

Punishing Violations of International Humanitarian Law at the National Level

**A Guide
for Common Law States**

Advisory Service

on International Humanitarian Law



ICRC

**Punishing Violations
of International
Humanitarian Law
at the National Level**
A Guide for Common Law States

**Drawing on the proceedings
of a meeting of experts**
(Geneva, 11-13 November 1998)

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TABLE OF CONTENTS

Acknowledgements	7
Foreword by Jakob Kellenberger, President of the ICRC	9
List of international instruments (and abbreviations used)	13

PART 1

MEETING OF EXPERTS ON NATIONAL MEASURES TO PUNISH VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

Chapter 1 Introduction to the Guide	19
1.1 Introduction	19
1.2 Information about the Guide	20
1.3 Implementation of international humanitarian law and the ICRC Advisory Service	21
1.4 Key points made in speakers' presentations	23

PART 2

STATE RESPONSIBILITY TO PUNISH INTERNATIONAL CRIMES

Chapter 2 Obligation to punish international crimes at the national level	29
2.1 Introduction	29
2.2 Obligation to punish violations of international humanitarian law and arms control treaties	30
2.3 Punishment of genocide, torture and crimes against humanity	34
2.4 International and national criminal justice systems	36
Chapter 3 Jurisdiction over international crimes	39
3.1 Introduction	39
3.2 The principle of universal jurisdiction	40
3.3 Universal jurisdiction over war crimes	41
3.4 Universal jurisdiction over genocide, torture and crimes against humanity	43

**PART 3
INDIVIDUAL RESPONSIBILITY
FOR INTERNATIONAL CRIMES**

Chapter 4	Responsibility for international crimes	49
4.1	Introduction	49
4.2	General principles of criminal responsibility in international law	50
4.3	Mental element (<i>mens rea</i>)	53
4.4	Defences and immunities in international law	54

**PART 4
NATIONAL ENFORCEMENT OF INTERNATIONAL LAW:
PUNISHMENT OF INTERNATIONAL CRIMES
IN COMMON LAW STATES**

Chapter 5	Punishing international crimes at the national level	59
5.1	Introduction	59
5.2	Punishing violations of international humanitarian law and arms control treaties under national law	60
5.3	Punishing genocide, torture and crimes against humanity under national law	67
5.4	Providing for universal jurisdiction in national law	68
Chapter 6	The Geneva Conventions and their Additional Protocols: Incorporation in the domestic law of common law States	71
6.1	Introduction	71
6.2	Geneva Conventions Acts	71
6.2.1	Introduction	71
6.2.2	Provisions of a typical Geneva Conventions Act	72
6.3	Guidelines for drafting a Geneva Conventions Act	73
6.3.1	Introduction to the Model Act and Guidelines	73
6.3.2	Modifications to the Model Act	73

Chapter 7	Jurisdiction of military law and courts over war crimes	113
	7.1 Introduction	113
	7.2 Military law and jurisdiction of military tribunals.....	114
	7.3 Military offences	116
	7.4 Jurisdiction over civil offences: Possible conflict between civil and military authorities.....	118
	7.5 Law applicable to prisoners of war.....	122

**PART 5
BRINGING A CASE TO TRIAL**

Chapter 8	Bringing a case to trial — criminal proceedings	127
	8.1 Introduction	127
	8.2 Decision to prosecute	128
	8.3 Mutual assistance.....	130
	8.4 Preparing the case — questions of evidence.....	132
	8.5 Judicial guarantees in international humanitarian law....	134

**PART 6
CONCLUSION**

Chapter 9	Conclusion	139
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ANNEXES

1.	Programme of the meeting.....	143
2.	Aim and objectives	146
3.	List of participants.....	147
4.	Working group questions	152
5.	Treaty provisions requiring enactment of criminal legislation ..	167
6.	Table summarizing treaty obligations to punish violations.....	175
7.	Table of grave breaches.....	180
8.	ICRC Advisory Service indicative list of common law States	182
9.	Model Geneva Conventions Act	184
10.	Bibliography	197

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This Guide would not have been written without the efforts of a number of dedicated people.

The starting point for preparation of the Guide was the organization of a meeting of experts in international humanitarian law, and in criminal law and procedure, from States whose legal system is based on the common law. The primary aim of the meeting was to draw up a guide providing common law States with practical advice on the enforcement of international humanitarian law through national criminal and military law.

The author would like to thank first of all the experts who took part in the meeting. Their active contribution, including information and debate about different national approaches, was an invaluable source of material and ideas which were drawn on substantially in the preparation of the Guide.

Particular thanks are due to Mr Michael Meyer, Head, International Law, British Red Cross, and Professor Peter Rowe, Head of the Department of Law, University of Lancaster. Their contribution to preparations for the meeting was a crucial factor in its success. The author also wishes to express her appreciation to Mr Meyer and Professor Rowe for reviewing and providing comments on an early draft of the Guide.

Finally, thanks should go to the British Red Cross, which provided generous support for the publication of this Guide.

Anna Segall
Geneva

FOREWORD

For over 130 years, the International Committee of the Red Cross (ICRC) has sought to protect and assist the victims of armed conflict, through humanitarian action on the battlefield and through the development and promotion of international rules to alleviate the suffering caused by war.

The development of international humanitarian law — to expand the protection afforded to those not, or no longer, taking part in fighting and to limit methods and means of warfare — is an unending challenge. Developments in technology and misuse of humanity's achievements must be met with determination and imagination. There have been significant successes. A text banning blinding laser weapons was adopted in 1996. In 1997, after an arduous campaign, the Ottawa Convention prohibiting anti-personnel landmines was concluded. It has already been ratified by over 100 States.

But to develop the law is not enough. Law without action remains a dead letter — a theoretical exercise. To achieve its lofty objectives, the law must be respected. Implementation is undoubtedly the greatest challenge facing international humanitarian law today. Those who have striven so hard to develop this body of law have therefore also sought to establish mechanisms to ensure that it is respected. It is essential that all those affected by the law — civilians and the military — are aware of its provisions. The dissemination of international humanitarian law is both a clear obligation for governments and a major activity of the ICRC and National Red Cross and Red Crescent Societies.

Action at the international level is also essential to ensure respect for international humanitarian law. Under Article 1 common to the four Geneva Conventions, States must not only respect but “ensure respect” for the law. The ICRC is constantly working, both bilaterally and within intergovernmental organizations, to remind States of their international obligations. It encourages States which have not done so to ratify the key treaties of international humanitarian law and to accept the competence of the International Humanitarian Fact-Finding Commission established under Article 90 of Additional Protocol I.

While diplomatic action is essential, respect for international humanitarian law ultimately depends on the actions of the individual — whether on the battlefield, at military headquarters or in the centres of government.

International humanitarian law was one of the first areas of international law in which it was made clear that the individual, and not just the State, was responsible for his or her own actions. The message is simple but powerful. Serious violations of international humanitarian law are crimes — heinous crimes. Those responsible must be tried and punished. Time of war, reasons of State, military necessity — none of these justify ill-treatment of those protected by international humanitarian law. Murder, torture, and rape are crimes in time of war as well as in peacetime. They must be punished.

International humanitarian law has gone further. The Geneva Conventions were the first treaties to *require* States to prosecute violators, regardless of their nationality or the place where the offence is committed. It is essential to make sure that there is no safe haven for war criminals. The enforcement of individual responsibility is undoubtedly one of the most important mechanisms for ensuring respect for international humanitarian law.

For many years we have watched in frustration as war crimes have gone unpunished, and as the obligation to punish offenders has been ignored. Today, however, we are witnessing changes of historic importance. The first international criminal tribunals for 50 years are sitting in The Hague and Arusha. In 1998, in Rome, a Diplomatic Conference adopted a Statute for a permanent International Criminal Court. The ICRC fully supports all these initiatives.

However, it is not only at the international level that action must be taken. States have a clear obligation to punish war criminals in their national courts. Today, undoubtedly prompted by the renewed determination of the international community, we are also witnessing prosecutions of war crimes in national courts. While limited in number, their example is of the greatest significance.

The ICRC attaches the utmost importance to national action to prevent and punish violations of international humanitarian law. At the request of the international community, we have established an Advisory Service to assist and advise on a wide range of measures relating to the national implementation of international humanitarian law. In its first five years, the Service has been active around the world, encouraging the ratification of international humanitarian law treaties, promoting the establishment of national committees or other bodies on international humanitarian law, and advising on national legislation.

In convening a meeting of common law experts in international humanitarian law and in criminal law and procedure, the ICRC's intention

was to promote an exchange of views on the advantages and disadvantages of different approaches to criminalization of violations of international humanitarian law, and to foster the development of national law for the prosecution and punishment of alleged offenders. This meeting followed on from a meeting of civil law experts on national measures for the repression of violations of international humanitarian law which took place in 1997.

The punishment of war crimes, regardless of where they are committed, is essential if the law is to be respected and justice is to be served. The purpose of this Guide is to provide common law States with practical advice on the enforcement of international humanitarian law through national criminal and military law. My sincere wish is that it may prove useful to governments in their crucial task of enforcing international humanitarian law at the national level.

A handwritten signature in black ink, reading "Jakob Kellenberger". The signature is written in a cursive, slightly slanted style.

Jakob Kellenberger
President of the ICRC
Geneva

LIST OF INTERNATIONAL INSTRUMENTS¹

(and abbreviations used)

Geneva Conventions and their Additional Protocols

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 (First Geneva Convention; GC I).

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 (Second Geneva Convention; GC II).

Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (Third Geneva Convention; GC III).

Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (Fourth Geneva Convention; GC IV).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977 (Protocol I; P I).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, 8 June 1977 (Protocol II; P II).

Protection of cultural property in armed conflicts

Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954 (Hague Cultural Property Convention).

Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.

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 (Second Protocol).

¹ These treaties may be found on the Websites of the International Committee of the Red Cross (<http://www.gva.icrc.org/ihl>) and of the United Nations (<http://untreaty.un.org>).

Other treaties which may affect the conduct of hostilities

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 (Hague Convention IV and annexed Regulations).

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, London, Moscow and Washington, 10 April 1972 (Biological Weapons Convention).

Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques, 10 December 1976 (Environmental Modification Techniques 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, Geneva, 10 October 1980 (Conventional Weapons Convention)

- 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
- Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980
- Protocol on Blinding Laser Weapons (Protocol IV), Vienna, 13 October 1995
- Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Amended Protocol II).

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993 (Chemical Weapons Convention).

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, 18 September 1997 (Ottawa Convention).

Genocide and torture

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (Genocide Convention).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (Torture Convention).

Ad hoc tribunals and permanent international criminal court

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, 25 May 1993, as amended on 13 May 1998 (Statute of the International Tribunal for the former Yugoslavia).

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, 8 November 1994 (Statute of the International Tribunal for Rwanda).

Rome Statute of the International Criminal Court, 17 July 1998.

Statutory limitations

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968.

PART 1

**MEETING OF EXPERTS
ON NATIONAL MEASURES
TO PUNISH VIOLATIONS OF
INTERNATIONAL HUMANITARIAN LAW**

CHAPTER 1

INTRODUCTION TO THE GUIDE

1.1 INTRODUCTION

In September 1997, the Advisory Service on International Humanitarian Law of the International Committee of the Red Cross (ICRC) organized a meeting of civil law experts to consider national measures for the repression of violations of international humanitarian law. The objective of the meeting was to draw conclusions and offer advice, for decision-makers and lawmakers in civil law States, concerning legal procedures and legislative problems connected with the repression of war crimes. The conclusions and recommendations of the meeting have been published in a special report² and summarized in the Advisory Service's 1997 *Annual Report*.³

In November 1998, the Advisory Service held a second meeting, bringing together experts in international humanitarian law and in criminal law and procedure from States whose legal system is based on the common law. The primary aim of the meeting was to draw up a guide providing common law States with practical advice on the enforcement of international humanitarian law through national criminal and military law. The meeting also considered national measures to punish other serious international crimes such as genocide and crimes against humanity. The conclusions and recommendations of the meeting are summarized in the Advisory Service's 1998 *Annual Report*⁴ and are set out more fully in this Guide.

The programme of the meeting, its aims and objectives, the list of participants, and the working group questions are annexed to this Guide. The meeting was opened by the President of the ICRC and chaired by the ICRC Director for International Law and Communication. It was attended by some 30 experts from governments and the academic world, and also by military personnel — notably the Director of the British Army Legal

² *National Measures to Repress Violations of International Humanitarian Law (Civil Law Systems)*, Report on the Meeting of Experts, C. Pellandini (ed.), Advisory Service on International Humanitarian Law, ICRC, 2000.

³ *National Implementation of International Humanitarian Law — Annual Report 1997*, Advisory Service on International Humanitarian Law, ICRC, 1998.

⁴ *National Implementation of International Humanitarian Law — Annual Report 1998*, Advisory Service on International Humanitarian Law, ICRC, 1999.

Services and the Joint Judge Advocate General of the Indian Army. The Senior Legal Adviser to the Tribunal for the former Yugoslavia and the Director of Legal and Constitutional Affairs, Commonwealth Secretariat, were present, together with other eminent figures.

1.2 INFORMATION ABOUT THE GUIDE

The Guide draws on the preparatory documents distributed to the participants in the meeting, papers given by the speakers, and the contributions of all participants in the working group discussions. It is not a summary of the proceedings of the meeting, but a tool or resource for common law States on the enforcement of international humanitarian law through national criminal and military law. The views expressed in the Guide are those of the author and do not necessarily reflect the views of individual participants in the meeting.

The ICRC would like to express its thanks to the experts who took part in the meeting. Their contribution — as speakers, as leaders of working groups, and as active participants in debate — was essential for the preparation of this Guide. Also of fundamental importance was the extensive literature on individual accountability for international crimes — on the crimes themselves and on principles of individual criminal responsibility, universal jurisdiction, national and international enforcement, and alternatives to prosecution.

The Guide is also informed by Advisory Service work with common law States, in particular a study on implementation of international humanitarian law in Commonwealth Member States prepared for the Meeting of Commonwealth Law Ministers (Port of Spain, Trinidad and Tobago, 3-7 May 1999).⁵

In order to make the Guide as “user-friendly” as possible, footnotes have been used only where absolutely necessary. This means that in certain cases where it would have been appropriate to refer to the sources of information, such sources are not cited in footnote. A short bibliography is included as an annex for those who wish to read more widely in relation to any of the topics covered in the text. Speakers’ papers have not been reproduced in full, although they have been drawn on heavily in preparation

⁵ “Strengthening International Humanitarian Law at the National Level”, paper prepared by the ICRC Advisory Service on International Humanitarian Law (January 1999) for the Meeting of Commonwealth Law Ministers, Port of Spain, Trinidad and Tobago, 3-7 May 1999.

of the Guide. Key points made by the various speakers are summarized in section 1.4 below.

This Guide is intended to raise awareness of the impact of international humanitarian law on the national legal system, and more particularly the impact of those provisions which require or permit criminal repression, at the national level, of war crimes or other violations of international humanitarian law. It identifies the provisions of international humanitarian law which require or permit enforcement at the national level, examines and assesses different approaches or legislative models which have been adopted in common law States, and outlines some of the difficulties which may be encountered in criminal proceedings for violations of international humanitarian law and suggests practical ways to overcome them.

The Guide also examines other crimes in international law — violations of certain arms control and disarmament treaties, torture, genocide, and crimes against humanity — which should be punished at the national level. The arms control and disarmament treaties examined in section 2.2 were not considered at the experts' meeting. They are included in the Guide for the sake of completeness, since insofar as they contain provisions prohibiting or regulating the use of certain weapons they will affect the conduct of hostilities.

1.3 IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW AND THE ICRC ADVISORY SERVICE

International humanitarian law — also called the “law of war” and the “law of armed conflict” — is a set of rules which, largely for humanitarian reasons, seeks to limit the effects of armed conflict. It protects those who are not, or are no longer, taking part in fighting and restricts the methods and means used in warfare. Implementation of international humanitarian law covers all the measures which must be taken to ensure that these rules are fully respected. It is not only necessary to apply these rules once fighting has begun. There are also measures which must be taken outside areas of conflict and in peacetime, to ensure that:

- all people, both civilian and military, are familiar with the rules of international humanitarian law;
- the structures, administrative arrangements and personnel required for the application of international humanitarian law are in place; and
- violations of the law are prevented and, where necessary, punished.

Primary responsibility for implementation of international humanitarian law rests with States. The ICRC established its Advisory Service on International Humanitarian Law in 1995 to advise governments on the national measures necessary to implement fully their obligations under international humanitarian law. Since its establishment, the Advisory Service's three main priorities have been to promote ratification of international humanitarian law treaties, to promote national implementation of obligations under those treaties, and to collect and facilitate the exchange of information regarding national implementation measures. In terms of legislative implementation, the Advisory Service's main priorities have been the adoption of national legislation for the prosecution and punishment of individuals alleged to have committed war crimes or other violations of international humanitarian law, and the adoption of national legislation to regulate use of the red cross and red crescent emblems and other protective symbols.

