humanity, war crimes and genocide.

The tribunal also is able to prosecute three crimes under Iraqi law:

- Attempting to manipulate the judiciary



- Wasting national resources or squandering public assets and funds
- Abusing position and pursuing policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country

For the tribunal to have jurisdiction, these crimes must have been committed between July 17, 1968 – the date on which the Ba’ath party came to power in Iraq by a political coup in which Saddam Hussein played a leading role – and May 1, 2003 – the date President Bush declared that major combat operations in Iraq had ended.

It is not necessary for the crimes to have been committed on the territory of Iraq. The tribunal also has jurisdiction to prosecute crimes committed elsewhere by Iraqi nationals or residents of Iraq, such as during Iraq’s war against Iran (1980-1988) and its invasion and occupation of Kuwait (1990-1991). [...]

### **Who are the judges?**

[...] According to the Statute, the authority to appoint judges and investigative judges resided with the Governing Council, and now rests with the Interim Government, which is required to consult on all appointments with a new Judicial Council.

In general, the Statute provides that judges and investigative judges shall be Iraqi nationals. It allows, however, for non-Iraqi judges with experience in dealing with crimes against humanity, genocide, war crimes and crimes under Iraqi law to be appointed if necessary.

The Statute further provides that a judge or investigative judge may not have been a member of the Ba’ath party. [...]

## **DISCUSSION**

1. According to IHL, may the CPA and/or the Governing Council of Iraq create a tribunal? May the Iraqi Special Tribunal be considered as having been established by the occupying power? If so, for which crimes and according to which law may the occupying power create such a court? (GC IV, Arts 64, 66 and 71)
2. What options existed in IHL to try Saddam Hussein? Discuss the advantages and disadvantages of every option.

**Case No. 190, Iraq, the End of Occupation**

[Source: United Nations Security Council Resolution 1546 (2004), 8 June 2004, and Annex, Letter of US Secretary of State Colin Powell to the UN Security Council, available on: [www.un.org/documents/scres.htm](http://www.un.org/documents/scres.htm)]

**UN Security Council Resolution 1546 (2004)**

*The Security Council,*

*Welcoming* the beginning of a new phase in Iraq's transition to a democratically elected government, and *looking forward* to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004, [...]

*Reaffirming* the independence, sovereignty, unity, and territorial integrity of Iraq, [...]

*Welcoming* the efforts of the Special Adviser to the Secretary-General to assist the people of Iraq in achieving the formation of the Interim Government of Iraq, as set out in the letter of the Secretary-General of 7 June 2004 (S/2004/461),

*Taking note* of the dissolution of the Governing Council of Iraq, and *welcoming* the progress made in implementing the arrangements for Iraq's political transition referred to in resolution 1511 (2003) of 16 October 2003, [...]

*Recalling* the establishment of the United Nations Assistance Mission for Iraq (UNAMI) on 14 August 2003, and *affirming* that the United Nations should play a leading role in assisting the Iraqi people and government in the formation of institutions for representative government, [...]

*Recognizing* the request conveyed in the letter of 5 June 2004 from the Prime Minister of the Interim Government of Iraq to the President of the Council, which is annexed to this resolution, to retain the presence of the multinational force,

*Recognizing also* the importance of the consent of the sovereign Government of Iraq for the presence of the multinational force and of close coordination between the multinational force and that government, [...]

*Noting* the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to cooperate with relevant international organizations, [...]

*Acting under Chapter VII of the Charter of the United Nations,*

1. *Endorses* the formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office as envisaged in paragraph four below;

2. *Welcomes* that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty;
3. *Reaffirms* the right of the Iraqi people freely to determine their own political future and to exercise full authority and control over their financial and natural resources;
4. *Endorses* the proposed timetable for Iraq's political transition to democratic government including:
  - (a) formation of the sovereign Interim Government of Iraq that will assume governing responsibility and authority by 30 June 2004;
  - (b) convening of a national conference reflecting the diversity of Iraqi society; and
  - (c) holding of direct democratic elections by 31 December 2004 if possible, and in no case later than 31 January 2005, to a Transitional National Assembly, which will, *inter alia*, have responsibility for forming a Transitional Government of Iraq and drafting a permanent constitution for Iraq leading to a constitutionally elected government by 31 December 2005; [...]
9. *Notes* that the presence of the multinational force in Iraq is at the request of the incoming Interim Government of Iraq and therefore *reaffirms* the authorization for the multinational force under unified command established under resolution 1511 (2003), having regard to the letters annexed to this resolution;
10. *Decides* that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, *inter alia*, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, [...]
12. *Decides* further that the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, and that this mandate shall expire upon the completion of the political process set out in paragraph four above, and *declares* that it will terminate this mandate earlier if requested by the Government of Iraq; [...]
24. *Notes* that, upon dissolution of the Coalition Provisional Authority, the funds in the Development Fund for Iraq shall be disbursed solely at the direction of the Government of Iraq, and *decides* that the Development Fund for Iraq shall be utilized in a transparent and equitable manner and through the Iraqi budget including to satisfy outstanding obligations against the Development Fund for Iraq, that the arrangements for the depositing of proceeds from export sales of petroleum, petroleum products, and natural gas established in paragraph 20 of resolution 1483 (2003) shall continue to apply, that the International Advisory and Monitoring Board shall continue its activities in monitoring the Development Fund for Iraq and shall include as an additional full voting member a duly qualified individual designated by the Government of Iraq and that appropriate

arrangements shall be made for the continuation of deposits of the proceeds referred to in paragraph 21 of resolution 1483 (2003);

[...].

## **Annex**

[...]

### ***Letter of Secretary of State Colin Powell to the UN Security Council***

#### **The Secretary of State**

Washington

5 June 2004

Excellency:

Recognizing the request of the government of Iraq for the continued presence of the Multi-National Force (MNF) in Iraq [...] I am writing to confirm that the MNF under unified command is prepared to continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism and protecting the territory of Iraq. [...]

Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security. [...]

In order to continue to contribute to security, the MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel and which will ensure arrangements for, and use of assets by, the MNF. The existing framework governing these matters is sufficient for these purposes. In addition, the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.

[...]

Sincerely,

(Signed) Colin L. Powell

**DISCUSSION**

1. a. Did the occupation of Iraq by Coalition forces end on 30 June 2004? On what basis? (HR, Art. 42; GC IV, Arts 6 and 47)  
b. May the end of an occupation depend on a determination by the UN Security Council, or only on the facts on the ground? May the UN Security Council absolve an occupying power of its IHL obligations although Convention IV would continue to apply according to the facts on the ground? (HR, Art. 42; GC IV, Arts 2, 6 and 47)
2. Is it conceivable that if Iraq is no longer an occupied territory, other parts of Convention IV continue to apply? (GC IV, Part II)
3. What law applies to the troops of the multinational force in Iraq following the end of the occupation? What are the obligations of the multinational force after 30 June 2004? If they arrest Iraqis? If fighting erupts between those troops and Iraqi insurgents or terrorists? (GC I-IV, Arts 2 and 3; GC IV, Art. 6(4))
4. What is the impact of the consent of the Iraqi Interim Government to the presence of the multinational force on the legal status of that force? What is the impact on its obligations? (GC IV, Arts 7 and 47)
5. Why is the Iraqi Interim Government not merely a different local authority that would entail application of Art. 47 of GC IV?
6. Is progressively handing over responsibility for security sufficient to end an occupation?
7. Did Security Council Resolution 1546 give Iraq full economic sovereignty?