As far as punishment of violations of international humanitarian law is concerned, the Advisory Service initially focused its attention on adoption of national legislation for the punishment of grave breaches of the 1949 Geneva Conventions and their Additional Protocol I of 1977. It also encourages and assists States to adapt their criminal law to allow persons to be tried for:

- other violations of the Conventions and Protocols;
- violations of the 1954 Hague Cultural Property Convention and its Second Protocol (adopted on 26 March 1999);
- wilfully killing or causing serious injury to civilians through violations of Amended Protocol II (mines, booby-traps and other devices) to the 1980 Conventional Weapons Convention;
- violations of the 1997 Ottawa Convention (anti-personnel landmines); and
- crimes within the jurisdiction of the International Criminal Court.

Adoption of the Statute of the International Criminal Court in Rome in 1998 has provided a new incentive for States to review their national criminal law so as to ensure that the national criminal justice system (civil and/or military) has the capacity to try persons suspected of having committed crimes within the jurisdiction of the Court. At present, the crimes covered are genocide, crimes against humanity and war crimes. The Advisory Service will advise and assist States in their efforts to ratify and implement the Statute of the International Criminal Court and will continue

to help States adopt the national implementation measures necessary to fulfil their obligation to prevent and, where necessary, punish violations of international humanitarian law and of certain arms control and disarmament treaties.

1.4 KEY POINTS MADE IN SPEAKERS' PRESENTATIONS

1.4.1 Introductory remarks by the ICRC

In his opening speech, *Mr Cornelio Sommaruga*, then President of the ICRC, spoke about individual and collective responsibility for implementing and ensuring respect for international humanitarian law and the need for action — at both national and international levels — to meet this challenge. *Mr Yves Sandoz*, then ICRC Director for International Law and Communication, announced that a final report of the meeting would be drawn up to provide practical advice for common law States on national enforcement of humanitarian law. He stressed that the strengthening of international enforcement measures, with the adoption of the Statute of the International Criminal Court, should not replace measures at the national level and, ideally, should serve to encourage them.

Ms María Teresa Dutli, Head of the ICRC Advisory Service on International Humanitarian Law, spoke about the work of the Advisory Service in promoting ratification and implementation of humanitarian law, mentioning in particular the meeting of civil law experts on repression of violations (Geneva, October 1997).

1.4.2 War crimes legislation, trials and alternatives to prosecution

A number of speakers discussed their countries' experience in enacting war crimes legislation and bringing proceedings against suspected war criminals. Mention was also made of practical alternatives to prosecution.

Mr Edward Cummings, Legal Adviser, Permanent Mission of the United States of America in Geneva, indicated that he and his colleagues would continue their efforts to ensure that their country's international obligations were fully met and noted the importance of the educational process in achieving these ends.

Lieutenant Colonel Anthony Johnston, Assistant Judge Advocate General (Europe), Canada, suggested practical alternatives to prosecutions when these were unrealistic (such as denial of refugee status, revocation of citizenship, deportation of suspected war criminals). Measures such as

these should ensure, as a minimum, that no country was a safe haven for war criminals.

The theme of alternatives to prosecution was also taken up by *Ms Miranda Joubert*, Principal State Law Adviser, Department of Foreign Affairs, South Africa, who spoke about the work of the South African Truth and Reconciliation Commission, thus providing another dimension to the exploration of practical ways of promoting justice, healing and reconciliation.

1.4.3 Difficulties in war-crimes trials

Mr Bill Fenrick, Senior Legal Adviser, Office of the Prosecutor, International Criminal Tribunals for the former Yugoslavia and Rwanda, mentioned some of the problems associated with the investigations and trials process. Such problems might also be relevant to the national trial of alleged war criminals, in particular the difficulty of obtaining evidence and of proving the elements involved in the crime alleged. Mr Fenrick felt that the only way of overcoming these difficulties was to have people with a wide range of expertise and different backgrounds involved in the investigation and trial process.

1.4.4 The military justice system

Brigadier Nilendra Kumar, Joint Judge Advocate General, Indian Army, explained the interplay between military and civil law in India, noting in particular how military law compensated for certain shortcomings of the approach adopted in the Geneva Conventions Act. His discussion of the military approach to prosecutions was instructive, as were his recommendations for improving compliance by armed forces.

Major-General Gordon Risius, Director of Army Legal Services, United Kingdom, stressed the advantages of involving specialists in military law in investigations into, and prosecutions of, alleged war crimes. On the basis of the British experience, he outlined the benefits of using military police and tribunals in war crimes investigations and prosecutions. These included the fact that military police and tribunals had specialist knowledge of the rules of international humanitarian law and that military police were more likely to be able to gather evidence in accordance with the rules concerning the admissibility of evidence under military law. He also emphasized the need to ensure that members of the armed forces were aware of their duty under military regulations to report suspected war crimes.

1.4.5 National enforcement and the International Criminal Court

In discussing the possible implications of the Statute of the International Criminal Court for national enforcement of international humanitarian law, *Ms Louise Doswald-Beck*, Head of the ICRC Legal Division, referred to the complementarity of national and international enforcement systems. She made the point that primary responsibility for enforcing international humanitarian law lay with national authorities and that the jurisdiction of the Court is intended to come into play only when the national system is unable or unwilling to take action against individuals over whom it would normally have jurisdiction.

Ms Doswald-Beck expressed the hope that the adoption of the Statute would have the effect of encouraging States to re-examine their national legislation and prosecutions practice in relation to war crimes. She also gave a word of caution, emphasizing that nothing in the Statute released States from their obligations under existing instruments of international humanitarian law to which they were party or from their customary international law obligations.

PART 2

**STATE RESPONSIBILITY
TO PUNISH
INTERNATIONAL CRIMES**

CHAPTER 2

OBLIGATION TO PUNISH INTERNATIONAL CRIMES AT THE NATIONAL LEVEL

2.1 INTRODUCTION

International humanitarian law consists of detailed rules aimed at protecting the victims of armed conflict and restricting means and methods of warfare. States are required to take a number of measures to ensure compliance with their obligations under international humanitarian law. In that respect, States have an obligation to prevent and, where necessary, punish violations of international humanitarian law through the adoption of national implementation measures.

The rules of international humanitarian law are found in agreements concluded between States (often called treaties or conventions) and in general principles or practices which States accept as legal obligations (often referred to as customary international law). International humanitarian law treaties frequently create an explicit obligation for States Parties to enact criminal legislation to punish individuals responsible for violations. These instruments may also require States Parties to bring alleged offenders before their own courts or to hand them over for trial in another State.

In addition to the treaty obligations to prevent and punish violations of international humanitarian law, States have an obligation to ensure compliance with rules arising under customary international law. This latter obligation does not *require* States to enact criminal legislation or punish alleged offenders, although they have the *capacity* to do so under international law.

Finally, adoption of the Statute of the International Criminal Court in Rome in 1998 is leading many States to review their criminal law to ensure that prosecutions can be brought, in national courts, for crimes within the Court's jurisdiction — genocide, crimes against humanity and war crimes.

This chapter includes a summary of:

- States' obligation to punish violations of international humanitarian law treaties and of certain arms control and disarmament treaties (section 2.2), with the relevant treaty provisions set out in full in Annex 5 and a table summarizing the relevant obligations in Annex 6;

- States' obligation to punish genocide, torture and crimes against humanity (section 2.3);
- the effect of adoption of the Rome Statute of the International Criminal Court on national criminal justice systems (section 2.4).

2.2 OBLIGATION TO PUNISH VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL TREATIES

2.2.1 Introduction

States have an obligation to prevent and, where necessary, punish violations of international humanitarian law. This obligation is set out in several humanitarian law instruments. For example, States party to the four 1949 Geneva Conventions and 1977 Protocol I additional thereto must enact laws to *repress*, that is, to punish, the most serious violations of these instruments (those which are defined as grave breaches). In addition, States party to the Conventions and Protocol I must *suppress* all violations. The obligation to *suppress* violations does not *require* criminal legislation to be adopted, but leaves it to States to adopt such legislative, administrative or disciplinary measures as may be necessary.

This section summarizes the obligations regarding punishment in the Geneva Conventions and their Additional Protocols, in other international humanitarian law treaties and in certain arms control and disarmament treaties. The treaties examined are, in chronological order, the 1949 Geneva Conventions and their 1977 Additional Protocols, the 1954 Hague Cultural Property Convention and its Second Protocol, the 1972 Biological Weapons Convention, the 1976 Environmental Modification Techniques Convention, Amended Protocol II to the 1980 Conventional Weapons Convention, the 1993 Chemical Weapons Convention, and the 1997 Ottawa Convention.

The nature of the obligation to repress and suppress violations varies from treaty to treaty in relation to both jurisdiction (universal or territorial)⁶ and scope (prohibitions applying in international or non-international armed conflicts, or at all times). The treaty obligations are summarized below, set out in full in Annex 5 and shown in a table format in Annex 6.

⁶ The principle of universal jurisdiction, and the cases in which jurisdiction may be asserted and exercised on this basis, are explained in Chapter 3.

2.2.2 The 1949 Geneva Conventions and their 1977 Additional Protocols

Grave breaches of the Conventions and Protocol I

States Parties are under an obligation to repress grave breaches⁷ of the Conventions and Protocol I in international armed conflict on the basis of *universal jurisdiction*, that is, regardless of the place where the offence was committed and the nationality of the perpetrator.⁸

The Conventions and Protocol I impose a twofold obligation: *to enact legislation* to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches; and *to search for, and to try or extradite*, such persons. For States which are party to Protocol I, the obligation to repress grave breaches extends to grave breaches which result from a failure to act when under a duty to do so.⁹

Other violations of the Conventions and Protocols

In addition to the obligation to repress grave breaches of the Conventions and Protocol I, States Parties are under an obligation to *suppress* all violations of the Conventions and Protocol I¹⁰ in international and non-international armed conflict (as applicable). For States which are party to Protocol I, the obligation to suppress other violations extends to violations which result from a failure to act when under a duty to do so.¹¹

2.2.3 The 1954 Hague Convention for the Protection of Cultural Property and the Second Protocol to the Convention (adopted on 26 March 1999)

States which are party to the 1954 Hague Convention only

States Parties have an obligation to take all necessary steps, within the framework of their ordinary criminal jurisdiction, to prosecute and impose

⁷ Conduct constituting a grave breach of the Conventions is defined in Article 50/51/130/147 common to the four Conventions. For Protocol I, grave breaches are defined in Articles 11(4) and 85(2), (3), (4). A table of grave breaches appears in Annex 7.

⁸ GC I-IV, Art. 49/50/129/146. P I, Art. 85(1).

⁹ PI, Art. 86(1).

¹⁰ GC I-IV, Art. 49/50/129/146. P I, Art. 85(1).

¹¹ PI, Art. 86(1).

penal or disciplinary sanctions upon persons, of whatever nationality, who commit or order to be committed a breach of the Convention.¹²

This obligation applies in international and non-international armed conflict, although it is limited, in the case of the latter, to breaches of those provisions which relate to respect for cultural property.¹³

States which are party to the Convention and its Second Protocol

States party to the Convention and its Second Protocol have an obligation, which applies in international and non-international armed conflict,¹⁴ to:

- *establish as criminal offences* under domestic law the serious violations of the Convention and Protocol listed in Article 15(1) of the Protocol;¹⁵
- *adopt such legislative, administrative or disciplinary measures as may be necessary to suppress* the conduct listed in Article 21 of the Protocol;¹⁶
- *prohibit and prevent*, in relation to occupied territory, the conduct listed in Article 9 of the Protocol.¹⁷

When enacting legislation to criminalize the offences listed in Article 15(1), States must ensure that the legislation provides for jurisdiction:

- on the basis of territoriality and nationality (that is, when the offence is committed in the territory of the State or the alleged offender is a national of the State); and
- for the offences specified in Article 15(1)(a), (b) and (c) of the Protocol, on the basis of the *presence* of the alleged offender in the State.¹⁸

In relation to the offences specified in Article 15(1)(a),(b) and (c), States Parties have an obligation, similar to that which applies to grave breaches of

¹² 1954 Hague Cultural Property Convention, Art. 28.

¹³ 1954 Hague Cultural Property Convention, Art. 19(1).

¹⁴ Second Protocol to the 1954 Hague Cultural Property Convention, Art. 22.

¹⁵ Second Protocol to the 1954 Hague Cultural Property Convention, Art. 15(2). The serious violations in Article 15(1) are set out in full in Annex 5.

¹⁶ Second Protocol to the 1954 Hague Cultural Property Convention, Art. 21. The conduct prohibited by Article 21 is listed in Annex 5.

¹⁷ Second Protocol to the 1954 Hague Cultural Property Convention, Art. 9. The conduct prohibited by Article 9 is listed in Annex 5.

¹⁸ Second Protocol to the 1954 Hague Cultural Property Convention, Art. 16.

the Geneva Conventions and Additional Protocol I, to *try or extradite* alleged offenders present in the territory.¹⁹

2.2.4 The 1972 Biological Weapons Convention

States Parties have an obligation to *prohibit and prevent* the development, production, stockpiling, acquisition or retention of biological weapons and delivery systems on the territory of the State or in any other place under its *jurisdiction or control*.²⁰

The Convention's prohibitions on development, production, acquisition, stockpiling, acquisition, retention and transfer apply *at all times*.

2.2.5 The 1976 Environmental Modification Techniques Convention

Each State Party has an obligation to *take measures it considers necessary to prohibit and prevent* violations of the Convention on territory under the State's *jurisdiction or control*.²¹

The Convention prohibits *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.²²

2.2.6 Amended Protocol II to the 1980 Conventional Weapons Convention (adopted on 3 May 1996)

States Parties have an obligation to *impose penal sanctions* on persons who wilfully kill or cause serious injury to civilians through violations of the Protocol, whether committed in international or non-international armed conflict.²³ This obligation applies in relation to persons or territory under the State's *jurisdiction or control*.

In addition to this obligation to impose penal sanctions, there is an obligation to *prevent and suppress* all violations of the Protocol by persons or on territory under the State's *jurisdiction or control*.

¹⁹ Second Protocol to the 1954 Hague Cultural Property Convention, Art. 17.

²⁰ 1972 Biological Weapons Convention, Art. IV.

²¹ 1976 Environmental Modification Techniques Convention, Art. IV.

²² 1976 Environmental Modification Techniques Convention, Art. I.

²³ Amended Protocol II to the 1980 Conventional Weapons Convention, Art. 14.

2.2.7 The 1993 Chemical Weapons Convention

States Parties have an obligation to enact *penal legislation* to punish violations of the Convention on the basis of territoriality or nationality, that is:

- on the territory of the State or in any other place under its *jurisdiction or control*; and
- by its *nationals* regardless of the place where the offence was committed.²⁴

The Convention's prohibitions on development, production, acquisition, stockpiling, retention and transfer, use or engaging in military preparations to use chemical weapons apply *at all times*.

2.2.8 The 1997 Ottawa Convention

States Parties have an obligation to prevent and suppress violations of the Convention by persons or on territory under the State's *jurisdiction or control*, including through the *imposition of penal sanctions*.²⁵

The Convention's prohibitions on use, development, production, acquisition, stockpiling, retention and transfer of anti-personnel landmines apply *at all times*.

2.3 PUNISHMENT OF GENOCIDE, TORTURE AND CRIMES AGAINST HUMANITY

2.3.1 Introduction

Genocide and torture are prohibited by international treaty law.²⁶ They are also crimes under customary international law. Crimes against humanity, which are customary law offences, are defined in the Statute of the International Criminal Court.²⁷

Each of these crimes is subject to universal jurisdiction, that is, any State *may* assert jurisdiction regardless of the place of the offence and the nationality of the alleged perpetrator. In relation to torture, States party to the Torture Convention are under an *obligation* to try or extradite.

²⁴ 1993 Chemical Weapons Convention, Art. VII.

²⁵ 1997 Ottawa Convention, Art. 9.

²⁶ 1948 Genocide Convention. 1984 Torture Convention.

²⁷ 1998 Rome Statute of the International Criminal Court, Art. 7.

States' obligations to punish these crimes are summarized in sections 2.3.2 to 2.3.4 below.

2.3.2 Genocide

States party to the Genocide Convention must enact legislation to provide effective penalties for persons guilty of genocide or criminal involvement in genocide.²⁸ The Convention provides further that persons charged with genocide shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction in relation to States which have accepted its jurisdiction.²⁹

The Statute of the International Criminal Court, adopted in Rome on 17 June 1998, provides for the establishment of an international tribunal with jurisdiction over the crime of genocide.

2.3.3 Torture

States party to the Torture Convention must ensure that all acts of torture are offences under their criminal law, punishable by appropriate penalties which take account of their grave nature.³⁰ The Torture Convention requires States Parties to establish jurisdiction over acts of torture committed in their territory, by their nationals and, where they consider it to be appropriate, where the victim is a national.³¹ They must also establish jurisdiction where the alleged offender is present in their territory if they do not extradite.³²

Insofar as torture constitutes a war crime or a crime against humanity, within the definitions in the Rome Statute, the International Criminal Court will also have jurisdiction.

2.3.4 Crimes against humanity

Unlike genocide and torture, which are prohibited by international treaty law, crimes against humanity are not prohibited by any specific treaty or

²⁸ Genocide Convention, Art. 5.

²⁹ Genocide Convention, Art. 6.

³⁰ Torture Convention, Art. 4.

³¹ Torture Convention, Art. 5(1).

³² Torture Convention, Art. 5(2).

treaty provision. It is nevertheless clear that crimes against humanity are crimes under international law. The customary law nature of the prohibition on crimes against humanity is well established, and these crimes have been prosecuted in both international and national tribunals. The International Criminal Court established pursuant to the Rome Statute will have jurisdiction over crimes against humanity.

Because of the solely customary law status of these crimes, there is no treaty obligation on States to punish violations. States may, however, decide to assert jurisdiction and may do so on the basis of universal jurisdiction.

2.4 INTERNATIONAL AND NATIONAL CRIMINAL JUSTICE SYSTEMS

2.4.1 Introduction

The main purpose of this Guide is to provide advice to common law States on measures to be taken, at the national level, to ensure that those alleged to have committed war crimes, other violations of international humanitarian law, and other serious international crimes, may be prosecuted in national courts. Some mention is required also of international prosecution mechanisms, particularly as these have implications for States' national criminal law, national prosecutions policy, and cooperation and judicial assistance procedures.

2.4.2 Establishment of the ad hoc tribunals and the International Criminal Court

In 1993, the United Nations Security Council, acting under Chapter VII of the United Nations Charter, established the International Criminal Tribunal for the former Yugoslavia. In 1994, the same procedure was followed to establish the International Criminal Tribunal for Rwanda. These tribunals are "ad hoc", that is, they have been set up to deal with crimes committed in two specific contexts. The tribunals have jurisdiction over genocide, crimes against humanity and certain violations of international humanitarian law committed in the former Yugoslavia since 1991 and in Rwanda (or by Rwandan nationals in neighbouring States) in 1994.

It has been over 50 years since the United Nations first recognized the need to establish a permanent international criminal court, to prosecute crimes such as genocide. The Genocide Convention, adopted in 1948, provides that persons charged with genocide "shall be tried by a competent tribunal

of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction". On 17 July 1998, 50 years after adoption of the Genocide Convention, a Diplomatic Conference in Rome adopted the Statute for the International Criminal Court. The Statute will enter into force once it is ratified by 60 States. The Court established by the Statute will be a permanent international criminal court. It will have jurisdiction over genocide, crimes against humanity, war crimes, and aggression.

2.4.3 Exercise of jurisdiction by national or international tribunals

Under the Statutes of the ad hoc tribunals, it is provided that the international tribunal and national courts have concurrent jurisdiction, with the international tribunal to have primacy over national courts.³³ Under the Statute of the International Criminal Court, the Court shall be complementary to national criminal jurisdictions, with the Court's jurisdiction arising only where a State which would otherwise have jurisdiction is unable or unwilling to investigate or prosecute.³⁴

Adoption of the Rome Statute, which is based on the premise that the Court should be complementary to national courts, provides an incentive for States to ensure that national courts have jurisdiction to try persons suspected of genocide, crimes against humanity and war crimes. The Rome Statute does not impose an obligation on States Parties to ensure that these crimes are crimes also in domestic law. However, States Parties which wish to take advantage of the principle of complementarity will need to review their national criminal law to ensure that prosecutions can be brought in national courts.

2.4.4 Complementarity under the Rome Statute and the incorporation of genocide, crimes against humanity and war crimes into national law

It is clear that most States which have started working on implementation of the Rome Statute intend to make genocide, crimes against humanity and

³³ Statute of the International Tribunal for the former Yugoslavia, Art. 9. Statute of the International Tribunal for Rwanda, Art. 8.

³⁴ Rome Statute of the International Criminal Court, Arts 1 and 17.

war crimes offences in their criminal law. Each State which intends to incorporate these crimes into its domestic system will need to consider:

- how to define the crimes (by reference to the definitions in Articles 6 to 8 of the Rome Statute or by drafting specific definitions);
- what penalties should be prescribed to them;
- what jurisdictional basis should be asserted (universal jurisdiction or on the basis of territoriality or nationality) and whether the legislation should have effect from the date of promulgation or with retrospective effect;
- whether to amend national rules about criminal responsibility in light of the Rome Statute (for example, to take account of the Statute's provisions on individual responsibility for inchoate offences, defences, command and superior responsibility, the mental element, grounds which will not relieve an accused of criminal responsibility);
- what use, if any, should be made of the Elements of Crime which are to be adopted by the Assembly of States Parties to assist the Court in the application and interpretation of Articles 6 to 8 of the Statute.

In relation to war crimes, it is important to remember that States are under an obligation to criminalize certain violations of international humanitarian law and arms control and disarmament treaties to which they are party. Adopting legislation to criminalize war crimes using the definition in the Rome Statute may not be enough to satisfy a State's existing treaty obligations. States parties to the Geneva Conventions and their Additional Protocols, the 1954 Cultural Property Convention and its Second Protocol, the 1972 Biological Weapons Convention, the 1976 Environmental Modification Techniques Convention, the 1980 Conventional Weapons Convention, the 1993 Chemical Weapons Conventions, and the 1997 Ottawa Convention will need to consider what obligations these treaties impose by way of prevention and punishment of violations. These obligations are summarized in section 2.2 above.

CHAPTER 3

JURISDICTION OVER INTERNATIONAL CRIMES

3.1 INTRODUCTION

Jurisdiction refers to a State's capacity to enact laws, take executive action and try cases (civil or criminal). It is universally accepted that a State may exercise jurisdiction within its own territory. While the assertion of jurisdiction is generally limited to national territory, international law recognizes that in certain circumstances a State may legislate for, or adjudicate on, events occurring outside its territory.³⁵

In relation to criminal law, a number of principles have been invoked as the basis for such extraterritorial jurisdiction. These permit the exercise of jurisdiction over acts:

- (i) committed by persons having the nationality of the forum (nationality or active personality principle);
- (ii) committed against nationals of the forum (passive personality principle); and
- (iii) affecting the security of the State (protective principle).

While these principles enjoy varying levels of support in practice and opinion, they all require some form of link between the act committed and the State asserting jurisdiction. The principle of universality, a further basis for asserting extraterritorial jurisdiction, requires no such link. Universal jurisdiction refers to the assertion of jurisdiction over offences regardless of the place where they were committed or the nationality of the perpetrator or victim. It is an important element in the repression at the national level of war crimes, crimes against humanity and the crime of genocide.

This chapter examines the legal basis for the assertion of universal jurisdiction, which can be found in treaty law and customary international law, and its application to war crimes, crimes against humanity and genocide.

³⁵ In the *Lotus* case (1927) PCIJ, Ser. A, No. 10, pp. 18-19, the Permanent Court of International Justice, while noting the territorial character of criminal law, observed that international law did not lay down "a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property or acts outside their territory".

3.2 THE PRINCIPLE OF UNIVERSAL JURISDICTION

Universal jurisdiction refers to the assertion of jurisdiction over offences regardless of the place where they were committed or the nationality of the perpetrator or victim. It is held to apply to a range of offences whose repression by all States is justified, or required, as a matter of international public policy. Certain offences are regarded as being subject to universal jurisdiction as a matter of customary international law. These include, for example, piracy, slavery, war crimes, genocide and crimes against humanity. Other offences are expressly made subject to universal jurisdiction in treaty law. These include grave breaches of the Geneva Conventions and Additional Protocol I, torture, hijacking, attacks on aircraft and shipping, apartheid, attacks on United Nations and related personnel, and hostage-taking.³⁶

A key distinction must be made between offences in relation to which States are *obliged* to assert universal jurisdiction (mandatory universal jurisdiction) and offences in relation to which a State *may*, if it so chooses, assert universal jurisdiction (permissive universal jurisdiction). Where treaties provide for universal jurisdiction, they generally provide for *mandatory* universal jurisdiction — that is, they require States to assert jurisdiction. Conversely, where customary international law alone provides for the assertion of universal jurisdiction, this is generally *permissive* rather than mandatory.

The exercise of universal jurisdiction normally takes the form of the enactment of national legislation giving the State jurisdiction over specified offences regardless of the place where they were committed or the nationality of the perpetrator. Even in States where national law provides for universal jurisdiction over war crimes, genocide or crimes against humanity, the investigation and trial of alleged offenders on the basis of universal jurisdiction has been the exception rather than the rule. It appears that this is starting to change. In recent years, the international community's concern to end impunity for these serious international crimes has led to the creation of ad hoc Tribunals for the former Yugoslavia and Rwanda and adoption of the Rome Statute to establish a permanent International Criminal Court.

³⁶ GC I-IV, Arts 49/50/129/146; PI, Art. 85(1); 1984 Torture Convention, Art. 5; Convention for the Suppression of Unlawful Seizure of Aircrafts (Hijacking), The Hague, 6 December 1970, Art. 4(2); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Sabotage), Montreal, 23 September 1971, Art. 5, as amended by the Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, Montreal, 24 February 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988, Art. 6(4); 1973 Apartheid Convention, Art. 5; Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, Arts 10(4), 14; International Convention against the Taking of Hostages, 17 December 1979, Art. 5(2).

At the same time, it would appear that States are becoming more willing to investigate and bring prosecutions on the basis of universal jurisdiction. With the adoption of the Statute of the International Criminal Court, and the changes in national criminal law which are occurring as States amend their law to ensure that their courts will have jurisdiction over the crimes within the Court's jurisdiction, an increasing number of States will have the capacity to prosecute war crimes, genocide and crimes against humanity. It is already clear, at this early stage after adoption of the Statute, that some States will choose to assert universal jurisdiction over these crimes.

In States where national law does not explicitly provide for universal jurisdiction over war crimes, genocide or crimes against humanity, it will be very difficult to proceed against alleged offenders on this basis. States that are party to treaties which impose an obligation to exercise universal jurisdiction in relation to certain treaty crimes should ensure that their national law enables them to do so. States that intend to ratify the Statute of the International Criminal Court may wish to consider providing for universal jurisdiction over the crimes covered by the Court, that is, war crimes, genocide and crimes against humanity.

3.3 UNIVERSAL JURISDICTION OVER WAR CRIMES

The basis for the assertion of universal jurisdiction over war crimes is to be found in both treaty law and customary international law.

3.3.1 Treaty law

The treaty basis for the assertion of universal jurisdiction was introduced by the four 1949 Geneva Conventions in relation to those violations of the Conventions that are defined as grave breaches.³⁷ Grave breaches of Protocol I are subject to the same regime.³⁸ Under the Conventions and Protocol I, States are required to search for alleged offenders “regardless of their nationality”, and either bring them before their own courts or hand them over for trial by another State Party. States must also ensure that their national law enables them to try alleged offenders, as the Conventions and Protocol I require States to enact any necessary legislation to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches.

³⁷ GC I-IV, Art. 49/50/129/146.

³⁸ P I, Art. 85(1).

While the Conventions do not expressly state that jurisdiction is to be asserted regardless of the place of the offence, they have been interpreted as providing for universal jurisdiction. As such they are among the earliest examples of universal jurisdiction in treaty law. The Conventions and Protocol I fall within the category of mandatory universal jurisdiction — they *oblige* States to assert jurisdiction over grave breaches. States are not necessarily obliged to try alleged offenders, but in cases where they do not do so they must institute the necessary procedures to hand the person over to another State Party which has made out a *prima facie* case. States party to the Conventions and Protocol I will, therefore, need to ensure that their extradition laws and procedures enable them to extradite alleged offenders.

Another international humanitarian law treaty which expressly requires States Parties to exercise universal jurisdiction over violations is the Second Protocol to the 1954 Hague Cultural Property Convention. Under Articles 16(1) and 17(1) of the Protocol, States Parties must assert jurisdiction over certain serious violations of the Convention and Protocol when committed in the State's territory, by the State's nationals or when the offender is present in the territory, and try or extradite alleged offenders.

3.3.2 Customary international law

In addition to the treaty provisions which require States to exercise universal jurisdiction over certain war crimes, it is generally accepted that customary international law also provides a basis for the assertion of universal jurisdiction over war crimes. This view is reflected in both legislative practice and national case law.

While the relevant treaty provisions are restricted to grave breaches of the Geneva Conventions and Additional Protocol I, and certain serious violations of the 1954 Hague Cultural Property Convention and its Second Protocol, universal jurisdiction in customary international law may be regarded as extending to all violations of the laws and customs of war which constitute war crimes. This would include certain serious violations of the laws relating to methods and means of warfare which are not classified as grave breaches. It would also include serious violations of international humanitarian law committed in non-international armed conflict. Customary international law therefore permits States to exercise universal jurisdiction over such violations, including serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.

In contrast with treaty law, there do not appear to be any grounds for concluding that customary international law *requires* States to exercise

jurisdiction. It provides rather for *permissive* universal jurisdiction. Thus, in relation to war crimes which do not constitute grave breaches of the Conventions or Protocol I or one of the serious violations referred to in the Second Protocol to the 1954 Hague Cultural Property Convention, States may *choose* whether to exercise universal jurisdiction.

3.3.3 Universal jurisdiction over war crimes in national law

States have adopted a range of methods to provide for universal jurisdiction over grave breaches under their national law. A number of civil law States, that is, States with code-based systems, provide for universal jurisdiction within their ordinary penal codes. Others may provide for universal jurisdiction in a code on criminal procedure, in a separate military penal code, or in a law on judicial powers.

In common law States, the usual practice is to provide for universal jurisdiction over grave breaches in legislation incorporating the Geneva Conventions in national law. This is the approach followed in over 25 Commonwealth States which have adopted a Geneva Conventions Act providing for punishment of grave breaches of the Conventions and, where applicable, Additional Protocol I, on the basis of universal jurisdiction. Another approach is to provide for universal jurisdiction over the offence in a wider statute dealing with the same general subject-matter. This is the approach followed in the United Kingdom *Criminal Justice Act 1988* (which provides universal jurisdiction over torture)³⁹ and the Canadian *Criminal Code 1987* (which permits the exercise of jurisdiction over war crimes and crimes against humanity if the alleged offender is present in Canada).⁴⁰ Similarly, the Canadian and New Zealand implementing legislation for the Rome Statute of the International Criminal Court provides for universal jurisdiction over war crimes, crimes against humanity and genocide.⁴¹

3.4 UNIVERSAL JURISDICTION OVER GENOCIDE, TORTURE AND CRIMES AGAINST HUMANITY

3.4.1 Introduction

Genocide and torture are prohibited by international treaty law. They are also crimes under customary international law. Crimes against humanity are

³⁹ United Kingdom *Criminal Justice Act 1988*, sec. 134(1).

⁴⁰ Canadian *Criminal Code*, sec. 7.3.71.

⁴¹ Canadian *Crimes Against Humanity and War Crimes Act 2000*, sec. 8. New Zealand *International Crimes and International Criminal Court Act 2000*, sec. 8(1).

customary law offences, which have been given their most recent definition in the Statute of the International Criminal Court.

States party to the Torture Convention have an *obligation* to exercise universal jurisdiction over the crime of torture. In fact, under the Torture Convention they must ensure that all acts of torture are offences under national law (Article 4) and take such measures as may be necessary to try alleged offenders, where they do not extradite (Article 5).

Genocide and crimes against humanity — and, for States which are not party to the Torture Convention, the crime of torture — are subject to *permissive* universal jurisdiction, that is, any State *may* assert jurisdiction regardless of the place of the offence and the nationality of the alleged perpetrator.

3.4.2 Universal jurisdiction over the crime of genocide

International law recognizes that genocide is outlawed under customary international law, as well as treaty law, and that it is a crime of universal concern.

States party to the Genocide Convention are under an *obligation* to enact legislation to provide effective penalties for persons guilty of genocide or criminal involvement in genocide (Article 5). The Convention provides further that persons charged with genocide shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction in relation to the States which have accepted its jurisdiction (Article 6).

The Genocide Convention does not *require* States Parties to exercise universal jurisdiction over the crime of genocide. It is generally accepted that customary international law *permits* States — whether party to the Genocide Convention or not — to assert universal jurisdiction over the crime of genocide. In this regard, it is important to note that the reference in Article 6 of the Convention to territorial jurisdiction and to the jurisdiction of a putative international penal tribunal does not undermine or diminish a State Party's capacity to exercise universal jurisdiction over genocide, which it may do on the basis of customary international law.⁴²

A number of States which have legislation prohibiting and punishing genocide have granted their tribunals universal jurisdiction over this crime.

⁴² See *Attorney-General of the Government of Israel v. Adolf Eichmann*, Israel, District Court of Jerusalem, 12 December 1961, 36 ILR 18, at 39. *Attorney-General of the Government of Israel v. Adolf Eichmann*, Israel, Supreme Court, 29 May 1962, 36 ILR 277, at 304.

Case law referring specifically to genocide is scarce. Nonetheless, three cases may be cited: the *Eichmann* cases,⁴³ which reaffirmed the customary international law status of the crime of genocide, and a recent civil case from the United States, which decided that genocide committed on the territory of the former Yugoslavia could be a basis for a civil action under the Alien Tort Claims Act.⁴⁴

3.4.3 Universal jurisdiction over crimes against humanity

The principle of universal jurisdiction in relation to crimes against humanity has been admitted in certain instances. The most important developments in relation to the repression of crimes against humanity can be traced, as with war crimes, back to the Nuremberg Charter. Crimes against humanity fell under the jurisdiction of the International Military Tribunal as provided for in Article 6(c) of the Charter. Indeed, a majority of individuals tried before this Tribunal were charged with crimes against humanity. Moreover, in application of the Allied Control Council Law No. 10, crimes against humanity have been recognized as offences against international law.

There have been relatively few cases of crimes against humanity before national tribunals, but these cases clearly indicate that such crimes are to be considered as crimes against international law and against the international community as a whole, and therefore are not restricted to the principle of territorial jurisdiction.⁴⁵

The absence of a comprehensive convention defining crimes against humanity may explain the absence of extensive national legislation conferring universal jurisdiction on national courts over crimes against humanity as such. However, the Canadian *Criminal Code*, the Canadian *Crimes Against Humanity and War Crimes Act*, the Israeli *Nazis and Nazi*

⁴³ *Ibid.*

⁴⁴ The Alien Tort Claims Act provides that: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”. The Act may be used to support actions for war crimes, genocide, torture, summary executions, and other human rights abuses which occur in violation of the law of nations. The decision *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995), at 242, affirmed the District Court’s jurisdiction over “a campaign of murder, rape, forced impregnation and other forms of torture designed to destroy [certain] religious and ethnic groups”, such conduct constituting a violation of the international law norm proscribing genocide.

⁴⁵ See the *Eichmann* cases, *supra*. See also *R. v. Finta* (24 March 1994), 1 S.C.R. 701, dissenting opinion by Justice La Forest.

Collaborators (Punishment) Law, and the New Zealand *International Crimes and International Criminal Court Act* provide for such jurisdiction.

With the adoption of the Statute of the International Criminal Court, it is certain that we will see increasing numbers of States adopting legislation to punish crimes against humanity. There are two reasons for this. First, States that wish to take advantage of the principle of complementarity — whereby the Court has jurisdiction only where a State which would otherwise have jurisdiction is unable or unwilling to act — will need to ensure that their national law enables them to prosecute alleged offenders. Secondly, the Statute provides a comprehensive definition of the term “crime against humanity”, thus making the task of adopting legislation easier: a simple reference to the definition in the Statute will suffice to define the crime in national law.

PART 3

**INDIVIDUAL
RESPONSIBILITY FOR
INTERNATIONAL CRIMES**

CHAPTER 4

RESPONSIBILITY FOR INTERNATIONAL CRIMES

4.1 INTRODUCTION

International humanitarian law was one of the first areas of international law in which it was made clear that the individual, and not just the State, was responsible for his or her own acts.

The principle of individual criminal responsibility for war crimes, crimes against humanity and genocide is now well established. It is part of customary international law, and is also recognized in international treaty law — in the provisions of the Geneva Conventions and Additional Protocol I relating to grave breaches, in the Genocide Convention and other international humanitarian law and human rights treaties, in the Statutes of the ad hoc International Tribunals for the former Yugoslavia and Rwanda, and in the Statute of the International Criminal Court.

The Geneva Conventions were the first treaties to *require* States to prosecute (or extradite) violators, regardless of their nationality or the place of the offence. It is essential to ensure that there is no safe haven for war criminals. The enforcement of individual responsibility, through the prosecution and trial of alleged offenders, is undoubtedly one of the most important mechanisms for ensuring respect for international humanitarian law. This chapter focuses on *individual criminal responsibility* for war crimes and other violations of international humanitarian law. Chapters 5, 6 and 7 examine how common law States establish criminal liability for these offences through their national criminal and military law. It is important to recall that criminal liability is not the only way of holding alleged offenders accountable for their acts. Other forms of accountability or responsibility include civil liability or liability in terms of damages to victims, truth commissions, immigration and nationality controls, etc. These are discussed briefly in Chapter 9.

This chapter looks at:

- general principles of criminal responsibility in international humanitarian law and international criminal law — for those who commit, or order the commission of, such crimes; responsibility in cases of omission; command and superior responsibility; aiding, abetting, and otherwise assisting; conspiracy (section 4.2);

- the mental element (*mens rea*) required to establish criminal responsibility (section 4.3);
- defences and immunities which may be raised in proceedings for international crimes — ignorance of the law; obedience to national law; sovereign immunity; duress and necessity; superior orders; statute of limitations (section 4.4).

4.2 GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW

4.2.1 Introduction

International law recognizes individual criminal responsibility for war crimes, crimes against humanity and genocide and for certain specific offences such as slavery and forced labour, piracy, torture, apartheid, and forced disappearances. This section focuses on general principles of criminal responsibility relevant to violations of international humanitarian law.

4.2.2 Principle of individual responsibility for war crimes

The system of grave breaches established by the Geneva Conventions and Additional Protocol I assigns criminal responsibility to those who have committed, or ordered to be committed, grave breaches and requires States Parties to enact legislation to punish such offences. A State's criminal or military law must allow prosecution of those who have committed, or ordered to be committed, grave breaches. In accordance with generally recognized principles of national and international criminal law, the law should extend criminal responsibility to persons other than those who directly commit, or order the commission of, the act — for example, those who aid, abet or otherwise assist in its commission, who attempt to commit such an act, or who participate in a criminal conspiracy to commit such an act.

The law should also extend liability to those who commit grave breaches and other violations by way of *omission* (in the circumstances outlined in section 4.2.3), and to commanders and superiors for acts of *subordinates* (in the circumstances outlined in section 4.2.4). In relation to the crime of genocide, it is necessary to cover not only the crimes of genocide and conspiracy and attempts to commit genocide, but also direct and public incitement to commit genocide.⁴⁶

⁴⁶ Genocide Convention, Art. 3.

Article 25 of the Statute of the International Criminal Court confirms the extension of criminal responsibility beyond persons who actually commit war crimes, crimes against humanity and genocide to persons who:

- commit the crime, as an individual or jointly with others;
- order, solicit or induce the crime which is committed or attempted;
- aid, abet or otherwise assist in its commission or its attempted commission, including providing the means for its commission;
- contribute to the commission or attempted commission of such a crime by a group of persons acting with a common purpose;
- in respect of the crime of genocide, directly and publicly incite others to commit the crime;
- attempt to commit such a crime.

4.2.3 Liability for omissions

The system of grave breaches established by the Geneva Conventions assigns criminal responsibility to those who have committed, or ordered to be committed, a grave breach. In certain cases, a failure to act may also amount to a grave breach. One example would be wilful killing by deprivation of food or care. Other examples of grave breaches which might be caused by omission include unjustifiable delay in repatriation of prisoners of war or civilians, and depriving a prisoner of war of the right to a fair and regular trial.

The notion that individuals may be responsible for violations of international humanitarian law resulting from omission is confirmed by Article 86(1) of Additional Protocol I, which requires States Parties to repress grave breaches, and take measures to suppress all other breaches of the Conventions and Protocol I which result from a failure to act when under a duty to do so.

4.2.4 Liability of commanders and superiors

The principle that commanders and superiors may be responsible for violations committed by their subordinates has been clearly recognized since the Nuremberg and Tokyo trials which took place after World War II. It is explicitly recognized in Article 86(2) of Additional Protocol I and in the Statutes of the International Tribunals for the former Yugoslavia and Rwanda and the Statute of the International Criminal Court. Under Article 86(2), the responsibility attaches where the superiors:

- knew or had reason to know that the subordinate was committing or was going to commit such acts; and
- failed to take “all feasible measures within their power” to prevent such acts or to punish the perpetrator.

The Statutes of the ad hoc tribunals and the International Criminal Court use a slightly different formulation. Under Article 7 of the Statute of the Tribunal for the former Yugoslavia and Article 6 of the Statute of the Rwanda Tribunal, responsibility attaches where the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and failed to take “the necessary and reasonable measures to prevent such acts or to punish the perpetrators”.

The regime established by Article 28 of the Statute of the International Criminal Court draws a distinction between the liability of military commanders and other superiors. In the case of commanders, responsibility attaches, in relation to forces under the commander’s effective command and control, or effective authority and control, if he or she knew or should have known that the subordinates were committing or going to commit such crimes and failed to take “the necessary and reasonable measures within his or her power” to prevent or punish such acts or submit the matter for investigation and prosecution (Article 28(a)). In the case of superiors who are not military commanders, in relation to subordinates under the superior’s effective authority and control, responsibility attaches if the superior “knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes” and failed to take “all necessary and reasonable measures within his or her power” to prevent or punish such acts or submit the matter for investigation and prosecution (Article 28(b)).

The provisions cited above all refer to the superior’s failure to prevent the crimes or punish the perpetrator as factors tending to establish responsibility for acts of subordinates. In this regard, it is interesting to note that Article 87 of Protocol I obliges States Parties to require commanders:

- to ensure that members of the armed forces under their command are aware of their obligations under the Conventions and the Protocol;
- to prevent and, where necessary, suppress breaches by members of the armed forces under their command and other persons under their control, and to report breaches to the competent authorities;

- where their subordinates or other persons under their control are going to commit or have committed such breaches, to initiate such steps as are necessary to prevent them and, where appropriate, to initiate disciplinary proceedings or penal action against violators.

4.3 MENTAL ELEMENT (*MENS REA*)

Chapter 8 deals with procedural and other aspects of bringing a case to trial. In a war crimes trial, it will be necessary to show the existence of an armed conflict, that the act was committed in the course of the armed conflict,⁴⁷ that it was committed by the accused (or the accused was otherwise responsible in accordance with the principles of secondary liability outlined in section 4.2 above), and that the act was committed with the requisite mental element.

Many grave breach or war crimes provisions specify the intent required as wilfulness, as in “*wilful* killing, torture or inhuman treatment”, or “*wilfully* ... making the civilian population or individual civilians the object of attack”. Sometimes the intent specified is wantonness, as in “extensive destruction ... of property, not justified by military necessity and carried out unlawfully and *wantonly*”.

The ICRC’s Commentary on Additional Protocol I defines “wilfully” as meaning that the perpetrator acted:

*“consciously and with intent, i.e., with his mind on the act and its consequences, and willing them [...]; this encompasses the concepts of ‘wrongful intent’ or ‘recklessness’, viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered [...].”*⁴⁸

Negligence which is not sufficient to render an act a war crime may still suffice for disciplinary action under military law.

Article 30(1) of the Statute of the International Criminal Court provides that a person shall not be criminally responsible for a war crime, a crime

⁴⁷ The Conventions and Protocol I apply not only to armed conflicts, but also to all cases of total or partial occupation of the territory of a State Party. In war crimes trials relating to events alleged to have occurred in these circumstances, it will be necessary to prove that there is (or was) a situation of partial or total occupation of a State Party and that the act or acts complained of were committed in the course of the occupation.

⁴⁸ ICRC Commentary, para. 3474.

against humanity or genocide unless it is committed with intent and knowledge. Article 30(2)(a) provides that a person has intent, in relation to conduct, where the person means to engage in the conduct. Article 30(2)(b) provides that a person has intent, in relation to a consequence, where the person means to cause that consequence or is aware that it will occur in the ordinary course of events.

4.4 DEFENCES AND IMMUNITIES IN INTERNATIONAL LAW

4.4.1 Introduction

This section looks at the defences and immunities which may be raised in proceedings for international crimes — war crimes, genocide, and crimes against humanity. The grounds which may relieve an accused of criminal responsibility, as well as those which may not, and those which may apply in mitigation of punishment, are summarized very briefly below.

These principles are recognized in the domestic criminal law of most States and endorsed, with some differences of formulation, in various treaties and other sources of international law, including the Statutes of the ad hoc Tribunals for the former Yugoslavia and Rwanda and the Statute of the International Criminal Court.

4.4.2 Ignorance of the law

Ignorance of the law is no defence unless it negates the mental element required for the crime. This principle is recognized in Article 32 of the Statute of the International Criminal Court, which provides that a mistake of law may be a ground for excluding criminal responsibility if it negates the mental element required by the crime.

4.4.3 Obedience to national law

The fact that an accused's conduct was legal under national law is no defence.

4.4.4 Sovereign immunity

An accused's official position or capacity, even as a head of State or government, does not relieve the person of criminal responsibility nor mitigate punishment.

4.4.5 Duress and necessity

The fact that a person acted pursuant to duress or necessity may be a defence if the person acted necessarily and reasonably to avoid the threat and did not intend to cause harm greater than the one sought to be avoided.⁴⁹ The term “duress” applies to threats from another person; the term “necessity” applies where the threat is constituted by other circumstances beyond the person’s control. In both cases, the threat must be an immediate threat to life or physical well-being.

4.4.6 Superior orders

The fact that a person acted pursuant to an order of a government or a superior (military or civilian) is not in itself a defence. Superior orders may be relevant to other defences — such as duress — or if it shows an absence of intent. It may be taken into account in mitigation of punishment if it lessens the defendant’s responsibility for his or her acts.

4.4.7 Statute of limitations

It is recognized that war crimes, crimes against humanity and genocide are not subject to any statute of limitations. The non-applicability of statutory limitations for these offences is established also by the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

⁴⁹ The limits to duress as a defence were clearly set in the decision of the International Tribunal for the former Yugoslavia, which stated that duress cannot afford a complete defence in international law to a charge of a crime against humanity or a war crime that involves the killing of innocent human beings. See ICTY, *Prosecutor v. Erdemovic*, Appeals Chamber, judgment of 7 October 1997, IT-96-22-A, p. 16.

PART 4

**NATIONAL ENFORCEMENT
OF INTERNATIONAL LAW:
PUNISHMENT OF
INTERNATIONAL CRIMES
IN COMMON LAW STATES**

CHAPTER 5

PUNISHING INTERNATIONAL CRIMES AT THE NATIONAL LEVEL

5.1 INTRODUCTION

5.1.1 Incorporation of international law into domestic law: general principles

In common law States, treaties do not, as a general rule, become part of domestic or national law until implementing or enabling legislation is enacted. Customary international law, on the other hand, becomes part of the law of the land and, provided it is not inconsistent with statute law, may be directly applied by the courts.

The effect of these principles on national enforcement of international humanitarian law in common law States is, first, that a State cannot prosecute an individual alleged to have committed violations of treaty rules of international humanitarian law unless it has adopted enabling legislation establishing those violations as offences under domestic law. In theory, customary rules of international humanitarian law may be enforced directly. In practice, it will be necessary to have domestic legislation which refers to these customary rules and provides penalties for breaches.

5.1.2 Overview of the chapter

This chapter looks at:

- the legislation that common law States have adopted to incorporate international humanitarian law treaties, and certain arms control and disarmament treaties, into their domestic law, focusing in particular on punishment of violations of those treaties (section 5.2);
- national legislation to punish genocide, torture and crimes against humanity (section 5.3);
- how to frame national legislation to provide for universal jurisdiction over such crimes (section 5.4).

5.2 PUNISHING VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL TREATIES UNDER NATIONAL LAW

5.2.1 Introduction

States should ensure that their national criminal and military law allows them to punish war crimes, crimes against humanity and genocide. The international treaty violations which States should criminalize are reviewed in Chapter 2. The circumstances in which States should exercise universal jurisdiction over these crimes are explained in Chapter 3. The principles of criminal responsibility which apply to international crimes are described in Chapter 4.

This chapter looks at the way in which common law States meet their obligations, under international humanitarian law treaties and certain arms control and disarmament treaties, to punish violations in national courts. The approach generally followed is to adopt a separate implementing Act for each treaty. The treaties examined in this section are, in chronological order, the 1949 Geneva Conventions and their 1977 Additional Protocols, the 1954 Hague Cultural Property Convention and its Second Protocol, the 1972 Biological Weapons Convention, the 1976 Environmental Modification Techniques Convention, Amended Protocol II to the 1980 Conventional Weapons Convention, the 1993 Chemical Weapons Convention, and the 1997 Ottawa Convention.

5.2.2 The 1949 Geneva Conventions and their 1977 Additional Protocols

Chapter 6 looks in detail at the approach that common law States have taken to incorporate the 1949 Geneva Conventions and their 1977 Additional Protocols into domestic law, that is, adoption of a Geneva Conventions Act which provides for punishment of grave breaches of the Conventions and Protocol I, specifies trial procedures for protected persons, and regulates use of the protective emblems established by the Conventions and Protocol I. This section provides a brief introduction to the way these Geneva Conventions Acts punish violations of the Conventions and Protocols.

Grave breaches of the Conventions and Protocol I

Under the Geneva Conventions Acts in force in over 25 States,⁵⁰ any individual who commits a grave breach of the Geneva Conventions — or

⁵⁰ States where Geneva Conventions Acts are in force are listed in the Introduction to section 6.2.

who aids, abets or procures the commission of a grave breach by another person — is guilty of an offence. This applies regardless of the place where the offence was committed and the nationality of the alleged perpetrator. For those States which are party to the Additional Protocols, and which have amended their Geneva Conventions Acts to give effect to the Protocols, grave breaches of Additional Protocol I are also an offence.

States party to the Conventions and Additional Protocol I have an obligation to enact criminal legislation to punish grave breaches — and to search for, and try or extradite, persons alleged to have committed such crimes. Notwithstanding this obligation, it seems that many States have no legislation criminalizing grave breaches. In some States, this gap may be partly remedied by the military legal system; courts-martial or military tribunals may be able to try members of the military (and associated personnel) for conduct that amounts to a grave breach of the Conventions or Protocol I.⁵¹ It must be stressed that such legislation only partly fills the gap. First, it usually applies to military personnel only, whereas grave breaches may be committed by civilians as well as the military. Secondly, it is unusual for the military legislation of common law States to specifically create an offence termed “war crimes”, which means that conduct amounting to a grave breach or a war crime may have to be tried under a catchall provision.

Other violations of the Conventions and Protocol I

In addition to the obligation to repress grave breaches of the Conventions and Protocol I, States Parties are under an obligation to suppress all other violations of those treaties. Most Geneva Conventions Acts provide for punishment of grave breaches, but are silent in relation to other violations. The Irish *Geneva Conventions Act, 1962* and the Nigerian *Geneva Conventions Ordinance 1960* are the only ones to refer specifically to violations other than grave breaches. The Irish Act provides for the punishment of other violations when committed in the Republic of Ireland or by an Irish citizen. The Nigerian Ordinance permits the Governor-General, by order, to provide that other breaches committed in Nigeria or by Nigerian citizens are liable to punishment.

It is clear that States could adopt a wider jurisdictional basis than this, providing for jurisdiction over serious violations of international humanitarian law (treaty or customary rules) on the basis of universal

⁵¹ The jurisdiction of military law and courts over war crimes is examined in Chapter 7.

jurisdiction. A number of States are already considering amending their legislation in this way and it is likely that more will consider such changes during their deliberations relating to the International Criminal Court.

5.2.3 The 1954 Hague Cultural Property Convention and its 1999 Protocol

According to information available to the ICRC, a number of civil law States have enacted legislation to give effect to the 1954 Hague Cultural Property Convention.⁵² This legislation varies from country to country. Switzerland, for example, has comprehensive legislation for the protection of cultural property in armed conflict. Others have a provision, in the criminal or military code, providing for punishment of offences against cultural property.

This does not appear to be the case in common law States, where the ICRC has no record of implementing legislation for the Convention.

States party to the 1954 Convention should consider whether it is necessary to amend their criminal and/or military law so that violations can be punished. States party to the Second Protocol to this Convention must ensure that their national law criminalizes the serious violations of the Convention and Protocol listed in Article 15(1) and that it does so, in relation to the first three offences listed in paragraphs 15(1)(a), (b) and (c), on the basis of universal jurisdiction. States party to the Protocol should also consider whether to amend national law so as to suppress the conduct referred to in Article 21 of the Protocol and prohibit and punish other violations of the Protocol, such as the conduct listed in Article 9 of the Protocol in relation to occupied territory.

5.2.4 The 1972 Biological Weapons Convention

The Biological Weapons Convention imposes a *total ban* on biological weapons and on delivery systems for biological weapons — on their production, acquisition, development, stockpiling and transfer. It also requires States Parties to destroy their biological weapons and delivery systems. The Convention does not explicitly require States to enact

⁵² Examples which appear in the ICRC's National Implementation database are Azerbaijan, Belarus, Belgium, Chile, Croatia, France, Germany, Kyrgyzstan, Poland, the Russian Federation, Spain and Switzerland.

criminal legislation to punish violations of the Convention, although it does impose an obligation on them to take any necessary measures, in accordance with their constitutional processes, to prohibit and prevent the conduct banned by the Convention — within their territory or elsewhere under their jurisdiction or control.

Two examples of implementing legislation for the Biological Weapons Convention are the Australian *Crimes (Biological Weapons) Act 1976* and the United Kingdom *Biological Weapons Act 1974*. This legislation prohibits the conduct outlawed by the Convention and provides that contravention of any of these prohibitions is an offence (which can only be prosecuted with the consent of the Attorney-General). The Australian legislation is expressed to extend to acts done or omitted to be done by Australian citizens outside the national territory.⁵³ The United Kingdom legislation contains no equivalent provision.

5.2.5 The 1976 Environmental Modification Techniques Convention

This Convention prohibits 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. It does not explicitly require States to enact criminal legislation to punish violations, although it does impose an obligation on each State Party to take any measures it considers necessary, in accordance with its constitutional processes, to prohibit and prevent any activity in violation of the provisions of the Convention anywhere under its jurisdiction or control.

The ICRC Advisory Service is not aware of any implementing legislation for this Convention.

5.2.6 Amended Protocol II to the 1980 Conventional Weapons Convention (adopted on 3 May 1996)

Amended Protocol II to the 1980 Conventional Weapons Convention contains rules restricting the use of landmines (both anti-personnel and anti-tank), booby-traps and certain other explosive devices. In addition, the Protocol requires States Parties to ensure that their national criminal law provides for punishment of persons who wilfully kill or cause serious injury

⁵³ Australian *Crimes (Biological Weapons) Act 1976*, sec. 5.

to civilians through violations of the Protocol. The national law must establish jurisdiction over acts committed by persons or on territory under the State's jurisdiction or control, whether committed in international or non-international armed conflict.

The Advisory Service is not aware of any common law State that has adopted legislation providing specifically for punishment of violations of Amended Protocol II. It may be that States have taken the view that the obligation to impose penal sanctions on persons who wilfully kill or cause serious injury to civilians through violations of the Protocol can be discharged through prosecutions under the ordinary criminal law (for offences such as assault or murder).

It is interesting to note that a different approach has been followed in Spain, where the implementing legislation for the Ottawa Convention prohibits the use, production, acquisition, stockpiling and transfer not only of anti-personnel mines but also of weapons with similar effect which are specified in Amended Protocol II to the Conventional Weapons Convention.

5.2.7 The 1993 Chemical Weapons Convention

The Chemical Weapons Convention imposes a *total ban* on chemical weapons — on their use, production, acquisition, development, stockpiling and transfer. It also requires States Parties to destroy their chemical weapons and chemical weapons production facilities, and to destroy any chemical weapons they have abandoned on the territory of another State Party. In addition, the Convention requires States to ensure that their criminal law provides for punishment of violations committed on their territory or on territory under their jurisdiction or control, and violations committed by their own nationals (wherever committed).

According to a report drawn up by the Organization for the Prohibition of Chemical Weapons, as at 11 November 1998 over 30 States had criminal legislation to punish violations of the Convention.⁵⁴ In accordance with the terms of the Convention, this legislation should extend to acts committed by the State's nationals abroad.

⁵⁴ Office for the Prohibition of Chemical Weapons, *Survey of national implementing legislation*, 1998. See, in particular, Annex 1, "Survey of national implementing legislation: prohibited acts, penal provisions, extraterritorial application". The common law States in this list are Australia, Ireland, Malta, New Zealand, South Africa, Switzerland, the United Kingdom, and the United States of America.

5.2.8 The 1997 Ottawa Convention

The Ottawa Convention prohibits the use, production, acquisition, development, stockpiling and transfer of anti-personnel landmines under all circumstances. It also requires States to destroy their existing stocks within four years and to clear all anti-personnel mines which are already in the ground within 10 years of the date of entry into force of the treaty for that State.

States party to the Convention must take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress violations of the Convention by persons or on territory under the State's jurisdiction or control. For most States, this will entail the adoption of criminal legislation. It is also likely to require other regulatory measures such as changes in military doctrine and procedures, notification of organizations and corporations involved in production and sale of anti-personnel mines, instructions to the relevant ministries to rescind export licences which may include anti-personnel mines, drawing up of plans for the collection, transport and destruction of anti-personnel mines, development and implementation of plans for minefield marking and mine clearance, and provision of resources for mine awareness and victim assistance programmes.

According to information available to the ICRC as at 1 July 2001, over 20 States party to the Ottawa Convention had adopted implementing legislation. These are Australia, Austria, Belgium, Cambodia, Canada, the Czech Republic, France, Germany, Guatemala, Honduras, Hungary, Italy, Japan, Malaysia, Mali, New Zealand, Nicaragua, Norway, Spain, Switzerland, Trinidad and Tobago, the United Kingdom and Zimbabwe. The legislative approach adopted varies from country to country, but the legislation of all States prohibits the use, development, production, stockpiling and transfer of anti-personnel mines and punishes violations with terms of imprisonment and/or fines.

In drafting national legislation to implement the Ottawa Convention, certain matters should be borne in mind:

- The legislation should use the definition in the Ottawa Convention and define a mine as “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”. This will prevent discrepancies between the national law and the Convention and avoid undesirable loopholes.

- The legislation must prohibit all activity forbidden by the Convention (that is, use, development, production, stockpiling and transfer of anti-personnel mines) and punish persons who violate these prohibitions.
- The Ottawa Convention requires States to punish violations committed by persons or on territory under its control. National legislation must, therefore, criminalize violations of the Convention committed in the territory of the State as well as violations committed by its nationals abroad.
- The Ottawa Convention does not explicitly refer to the component parts of anti-personnel mines. Nonetheless, knowingly producing or transferring components intended to be used to assemble anti-personnel mines would violate the prohibition on assisting in the production of these weapons. The national laws passed by a number of States classify anti-personnel mine components as prohibited objects.

The Austrian law on the prohibition of anti-personnel mines was one of the first to contain a comprehensive ban on anti-personnel mines and provides an example of legislation incorporating most of the above elements. Common law States having adopted implementing legislation for the Ottawa Convention include Australia, Canada, Malaysia, New Zealand, the United Kingdom and Zimbabwe.⁵⁵ These Acts:

- provide that it is an offence to use, develop, produce, stockpile or transfer anti-personnel mines;
- provide for the destruction of existing stocks of anti-personnel mines;
- confer certain powers on, and allow for the granting of privileges and immunities to, those involved in fact-finding missions;
- confer information-gathering powers on the relevant Minister;
- create offences relating to giving false or misleading statements or information to fact-finding missions or the Minister.

The Australian and United Kingdom Acts extend to acts committed outside the territory, where such acts are committed by Australian or United Kingdom nationals respectively.

⁵⁵ Australian *Anti-Personnel Mines Convention Act 1998*; Canadian *Anti-Personnel Mines Convention Implementation Act 1997*; Malaysia *Anti-Personnel Mines Convention Implementation Act 2000*; New Zealand *Anti-Personnel Mines Prohibition Act 1998*; United Kingdom *Landmines Act 1998*; Zimbabwe *Anti-Personnel Mines (Prohibition) Act 2000*.

5.3 PUNISHING GENOCIDE, TORTURE AND CRIMES AGAINST HUMANITY UNDER NATIONAL LAW

5.3.1 Introduction

Genocide and torture are outlawed under treaty and customary international law. Crimes against humanity, a customary law offence, are defined in a comprehensive manner in the 1998 Statute of the International Criminal Court. States' obligations to enact legislation providing for punishment of these crimes are reviewed in Chapter 2. Sections 5.3.2 to 5.3.4 below look at ways in which States might discharge these obligations.

5.3.2 Genocide

The Genocide Convention requires States Parties to enact legislation to provide effective penalties for persons guilty of genocide, criminal involvement in genocide, or direct and public incitement to genocide.⁵⁶ The need for implementing legislation is clearly demonstrated by a recent decision of the Australian Federal Court, *Nulyarimma v. Thompson* [1999] FCA 1192.

National legislation often makes no distinction between genocide and crimes against humanity, or may consider the crime of genocide as a particular type of crime against humanity. States which adopt legislation on genocide may grant their courts universal jurisdiction over this crime. Common law States which have enacted legislation on this basis include Canada, Israel and New Zealand.⁵⁷

5.3.3 Torture

As indicated in Chapter 2, States party to the Torture Convention must ensure that all acts of torture are offences under their criminal law, punishable by appropriate penalties which take account of the grave nature of the acts. They must establish jurisdiction over acts of torture committed in their territory, by their nationals and, where they consider it to be appropriate, where the victim is a national. They must also establish jurisdiction where the alleged offender is present on their territory if they do not extradite.

⁵⁶ Genocide Convention, Art. 5.

⁵⁷ Canadian *Criminal Code* 1987, Canadian *Crimes Against Humanity and War Crimes Act* 2000, Israeli *Nazis and Nazi Collaborators (Punishment) Law* 1950, New Zealand *International Crimes and International Criminal Court Act* 2000.

Common law States have followed two different approaches to criminalization of torture. Canada, the United Kingdom and the United States have included the crime of torture in their ordinary domestic criminal codes.⁵⁸ Australia, New Zealand and Sri Lanka have adopted specific implementing legislation for the Torture Convention.⁵⁹ In accordance with the obligations in the Torture Convention, this legislation provides for universal jurisdiction over the crime of torture.

5.3.4 Crimes against humanity

The absence of a comprehensive Convention defining crimes against humanity may explain the absence of extensive national legislation conferring jurisdiction on national courts over crimes against humanity as such. Common law States which have such legislation include Canada, Israel, New Zealand and the United Kingdom.⁶⁰

With the adoption of the Statute for the International Criminal Court, it is certain that we will see increasing numbers of States adopting legislation to punish crimes against humanity. There are two reasons for this. First, States which wish to take advantage of the principle of complementarity — whereby the Court has jurisdiction only when a State which would otherwise have jurisdiction is unable or unwilling to act — will need to ensure that their national law enables them to prosecute alleged offenders. Secondly, the Statute provides a comprehensive definition of the expression “crime against humanity”, thus making the task of legislating against crimes against humanity easier — a simple reference to the definitions in the Statute will suffice to define such crimes in national law.

5.4 PROVIDING FOR UNIVERSAL JURISDICTION IN NATIONAL LAW

Under customary international law, any State has the right to exercise universal jurisdiction over war crimes, crimes against humanity and genocide. There are also certain international humanitarian law treaties

⁵⁸ Canadian *Criminal Code*, secs 269.1 and 7(3.7). United Kingdom *Criminal Justice Act 1988*, Art. 134. United States 18 U.S.C. §§2340 and 2340A.

⁵⁹ Australian *Crimes (Torture) Act 1988*, sec. 6(1). New Zealand *Crime of Torture Act 1989*, sec. 4. Sri Lankan *Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment Act No. 8 of 1994*.

⁶⁰ Canadian *Criminal Code 1987*, Canadian *Crimes Against Humanity and War Crimes Act 2000*, Israeli *Nazis and Nazi Collaborators (Punishment) Law 1950*, New Zealand *International Crimes and International Criminal Court Act 2000*, United Kingdom *International Criminal Court Act 2001*.

which impose an obligation on States Parties to exercise universal jurisdiction over violations. This is the case in relation to grave breaches of the Geneva Conventions and Additional Protocol I, and certain serious violations of the 1954 Hague Cultural Property Convention and its Second Protocol.

In providing for universal jurisdiction in national legislation, it is important to make clear that jurisdiction extends to *all* offenders, whatever their nationality and whether the offence was committed within the State's territory or abroad.

The trial of offences committed abroad gives rise to particular problems in relation to the gathering of evidence and the defendant's right to test that evidence. In providing for universal jurisdiction, it is vital to address the issue of gathering and evaluating evidence and, where necessary, to establish appropriate procedures. This may include, for example, provisions for taking evidence by video link, dispatching letters of request or conducting rogatory commissions abroad.⁶¹ It may also require more effective arrangements for international judicial cooperation.

⁶¹ See, for example, Australia's *Crimes (Child Sex Tourism) Offenders Act 1994*, which allows the court to take evidence by video link.

CHAPTER 6

THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS: Incorporation in the domestic law of common law States⁶²

6.1 INTRODUCTION

All States party to the four Geneva Conventions of 1949 must adopt a range of measures to implement the Geneva Conventions at the national level. In particular, they must ensure that their national laws provide for the punishment of grave breaches of the Conventions, regulation of the use of the red cross, the red crescent and other emblems, and protection of the fundamental guarantees provided for in these instruments. States that are party to the First Additional Protocols of 1977 must also ensure that their national legislation takes account of similar obligations deriving from this Protocol.

Most countries need to introduce specific legislation, or amendments to existing legislation, for this purpose. Even where international law is applied directly as part of the legal system, it is usually necessary to adopt implementing legislation to establish, for example, clear legal procedures and penalties for repressing breaches.

6.2 GENEVA CONVENTIONS ACTS

6.2.1 Introduction

Many countries with a common-law tradition⁶³ have adopted a Geneva Conventions Act to provide for implementation of their obligations under the Conventions and Protocol I. On the basis of information available to the ICRC, it appears that a Geneva Conventions Act is in force in over 25 countries. States which have adopted such legislation include Australia,

⁶² This Chapter draws on work produced by Mr Paul Berman, then Legal Adviser at the ICRC Advisory Service on IHL. The text which appears, including the provisions of the Model Geneva Conventions Act and the comments thereon, is the responsibility of the author.

⁶³ An indicative list of common law States appears at Annex 8.

Botswana, Canada, India, Ireland, Kenya, Malawi, Malaysia, Nigeria, New Zealand, Papua New Guinea, Seychelles, Singapore, Uganda, the United Kingdom, Vanuatu and Zimbabwe.⁶⁴ In addition, there is Fiji, Gambia, Kiribati, the Solomon Islands, Trinidad and Tobago⁶⁵, and Tuvalu, to which the United Kingdom *Geneva Conventions Act* applies, and the Cook Islands, Niue, and Samoa, to which the New Zealand *Geneva Conventions Act* applies⁶⁶. It may be that the United Kingdom Act applies also in a number of other Commonwealth States.

Some countries which are party to the Additional Protocols have amended their Geneva Conventions Act — by means of a Geneva Conventions (Amendment) Act — to provide for implementation of the Protocols. These States include Australia, Canada, Ireland, New Zealand, the United Kingdom and Zimbabwe.

A country that has adopted a Geneva Conventions Act and that subsequently adheres to the Additional Protocols will need to promulgate a Geneva Conventions (Amendment) Act. Countries that are party to both the Conventions and the Protocols but that have not yet introduced the corresponding implementing legislation will need to adopt a consolidated version of the Geneva Conventions Act, which includes provisions implementing Protocol I.

6.2.2 Provisions of a typical Geneva Conventions Act

The wording and structure of Geneva Conventions Acts are generally similar from one country to another. In terms of structure, they are normally divided into a number of parts, including parts:

- providing for punishment of grave breaches of the Geneva Conventions (and Additional Protocol I, where applicable);
- specifying trial procedures for protected persons; and
- regulating use of the red cross and red crescent emblem (and the civil defence sign and electronic signals established by Additional Protocol I, where this is applicable) and creating an offence of unauthorized use of these emblems, sign and signals.

⁶⁴ Bangladesh and Pakistan each have a *Geneva Conventions Act, 1936*, which preceded the adoption of the 1949 Geneva Conventions and thus does not incorporate these treaties in domestic legislation.

⁶⁵ UK *Geneva Conventions Act (Colonial Territories) Order in Council, 1959*.

⁶⁶ New Zealand *Geneva Conventions Act 1958*, sec. 10.

6.3 GUIDELINES FOR DRAFTING A GENEVA CONVENTIONS ACT

6.3.1 Introduction to the Model Act and Guidelines

Using the Geneva Conventions Acts adopted by different States, and following discussions held with common law experts, the Advisory Service has drawn up a model Geneva Conventions Act and guidelines for lawmakers working in this field. These guidelines and provisions of a Model Act are set out below (pages 75 to 111) and should be regarded as practical advice designed to facilitate the task of the authorities concerned. The guidelines include comments on the individual provisions of the Model Act. The full text of the Model Act appears at Annex 9.

The Model Act gives effect to the provisions of the Conventions and the Protocols. The main provisions of the Act are described below, accompanied by some explanatory comments and references to the relevant provisions of the four Conventions (hereinafter referred to as “GC I”, “GC II”, “GC III” and “GC IV”) and their Additional Protocols (hereinafter referred to as “P I” and “P II”), and to the Geneva Conventions Acts adopted in different countries.

It should be emphasized that it is up to each State Party to ensure that it is complying fully with its obligations under the Geneva Conventions and the Additional Protocols, having regard to its own legal system, its Constitution and other domestic legislative provisions.

It should be recalled, also, that there are other obligations arising under the Conventions and Protocols which require the adoption of administrative measures.

6.3.2 Modifications to the Model Act

States wishing to use the Model Act as a base for preparing their own Geneva Conventions Act will need to insert certain information (for example, the name of the country, the fines to be imposed, the name of relevant courts) and modify references appropriately.

The Model Act uses square brackets to indicate where information needs to be inserted or references modified. References to the Attorney-General (subsections 5(1), 10(2), 11(1), 11(2), 13(4)), the Armed Forces (subsections 10(1) and 11(2)), the Minister for Defence (subsection 12(1) and 12(2)), the Minister of State for Foreign Affairs (section 6) and the Minister (subsection 9(4)), will need to be modified as appropriate.

The information which needs to be inserted (shown in upper case in square brackets), is the name of the country (in the long title, the enactment provision, and subsections 2(1), 2(2), 3(1), 4(1), 4(2), 7(2), and 12(3)), the name of the regulation-making authority (in section 15), the year of adoption of the Act (in subsections 1(1) and 1(2)), the courts which have jurisdiction to try grave breaches and other violations (in subsection 7(1)) and over appeals by protected persons (in subsections 10(1) and 10(2)), and the maximum fine or period of imprisonment which may be imposed for unauthorized use of protected emblems, signs and distinctive signals (in subsections 13(1) and 15(2)).

MODEL ACT AND GUIDELINES

LONG TITLE AND ENACTMENT

Title of the Act

The long title of the Model Act refers to all four Geneva Conventions of 1949 and to both Additional Protocols of 1977. While States may not always require primary legislation to implement the Second Additional Protocol, the inclusion of its name in the long title (and of its text in the schedules to the Act) is encouraged: see discussion of the Schedules below. The long titles of the Acts of a number of countries (e.g., Canada, New Zealand and the United Kingdom) refer to both Additional Protocols.

Reference to enactment

Immediately after the title, and before section 1, the Model Act includes a provision referring to its enactment by Parliament. The wording of this provision will need to be tailored to the country's legal and political system, as the authority responsible for enacting legislation varies from country to country.

GENEVA CONVENTIONS ACT [INSERT YEAR]

An Act to enable effect to be given to certain international Conventions done at Geneva on 12 August 1949 and to the Protocols additional to those Conventions done at Geneva on 10 June 1977, and for related purposes

Be it enacted by [the Parliament of INSERT COUNTRY NAME]
as follows:

PART I (PRELIMINARY)

SECTION 1: SHORT TITLE AND COMMENCEMENT

Immediately on becoming party to the Conventions (and the First Additional Protocol), a State is obliged to enact legislation to implement these instruments. The Act should therefore enter into force as soon as possible. Where a State is amending legislation already in force, in anticipation of its adherence to Protocol I, these amendments must enter into force as soon as the State is bound by the Protocol, in other words, six months after its instrument of ratification or accession has been deposited (P I, Article 95(2)).

PART I – PRELIMINARY

Short title and commencement

1. (1) *This Act may be cited as the Geneva Conventions Act [INSERT YEAR].*
- (2) *This Act shall come into force on [INSERT DATE].*

ALTERNATIVE APPROACHES TO PART I (PRELIMINARY)

Arrangement of sections

The Geneva Conventions Acts of some States (for example, Malawi, Nigeria, Singapore and the United Kingdom) include a part entitled “Arrangement of Sections” — effectively a table of contents — before the long title. The Model Act does not include such a provision. In States where the legislative practice is to include a part, “Arrangement of Sections”, consideration should be given to adding this to the Geneva Conventions Act.

Extent of application

It is important to ensure that the Act applies throughout the territory of the State. In some States, the legislation includes a specific provision to this effect in section 1.⁶⁷ For most States, it will not be necessary to expressly provide for this, as legislation will ordinarily extend to the whole of the territory of the State.

States whose legislation extends to external territories or former colonies include, in their Geneva Conventions Act, a provision specifying the territories covered (see section 6 of the Australian Act, section 10 of the New Zealand Act, and section 8(2) of the UK Act). States which were covered by the Geneva Conventions Act of another State (in most cases, that of the United Kingdom), when they adopt their own Geneva Conventions Act, usually include a provision stating that the legislation of that State no longer applies. Examples are sections 8 and 12 of the Kenya and Singapore Geneva Conventions Acts, which are set out below.

Kenya Geneva Conventions Act 1968

8. *The Geneva Conventions Act 1911, the Geneva Conventions Act 1937 and the Geneva Conventions Act 1957 of the United Kingdom are repealed in so far as they form part of the law of Kenya.*

Singapore Geneva Conventions Act

12. *The Geneva Conventions Act, 1911, and the Geneva Conventions Act, 1937, shall cease to apply to Singapore.*

The scope of application of the Geneva Conventions Act must be extraterritorial as regards the punishment of grave breaches. Section 3 of the Model Act, discussed below, includes a provision to this effect.

⁶⁷ Section 1(2) of the Indian Act includes provides: “[This Act] extends to the whole of India”. Section 1 of the Nigerian Ordinance provides: “This Ordinance ... shall have effect throughout the Federation”.

SECTION 2: INTERPRETATION

This section defines the terms used in the Act, including the full official titles of the Conventions and Protocols set out in the schedule. It also defines “prisoners’ representative”, “protected prisoner of war”, “protected internee” and “protecting power”. These terms refer to provisions of the Third and Fourth Geneva Conventions and Protocol I: prisoners’ representative (GC III, Art. 79); protected prisoner of war (GC III, Art. 4; P I, Arts 44, 45); protected internee (GC IV, Art. 4); and protecting powers and substitutes (GC III, Arts 8, 10; GC IV, Arts 9, 11; P I, Art. 5).

The Model Act also includes a definition of “court” (which excludes courts-martial and military tribunals).

This section must also provide for the Conventions and Protocols to be construed in accordance with any declarations and reservations the State may have made at the time of its accession or ratification. Where such declarations or reservations exist, it is important to ensure that a court will be able to take them into account in interpreting the State’s obligations.

Interpretation

2 (1) *In this Act, unless the contrary intention appears:*

“court” does not include a court-martial or other military court;

“the First Convention” means the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted at Geneva on 12 August 1949, a copy of which Convention (not including the annexes to that Convention) is set out in Schedule 1;

“the Second Convention” means the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted at Geneva on 12 August 1949, a copy of which Convention (not including the annex to that Convention) is set out in Schedule 2;

“the Third Convention” means the Geneva Convention relative to the Treatment of Prisoners of War, adopted at Geneva on 12 August 1949, a copy of which Convention (not including the annexes to that Convention) is set out in Schedule 3;

“the Fourth Convention” means the Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted at Geneva on 12 August 1949, a copy of which Convention (not including the annexes to that Convention) is set out in Schedule 4;

“the Conventions” means the First Convention, the Second Convention, the Third Convention and the Fourth Convention;

“prisoners’ representative”, in relation to a particular protected prisoner of war at a particular time, means the person by whom the functions of prisoners’ representative within the meaning of Article 79 of the Third Convention were exercisable in relation to that prisoner at the camp or place at which that prisoner was, at or last before that time, detained as a protected prisoner of war;

“protected internee” means a person protected by the Fourth Convention or Protocol I, and interned in [INSERT COUNTRY NAME];

“protected prisoner of war” means a person protected by the Third Convention or a person who is protected as a prisoner of war under Protocol I;

“the protecting power”, in relation to a protected prisoner of war or a protected internee, means the power or organization which is carrying out, in the interests of the power of which he or she is a national, or of whose forces he or she is, or was at any material time, a member, the duties assigned to protecting powers under the Third Convention, the Fourth Convention or Protocol I, as the case may be;

“Protocol I” means the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), done at Geneva on 10 June 1977, a copy of which Protocol (including Annex 1 to that Protocol) is set out in Schedule 5;

“Protocol II” means 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), done at Geneva on 10 June 1977, a copy of which Protocol is set out in Schedule 6;

“the Protocols” means Protocol I and Protocol II.

- (2) *If the ratification on behalf of [INSERT COUNTRY NAME] of any of the Conventions or of either of the Protocols is subject to a reservation or is accompanied by a declaration, that Convention or that Protocol shall, for the purposes of this Act, have effect and be construed subject to and in accordance with that reservation or declaration.*

PART II: PUNISHMENT OF OFFENDERS

SECTION 3: PUNISHMENT OF GRAVE BREACHES

The Conventions and Protocol I describe as “grave breaches” certain serious violations committed against persons or property protected by the Conventions and Protocol I (see GC I, Art. 50; GC II, Art. 51; GC III, Art. 130, GC IV, Art. 147; P I, Art. 11, Art 85(4); see also the table at Annex 7 of this Guide, which lists conduct constituting a grave breach).

States are bound to enact criminal legislation to punish any person who has committed, or given orders to commit, grave breaches of the Conventions or Protocol I. For States party to Protocol I, this obligation extends to grave breaches which result from a failure to act when under a duty to do so. States must also search for all persons alleged to have perpetrated such violations and either bring them for trial before their own courts or extradite them to another State Party. They must do so in accordance with the principle of universal jurisdiction — that is, regardless of the nationality of the offender or the place of the offence (see GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; P I, Art. 85(1)).

In many States, there is a presumption that criminal legislation applies solely to acts committed on the national territory. It is thus most important to provide expressly for application of the principle of universal jurisdiction, specifying clearly that the provisions of this section apply both within and outside the territory, regardless of the nationality or citizenship of the offender (see subsections 3(1) and 3(3) of the Model Act).

Rather than establishing its own definition of “grave breaches”, the Geneva Conventions Act refers to the definitions given in the Conventions and in Protocol I — which are set out in the schedules (see paragraphs (a) to (e) of section 3(2) of the Model Act).

It is important to ensure that the scope of offences also applies to those who order the commission of grave breaches. In accordance with generally recognized principles of national and international criminal law, Geneva Conventions Acts extend liability to any person who “*aids, abets or procures the commission by another person*” of a grave breach. This is covered in section 3(1) of the Model Act. The Act must also take account of the fact that under Protocol I certain acts of omission constitute grave breaches. This is covered in section 3(2)(e) of the Model Act.

The Act must also stipulate the applicable penalties (see section 5(1) of the Model Act). These should reflect the seriousness of the offence.

Geneva Conventions Acts provide that the indictment must be brought in the name of the Attorney-General or Director of Public Prosecutions (see section 5(2) of the Model Act). It should be stressed that there is a clear obligation for States to search for, and try or extradite, persons alleged to have committed grave breaches. The requirement of the consent of the Attorney-General, Director of Public Prosecutions or equivalent officer may make it possible to avoid vexatious prosecutions or the bringing of actions that are not founded in law. The State must not, however, make use of this obligation to bring political considerations into play or to evade its duty to search for, and try or extradite, an alleged offender.

The Act must contain provisions relating to respect for judicial guarantees, in order to comply with the rule that persons being tried for grave breaches must benefit from safeguards of proper trial and representation that are at least equivalent to those provided for prisoners of war under the Third Geneva Convention (see GC I, Art. 49(4); GC II, Art. 50(4); GC IV, Art. 146(4); P I, Art. 85(1)). Part III of the Model Act sets out the safeguards which apply to prisoners of war. These include, in section 9, the right to legal assistance, which applies also to persons on trial for an offence against section 3 (grave breaches) or section 4 (other breaches). A list of the main judicial guarantees laid down in international humanitarian law treaties appears in section 8.5 of this Guide. Many of these will be covered in the State's ordinary criminal law.

The grave breaches regime is essential for deterring and punishing violations of international humanitarian law applicable in *international armed conflict*. Its implementation is a cardinal obligation on all States parties to the Conventions and Protocol I. Section 3 of the Model Act is based on the grave breach provision of Geneva Conventions Acts existing in more than 25 common law States.

**PART II – PUNISHMENT OF OFFENDERS AGAINST
THE CONVENTIONS AND PROTOCOL I**

Punishment of grave breaches of the Conventions and Protocol I

- 3 (1) *A person, whatever his or her nationality, who, in [INSERT COUNTRY NAME] or elsewhere, commits, or aids, abets or procures any other person to commit, a grave breach of any of the Conventions or of Protocol I, is guilty of an indictable offence.*
- (2) *For the purposes of this section:*
- (a) *a grave breach of the First Convention is a breach of that Convention involving an act referred to in Article 50 of that Convention committed against persons or property protected by that Convention;*
 - (b) *a grave breach of the Second Convention is a breach of that Convention involving an act referred to in Article 51 of that Convention committed against persons or property protected by that Convention;*
 - (c) *a grave breach of the Third Convention is a breach of that Convention involving an act referred to in Article 130 of that Convention committed against persons or property protected by that Convention;*
 - (d) *a grave breach of the Fourth Convention is a breach of that Convention involving an act referred to in Article 147 of that Convention committed against persons or property protected by that Convention; and*
 - (e) *a grave breach of Protocol I is anything referred to as a grave breach of the Protocol in paragraph 4 of Article 11, or paragraph 2, 3 or 4 of Article 85, of the Protocol.*
- (3) *In the case of an offence against this section committed outside [INSERT COUNTRY NAME], a person may be proceeded against, indicted, tried and punished therefor in any place in [INSERT COUNTRY NAME] as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.*

ALTERNATIVE APPROACHES TO SECTION 3

Subsection 3(3) regarding offences committed outside the State

In keeping with the requirement in the Geneva Conventions and Additional Protocol I that States exercise jurisdiction over grave breaches regardless of the nationality of the alleged offender and the place the offence was committed, the Geneva Conventions Acts of most States include a provision along the lines of section 3(3) providing that offences against the section (i.e., grave breaches) may be proceeded against, charged, tried and punished as if they had been committed in the State. Section 3(3) of the Model Act is based on section 1(2) of the United Kingdom *Geneva Conventions Act, 1957*. Other States with a similar provision include India, Kenya, Malaysia and Zimbabwe.

The approach followed in the grave breach provisions of the Australian and New Zealand *Geneva Conventions Acts* is somewhat different. Section 7(3) of the Australian Act and section 3(3) of the New Zealand Act provide that the grave breach provision of the Act applies to persons regardless of their citizenship or nationality.

SECTION 4: PUNISHMENT OF OTHER BREACHES

Most Geneva Conventions Acts provide for punishment of grave breaches, but are silent in relation to other violations of the Conventions and Protocols. The reason for this is clear. While the Conventions and Protocol I *require* States Parties to enact criminal legislation (on the basis of universal jurisdiction) to punish grave breaches, there is no such obligation in relation to violations of the Conventions or Protocol I which do not amount to grave breaches, nor in relation to violations of common Article 3 of the Conventions or Protocol II (which apply to internal armed conflict).

Certain States have extended the scope of their Geneva Conventions Acts so that they cover not only grave breaches of the Conventions and Protocol I, but all violations of the Conventions and the Protocols. Two examples are the Irish *Geneva Conventions Act, 1962* and the Nigerian *Geneva Conventions Ordinance, 1960*. Section 4 of the Irish Act provides for the punishment of other violations (referred to as “minor breaches”) when committed in the Republic of Ireland or by an Irish citizen. Section 4(2) of the Nigerian Ordinance permits the Governor-General, by order, to provide that other breaches committed in Nigeria or by Nigerian citizens are liable to punishment.

The Model Act includes a provision providing for punishment of violations other than grave breaches (see section 4). This extension of criminal liability beyond grave breaches of the Conventions and Protocol I is important. It permits prosecution of violations in international armed conflict which may not amount to grave breaches, but which are clearly of a nature to warrant prosecution. It also permits the prosecution of violations of common Article 3 of the Conventions and Protocol II, that is, of violations occurring in non-international armed conflict. That criminal responsibility should extend to acts of these nature is recognized in the national law of many States, in the Statutes and jurisprudence of the International Tribunals for the Former Yugoslavia and Rwanda, and in the Statute of the International Criminal Court.

Section 4 of the Model Act assumes jurisdiction on the basis of the territoriality and nationality principles — that is, over acts committed within the State’s territory or by its nationals. It is clear that States could

adopt a wider jurisdictional basis than this, providing universal jurisdiction over serious violations of international humanitarian law, whether committed in international or non-international armed conflict (see section 3.3 of the Guide).

Punishment of other breaches of the Conventions and Protocols

4. (1) *A person, whatever his or her nationality, who, in [INSERT COUNTRY NAME], commits, or aids, abets or procures any other person to commit, a breach of any of the Conventions or Protocols not covered by section 3, is guilty of an indictable offence.*
- (2) *Any national of [INSERT COUNTRY NAME] who, outside [INSERT COUNTRY NAME], commits, or aids, abets or procures the commission by another person of a breach of any of the Conventions or Protocols not covered by section 3 is guilty of an indictable offence.*

ALTERNATIVE APPROACHES TO SECTION 4

Procedural matters in relation to the trial of “other breaches”

Section 4 of the Model Act provides that breaches of the Conventions and Protocol I which are not covered by section 3 (that is, breaches other than grave breaches) are indictable offences. Section 5(1) of the Model Act, described in greater detail below, specifies the maximum penalties which may be imposed for offences against section 3 (grave breaches) or section 4 (other breaches): life imprisonment (where wilful killing is involved) and 14 years (for other breaches). Section 5(2) provides that the Attorney-General’s consent is required to bring a prosecution for an offence against section 3 or 4, and that these offences must be tried on indictment.

The approach adopted in sections 4 and 5 of the Model Act is different, in some respects, from that adopted in the Irish *Geneva Conventions Act* and Nigerian *Geneva Conventions Ordinance*. Under section 4(3) of the Irish Act, breaches other than grave breaches may be tried in summary proceedings (in which case the maximum period of imprisonment is six months) or on indictment (in which case the maximum period of imprisonment is two years). The Nigerian Act also provides a lesser penalty for breaches other than grave breaches: a maximum of seven years (see section 4(1)).

The Irish *Geneva Conventions Act* draws a further procedural distinction in the treatment of grave breaches and other breaches. The former can only be instituted with the consent of the Attorney-General (see section 3(3)). There is no similar requirement in relation to other breaches. The Nigerian *Geneva Conventions Ordinance* requires the Attorney-General’s consent for both grave breaches and other breaches.

The approach adopted in the Model Act is to treat grave breaches and other breaches in a similar fashion: prosecutions must be brought on indictment; they must be brought in the name of the Attorney-General; and the maximum penalties which may be imposed are the same for both. The discussion of section 4 stresses the importance of extending criminal responsibility beyond grave breaches of the Conventions and Protocol I to all violations of the Conventions and Protocols. Once that decision has been taken, the simplest approach is to treat the two offences in a similar

manner. To do so is also legitimate as a matter of policy: conduct which does not constitute a grave breach under the Conventions or Protocol I may be equally serious and worthy of equivalent treatment and punishment.

Consequential amendments required if section 4 is not included

States wishing to use the Model Act as a base for preparing their own Geneva Conventions Act, but which do not wish to include a provision along the lines of section 4, will need to modify their Geneva Conventions Act appropriately. Subsequent sections will need to be re-numbered and the references in subsections 5(1), 5(2), 7(1) and 9(1) to offences against section 3 and section 4 will need to be amended.

SECTION 5: PROCEDURAL

Most Geneva Conventions Acts provide a maximum penalty of life imprisonment for grave breaches involving wilful killing and a maximum penalty of 14 years for other grave breaches. Sections 3 and 4 of the Model Act provide for punishment of grave breaches and other violations of the Conventions and Protocols. Under section 5(1) of the Model Act, the maximum penalties for grave breaches under section 3 or other breaches under section 4 are life imprisonment (where wilful killing is involved) and 14 years (for other breaches).

Section 5(2) of the Model Act provides that the Attorney-General's consent is required to bring proceedings under section 3 or section 4.

Procedural

5. (1) *The punishment for an offence against section 3 or section 4 is:*
- (a) *where the offence involves the wilful killing of a person protected by the relevant Convention or by Protocol I— imprisonment for life or for any less term; and*
 - (b) *in any other case — imprisonment for a term not exceeding 14 years.*
- (2) *An offence against section 3 or section 4 shall not be prosecuted in a court except by indictment by or on behalf of the [Attorney-General/Director of Public Prosecutions].*

SECTION 6: PROOF OF APPLICATION OF THE CONVENTIONS OR PROTOCOLS

In proceedings under the Geneva Conventions Act for a grave breach of the Conventions or Protocol I, a question may arise under Article 2 of the Conventions or Article 1 or 3 of the Protocol as to whether there is an *international armed conflict* to which these instruments apply. To determine the applicability of the Conventions or of Protocol I, it may be necessary to assess international events, and in particular to establish whether there is (or was) an international armed conflict. Geneva Conventions Acts therefore provide for the Minister for Foreign Affairs, or an equivalent authority, to submit a certificate on matters relevant to these provisions.

In those States whose Geneva Conventions Act permits prosecutions for violations other than grave breaches, questions may also arise as to whether there is a *non-international armed conflict* under Article 3 of the Convention or Article 1 of Additional Protocol II. The Model Act authorizes the Minister to determine questions arising as to the existence of an international or non-international armed conflict. This is the approach followed in the Irish *Geneva Conventions Act*.

The Model Act provides that the certificate is *prima facie* evidence of the matter so certified, which is the approach taken in the Australian *Geneva Conventions Act*. In the Geneva Conventions Acts of other States, the certificate appears to be determinative (see section 8.4.2 of the Guide).

Proof of application of the Conventions or Protocols

6. *If, in proceedings under this Part in respect of a breach of any of the Conventions or of either of the Protocols, a question arises under:*

- (a) *Article 2 or Article 3 of that Convention (which relate to the circumstances in which the Convention applies);*
- (b) *Article 1 or Article 3 of Protocol I (which relate to the circumstances in which that Protocol applies); or*
- (c) *Article 1 of Protocol II (which relates to the circumstances in which that Protocol applies);*

a certificate under the hand of the [Minister of State for Foreign Affairs] certifying to any matter relevant to that question is prima facie evidence of the matter so certified.

SECTION 7: JURISDICTION OF COURTS

Section 7(1) of the Model Act stipulates which courts are to have jurisdiction to try the above offences (that is, grave breaches and other breaches). This, of course, will vary from country to country, but it is important to ensure that the courts are of a sufficient level to address the difficult legal and political questions that may arise and to impose penalties reflecting the seriousness of the offences.

Section 7(2) of the Model Act is based on a provision relating to courts-martial common to the Geneva Conventions Acts of many States. It provides that any enactment relating to the trial by court-martial of persons who commit civil offences shall have effect for the purposes of the jurisdiction of courts-martial convened in the territory as if this section had not been passed.

Jurisdiction of courts

- 7 (1) *A person shall not be tried for an offence against section 3 or section 4 by a court other than the [INSERT NAME OF COURT].*
- 7 (2) *The enactments relating to the trial by court-martial of persons who commit civil offences shall have effect for the purposes of the jurisdiction of courts-martial convened in [INSERT NAME OF COUNTRY] as if this Part had not been passed.*

ALTERNATIVE APPROACHES TO SECTION 7

Jurisdiction of courts over grave breaches, etc.

Section 7(1) of the Model Act specifies which courts shall have jurisdiction over grave breaches and other breaches. A slightly different approach, followed by a number of States, is for the Geneva Conventions Act to specify which courts shall not have jurisdiction over these offences. This is the approach followed in Botswana, India, Malaysia, Singapore and the United Kingdom. The relevant provisions of the Indian and Malaysian *Geneva Conventions Acts* are set out below.

Indian Geneva Conventions Act, 1960

5. *No court inferior to that of a Chief Presidency Magistrate or a Court of Session shall try any offence punishable under this Chapter.*

Malaysia Geneva Conventions Act, 1962

- 3 (2) *No Magistrates Court or Sessions Court shall have jurisdiction to try any offence under this section.*

The Irish *Geneva Conventions Act*, which, like the Model Act, provides for punishment of grave breaches and other breaches, specifies that grave breaches shall be tried by the Central Criminal Court (see section 3(4)). The Act does not specify which courts are to have jurisdiction over other breaches, other than to provide that these may be tried in summary proceedings or on indictment (see section 4(3)).

**PART III: LEGAL PROCEEDINGS IN RESPECT
OF PROTECTED PERSONS**

Section 8: Notice of trial of protected persons
to be served on protecting power

Section 9: Legal representation
of certain persons

Section 10: Appeals by protected prisoners
of war and internees

Section 11: Reduction of sentence and custody
of protected prisoners of war and internees

These four sections set out in detail the safeguards which apply in the context of the trial and sentencing of prisoners of war (under the Third Geneva Convention) and civilian internees (under the Fourth Geneva Convention).

Section 8 provides for service of the notice of trial of a prisoner of war (GC III, Art. 104) or an internee (GC IV, Art. 71).

Section 9 defines the legal assistance to which prisoners of war are entitled (GC III, Art. 105); consideration should be given to extending the scope of this provision to internees (GC IV, Art. 72). Section 9, which guarantees the right to legal assistance, applies also to persons charged with an offence against section 3 (grave breaches) or section 4 (other breaches).

Section 10 sets out the procedures for appeals by prisoners of war (GC III, Arts 106 and 107) and internees (GC IV, Art. 73).

Finally, section 11 regulates the reduction of sentences imposed on prisoners of war (GC III, Art. 103) and internees (GC IV, Art. 69), and the custody of prisoners of war.

References in these sections to the Attorney-General (subsections 10(2), 11(1), 11(2)), the Defence Force (subsections 10(1) and 11(2)), and the Minister (subsection 9(4)) will need to be modified as appropriate. In subsections 10(1) and 10(2), the name of the relevant appeal court will need to be inserted.

**SECTION 8: NOTICE OF TRIAL OF PROTECTED PERSONS
TO BE SERVED ON PROTECTING POWER**

Section 8 provides for the serving of notice of trial of a protected prisoner of war or a protected internee on the protecting power and, in the case of a protected prisoner of war, the prisoners' representative.

***Notice of trial of protected persons to be served
on protecting power, etc.***

8 (1) *The court before which:*

- (a) *a protected prisoner of war is brought up for trial for an offence; or*
- (b) *a protected internee is brought up for trial for an offence for which that court has power to sentence him or her to imprisonment for a term of two years or more;*

shall not proceed with the trial until it is proved to the satisfaction of the court that a notice containing the particulars mentioned in subsection (2), so far as they are known to the prosecutor, has been served not less than three weeks previously on the protecting power (if there is a protecting power) and, if the accused is a protected prisoner of war, on the accused and the prisoners' representative.

(2) *The particulars referred to in subsection (1) are:*

- (a) *the full name, date of birth and description of the accused, including his or her profession or trade; and where the accused is a protected prisoner of war, the accused's rank and his or her army, regimental, personal and serial number;*
- (b) *the accused's place of detention, internment or residence;*
- (c) *the offence with which the accused is charged; and*
- (d) *the court before which the trial is to take place and the time and place appointed for the trial.*

(3) *For the purposes of this section, a document purporting:*

- (a) *to be signed on behalf of the protecting power or by the prisoners' representative or by the person accused, as the case may be; and*
- (b) *to be an acknowledgment of the receipt by that power, representative or person on a specified day of a notice described in the document as a notice under this section;*

shall, unless the contrary is shown, be sufficient evidence that the notice required by subsection (1) was served on that power, representative or person on that day.

(4) *A court which adjourns a trial for the purpose of enabling the requirements of this section to be complied with may, notwithstanding anything in any other law, remand the accused for the period of the adjournment.*

ALTERNATIVE APPROACHES TO SECTION 8

Definition of “prisoners’ representative”

Section 8 provides for the serving of trial of protected persons on the protecting power and the prisoners’ representative. In the Model Act, the definition of “prisoners’ representative” appears in section 2 (“Interpretation”). This is the approach followed in the Geneva Conventions Acts adopted in, for example, Canada and Kenya.

The Geneva Conventions Acts of some States place this definition instead in their equivalent of section 8 (see, for example, section 8(4) of the Indian *Geneva Conventions Act, 1960* and section 2(4) of the UK *Geneva Conventions Act, 1957*).

References to life imprisonment in sections 8 and 10

The application of section 8 (notice of trial) and section 10 (appeals) in the Model Act depends on “imprisonment for a term of two years or more” (see subsections 8(1)(b), 10(1) and (2)). In the Geneva Conventions Acts of certain States, these provisions refer also to the death sentence. The wording used in, for example, the Geneva Conventions Acts of Kenya, Singapore and the United Kingdom is “death or imprisonment for a term of two years or more”).

**SECTION 9: LEGAL REPRESENTATION
OF CERTAIN PERSONS**

Section 9 provides for legal assistance for protected prisoners of war and persons charged with an offence under section 3 (grave breaches) or section 4 (other breaches) of the Act.

Legal representation of certain persons

9 (1) *The court before which:*

- (a) *any person is brought up for trial for an offence under section 3 or section 4 of this Act; or*
- (b) *a protected prisoner of war is brought up for trial for any offence;*

shall not proceed with the trial unless:

- (i) *the accused is represented by counsel; and*
- (ii) *it is proved to the satisfaction of the court that a period of not less than 14 days has elapsed since instructions for the representation of the accused at the trial were first given to the counsel;*

and if the court adjourns the trial for the purpose of enabling the requirements of this subsection to be complied with, then, notwithstanding anything in any other law, the court may remand the accused for the period of the adjournment.

- (2) *Where the accused is a protected prisoner of war, in the absence of counsel accepted by the accused as representing him or her, counsel instructed for the purpose on behalf of the protecting power shall, without prejudice to the requirements of paragraph (ii) of subsection (1), be regarded for the purposes of that subsection as representing the accused.*
- (3) *If the court adjourns the trial in pursuance of subsection (1) by reason that the accused is not represented by counsel, the court shall direct that a counsel be assigned to watch over the interests of the accused at any further proceedings in connection with the offence, and at any such further proceedings, in the absence of counsel either accepted by the accused as representing him or her or instructed as mentioned in subsection (2), counsel assigned in pursuance of this subsection shall, without prejudice to the requirements of paragraph (ii) of subsection (1), be regarded for the purposes of subsection (1) as representing the accused.*
- (4) *Counsel shall be assigned in pursuance of subsection (3) in such manner as may be prescribed in regulations or, in the absence of provision in the regulations, as the court directs, and counsel so assigned shall be entitled to be paid by [the Minister] such sums in respect of fees and disbursements as may be prescribed by regulations.*

ALTERNATIVE APPROACHES TO SECTION 9

Extension of section 9 to protected internees

Consideration should be given to extending the scope of section 9 to internees. This is not only logical in terms of Article 72 of the Fourth Geneva Convention, which guarantees a protected internee's right to counsel, but also provides for consistency across the four provisions of this Part. Sections 8, 10 and 11 each deal with the protection of rights of protected prisoners of war and protected internees. The Botswana *Geneva Conventions Act, 1970* follows this approach; paragraph (b) of subsection 5(1) refers to protected prisoners of war and protected internees.

Appointment of counsel

Subsection 9(4) provides for the appointment of counsel to represent an accused (whether a prisoner of war or any person brought up on trial for an offence under section 3 or 4) and for the payment of counsel's fees and disbursements. Essentially, both are to be done in accordance with applicable regulations. States may wish to complement this provision, as has been done in New Zealand, with a reference to the country's legal aid scheme. Another possibility, the approach adopted in Zimbabwe, is to simply refer directly to the country's legal aid system. The relevant provisions of the New Zealand and Zimbabwe *Geneva Conventions Acts* are set out below.

New Zealand Geneva Conventions Act 1958

5 (4) *A counsel shall be assigned in pursuance of subsection 3 of this section in such manner as may be prescribed by regulations made under this Act, and any counsel so assigned shall be entitled to receive, out of moneys appropriated by Parliament for the purpose, such remuneration and disbursements as may be in like manner prescribed. While there are no such regulations for the purposes of this section or so far as any such regulations do not apply, the provisions of the Offenders Legal Aid Act 1954 and of any regulations made under that Act shall apply to the assignment, remuneration, and disbursement of counsel under this section.*

Zimbabwe Geneva Conventions Act 1981

5 (4) *The provisions of the Legal Assistance and Representation Act [Chapter 66] shall, mutatis mutandis, apply in relation to the manner in which a legal practitioner shall be assigned in terms of this section and in relation to the remuneration payable to any such legal practitioner on the completion of his duties.*

SECTION 10: APPEALS BY PROTECTED PRISONERS OF WAR AND INTERNEES

Section 10 of the Model Act sets out the procedures for appeals by prisoners of war and internees. It consists of four subsections. Subsection 10(1) gives convicted prisoners of war or internees a period of 10 days to institute an appeal, which period starts to run from the date the protecting power is notified of the person's conviction or sentence. Subsection 10(2) provides similarly in relation to further appeals, allowing a period of seven days from the date the protecting power is notified that the person's conviction or sentence has been confirmed. Subsection 10(3) provides that restitution or compensation orders shall not take effect while an appeal is possible or pending. Subsection 10(4) of the Model Act provides that the first two subsections do not apply where there is no protecting power.

Appeals by protected prisoners of war and internees

10(1) Where a protected prisoner of war or a protected internee has been sentenced to imprisonment for a term of two years or more, the time within which the person must give notice of appeal or notice of application for leave to appeal [to INSERT NAME OF APPEAL COURT] shall, notwithstanding anything in any enactment relating to such appeals, be the period from the date of conviction or, in the case of an appeal against sentence, of sentencing, to the expiration of 10 days after the date on which the person receives a notice given:

- (a) in the case of a protected prisoner of war, by an officer of [the Armed Forces]; or*
- (b) in the case of a protected internee, by or on behalf of the governor or other person in charge of the prison or place in which he or she is confined;*

that the protecting power has been notified of his or her conviction and sentence.

(2) Where, after an appeal against the conviction or sentence by a court of a protected prisoner of war or a protected internee has been determined, the sentence remains or has become a sentence of imprisonment for a term of two years or more, the time within which the person must apply to the [Attorney General] for a certificate authorizing an appeal [to INSERT NAME OF APPEAL COURT] shall be the period from the date of

the previous decision on appeal until seven days after the date on which the person receives a notice given by a person referred to in paragraph (a) or (b), as the case may require, of subsection (1) that the protecting power has been notified of the decision of the court on the previous appeal.

- (3) Where subsection (1) or (2) applies in relation to a convicted person, then, unless the court otherwise orders, an order of the court relating to the restitution of property or the payment of compensation to an aggrieved person shall not take effect, and a provision of a law relating to the revesting of property on conviction shall not take effect in relation to the conviction, while an appeal by the convicted person against his or her conviction or sentence is possible.*
- (4) Subsections (1) and (2) do not apply in relation to an appeal against a conviction or sentence, or against the decision of a court upon a previous appeal, if, at the time of the conviction or sentence, or of the decision of the court upon the previous appeal, as the case may be, there is no protecting power.*

ALTERNATIVE APPROACHES TO SECTION 10

Calculation of appeals period under subsections 10(1) and (2)

The Geneva Conventions Acts of all States have a provision along the lines of subsection 10(1) of the Model Act, specifying the period allowed for appeals by convicted prisoners of war or internees. These provisions vary from country to country. The New Zealand Act allows a period of 28 days from receipt of notice by the protecting power. In most States, the period allowed is 10 days, and this is the approach followed in the Model Act. In Botswana, Australia and India, the provision does not specify the number of days allowed for the appeal, simply providing that the period for the appeal starts to run from the date the protecting power receives notice of the person's conviction or sentence.

States which include a provision along the lines of subsection 10(2) — governing the period within which a protected prisoner of war or internee may bring an appeal from a decision on appeal — include Australia, India, Ireland, Malaysia, Singapore and the United Kingdom. As with subsection 10(1), these provisions specify either the time allowed for the appeal (UK, Ireland, Malaysia, Singapore) or that time for the appeal runs from the date the protecting power has been notified (Australia and India). Many States have no such provision (see, for example, the *Geneva Conventions Acts* of Kenya, Uganda, and Zimbabwe).

Delaying restitution or compensation orders during appeals' period

Subsection 10(3) of the Model Act — which provides that restitution or compensation orders shall not take effect while an appeal is possible or pending — is modelled on similar provisions in the Australian, Irish and New Zealand *Geneva Conventions Acts*. Most States have no such provision.

Application of section 10 where there is no protecting power

Subsection 10(4) of the Model Act provides that the first two subsections do not apply where there is no protecting power. This is the approach followed in the Irish Act, and is slightly different from the Australian and

Indian Acts, which provide that the first three subsections do not apply in these circumstances.

Delaying execution of death sentence during a period of appeal

A number of Geneva Conventions Acts also include a specific provision delaying execution of a death sentence on a protected prisoner of war or internee for a period of six months after the sentence has been communicated to the protecting power (GC III, Art. 101; GC IV, Art. 75). This section may appear in the general section on appeals by protected persons (see subsections 6(5) and (6) of the New Zealand Act, and subsection 6(2) of the Canadian Act) or in a separate section (see section 7 of the Botswana Act). Section 7 of the Botswana Act is set out below.

Botswana Geneva Conventions Act, 1970

7. *If sentence of death is pronounced on a protected prisoner of war or a protected internee, the sentence shall not be executed before the expiration of a period of at least six months from the date when the protecting power is notified of the final judgement imposing or confirming such sentence.*

SECTION 11: REDUCTION OF SENTENCE AND CUSTODY OF PROTECTED PRISONERS OF WAR AND INTERNEES

Most Geneva Conventions Acts contain a provision regulating the reduction of sentences imposed on prisoners of war and internees and the custody of prisoners of war. Under section 11(1) of the Model Act, the Attorney-General may direct that the term of the sentence of imprisonment of a protected prisoner of war or protected internee be reduced by any period during which the person has been in custody in connection with that offence before or during the trial. Under section 11(2), the Attorney-General may direct that a prisoner of war who has been in custody for an aggregate period of three months or more be transferred to military custody.

Reduction of sentence and custody of protected prisoners of war and internees

- 11 (1) *In any case in which a protected prisoner of war or a protected internee is convicted of an offence and sentenced to a term of imprisonment, it shall be lawful for the [Attorney-General] to direct that there shall be deducted from that term a period, not exceeding the period, if any, during which that person was in custody in connection with that offence, either on remand or after committal for trial (including the period of the trial), before the sentence began, or is deemed to have begun, to run.*
- (2) *In a case where the [Attorney-General] is satisfied that a protected prisoner of war accused of an offence has been in custody in connection with that offence, either on remand or after committal for trial (including the period of the trial), for an aggregate period of not less than three months, it shall be lawful for the [Attorney-General] to direct that the prisoner shall be transferred from that custody to the custody of [an officer of the Armed Forces] and thereafter remain in military custody at a camp or place in which protected prisoners of war are detained, and be brought before the court at the time appointed by the remand or committal order.*

ALTERNATIVE APPROACHES TO SECTION 11

Reduction of sentence of protected prisoners of war and protected internees

Most Geneva Conventions Acts contain a provision like section 11 of the Model Act, which regulates the reduction of sentence of a protected prisoner of war or internee and custody of prisoners of war. The Australian, Indian and New Zealand *Geneva Conventions Acts* are different in two respects. First, where the Model Act gives the Attorney-General (or other relevant authority) the power to reduce sentences of protected persons, under the Australian, Indian and New Zealand *Geneva Conventions Acts*, it is the court which shall, in fixing a term of imprisonment in respect of the offence, deduct from the term which it would otherwise have fixed any period during which the convicted person has been in custody in connection with that offence before the trial. Second, in these States, there is provision for the court to take into account a period of imprisonment not only in fixing a term of imprisonment but also in fixing any penalty other than imprisonment. A copy of section 14(1) of the Australian Act is set out below.

Another interesting difference can be seen in the Nigerian *Geneva Conventions Ordinance* and the Zimbabwe *Geneva Conventions Act*, which simply state that any period of custody served in connection with the offence “shall be deducted” from the term of imprisonment to which the person has been sentenced. A copy of section 7(1) of the Zimbabwe Act appears below.

Australian Geneva Conventions Act 1957

14(1) *When a protected prisoner of war or a protected internee is convicted of an offence, the court shall:*

14(1) (a) *in fixing a term of imprisonment in respect of the offence, deduct from the term which it would otherwise have fixed any period during which the convicted person has been in custody in connection with that offence before the trial; and*

14(1) (b) *in fixing any penalty other than imprisonment in respect of the offence, take that period of custody into account.*

Zimbabwe Geneva Conventions Act 1981

7(1) *In any case in which a protected prisoner of war or a protected internee is convicted of an offence and sentenced to a term of imprisonment, there shall be deducted from that term any period during which that person was in custody in connexion with the offence, either on remand or after committal for trial, including the period of the trial, before the sentence began to run or is deemed to have begun to run.*

PART IV: MISUSE OF THE RED CROSS AND OTHER EMBLEMS, SIGNS, SIGNALS, IDENTITY CARDS, INSIGNIA AND UNIFORMS

SECTION 12: USE OF RED CROSS, RED CRESCENT AND OTHER EMBLEMS

The Geneva Conventions provide for the use of the red cross, the red crescent and the red lion and sun⁶⁸ to identify protected persons, buildings and vehicles (in particular, medical personnel, hospitals and ambulances). The use of the name and emblem (together with any markings or wording that could be confused with them) is strictly regulated (see GC 1, Arts 38-44; GC II, Arts 41-44; and P I, Art. 38). States Parties are obliged to take measures to prevent and punish any misuse (see GC I, Art. 54; GC II, Art. 45).

Protocol I establishes other protective signs and signals: the international distinctive sign of civil defence for the protection of civil defence organizations, personnel, buildings and *matériel* and civilian shelters (P I, Art. 66(8)); the international special sign to facilitate the identification of works and installations containing dangerous forces (P I, Art. 56(7)); and distinctive signals (radio, light and electronic) to identify medical units and transports (P I, Art. 18(6)). Annex I to Protocol I contains detailed provisions about these signs and signals. States party to the Protocol must take measures to prevent and punish any misuse of the civil defence sign (P I, Art. 66(8)) and the distinctive signals (P I, Art. 18(8)). There is no such obligation for the special sign for works and installations containing dangerous forces.

In addition to the above, Protocol I contains rules prohibiting improper use of the emblems, signs or signals provided for in the Conventions and Protocol I (PI, Art. 38(1)), deliberate misuse, in an armed conflict, of other internationally recognized emblem, signs or signals, such as the flag of truce and the protective emblem of cultural property (PI Art. 38(1)), use of the distinctive emblem of the United Nations (P I, Art. 38(2)), and misuse of emblems of nationality, such as flags or military emblems, insignia or uniforms (P I, Art. 39). These provisions do not require the enactment of legislation.

Having regard to these provisions, the Model Act makes misuse of the above emblems, signs, etc. a criminal offence (see section 13 below). Section 12(1) prohibits (except with the Minister's consent) use of the

⁶⁸ The emblem of the red lion and sun is no longer in use, Iran having adopted the red crescent in 1980.

emblem and name of the Red Cross/Red Crescent, the Swiss flag, and of any other designs or wording liable to be confused with these emblems and names. It also prohibits unauthorized use of the distinctive sign of civil defence, the special sign for works and installations containing dangerous forces, the distinctive signals for medical units and transports, and misuse of such flags, emblems, signs, identity cards, uniforms, etc., as may be prescribed to give effect to the Conventions or Protocols.

Section 12(2) limits the Minister's right to authorize use of the emblems, signs or signals referred to in section 12(1) to the situations referred to in the Geneva Conventions and Protocol I. It is therefore essential to ensure that the Minister or authority responsible is familiar with the full range of restrictions laid down in the Conventions and Protocols.

The scope of this section must extend beyond the national territory to use on any ship or aircraft registered in the country. This is provided for in section 12(3) and is strongly recommended, as it is crucial to ensure comprehensive protection of the red cross/red crescent emblem.

Given the complexity of monitoring and enforcing correct use of the emblems, signs and signals, it is important to identify clearly the authority in charge of regulating their use. It may therefore be advisable, in the Act or in secondary legislation, to designate a specific Minister to oversee these matters.

**PART IV – MISUSE OF THE RED CROSS
AND OTHER EMBLEMS, SIGNS, SIGNALS,
IDENTITY CARDS, INSIGNIA AND UNIFORMS**

Use of red cross, red crescent and other emblems, etc.

12(1) *Subject to the provisions of this section, it shall not be lawful for any person, without the consent in writing of the [Minister for Defence or a person authorized in writing by the Minister] to give consents under this section, to use or display for any purpose whatsoever any of the following:*

- (a) *the emblem of a red cross with vertical and horizontal arms of the same length on, and completely surrounded by, a white ground, or the designation "Red Cross" or "Geneva Cross";*
- (b) *the emblem of a red crescent moon on, and completely surrounded by, a white ground, or the designation "Red Crescent";*

- (c) *the following emblem in red on, and completely surrounded by, a white ground, that is to say, a lion passing from right to left of, and with its face turned towards, the observer, holding erect in its raised right forepaw a scimitar, with, appearing above the lion's back, the upper half of the sun shooting forth rays, or the designation "Red Lion and Sun";*
 - (d) *the emblem of a white or silver cross with vertical and horizontal arms of the same length on, and completely surrounded by, a red ground, being the heraldic emblem of the Swiss Confederation;*
 - (e) *the sign of an equilateral blue triangle on, and completely surrounded by, an orange ground, being the international distinctive sign of civil defence;*
 - (f) *any of the distinctive signals specified in Chapter III of Annex I to Protocol I, being the signals of identification for medical units and transports;*
 - (g) *the sign consisting of a group of three bright orange circles of equal size, placed on the same axis, the distance between each circle being one radius, being the international special sign for works and installations containing dangerous forces;*
 - (h) *a design, wording or signal so nearly resembling any of the emblems, designations, signs or signals specified in paragraph (a), (b), (c), (d), (e), (f) or (g) as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems, designations, signs or signals;*
 - (i) *such other flags, emblems, designations, signs, signals, designs, wordings, identity cards, information cards, insignia or uniforms as are prescribed for the purpose of giving effect to the Conventions or Protocols.*
- (2) *The [Minister for Defence or a person authorized in writing by the Minister to give consents under this section] shall not give such a consent except for the purpose of giving effect to the provisions of the Conventions or Protocols and may refuse or withdraw such a consent as necessary.*
- (3) *This section extends to the use in or outside [INSERT COUNTRY NAME] of an emblem, designation, sign, signal, design, wording, identity card, identification cards, insignia or uniform referred to in subsection (1) on any ship or aircraft registered in [INSERT COUNTRY NAME].*

SECTION 13: OFFENCES AND PENALTIES

Section 13 makes contravention of the prohibition in section 12 an offence and specifies the penalties for misuse. It is important to provide for an appropriate fine. In order to prevent any misuse for commercial purposes, or repeated misuse, it is advisable, as in section 13(2) of the model Act, to provide for forfeiture of goods used in the commission of the offence. It is also advisable, as in section 13(3), to enable adequate action to be taken against companies and other bodies corporate.

Most Geneva Conventions Acts provide that proceedings for misuse of the emblem can only be brought with the consent of the Attorney-General or Director of Public Prosecutions. Section 13(4) of the Model Act follows this approach.

Offences and penalties

13(1) Any person who contravenes section 12(1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding [INSERT MAXIMUM FINE] or to imprisonment for a term not exceeding [INSERT MAXIMUM PERIOD OF IMPRISONMENT] or both.

(2) Where a court convicts a person of an offence against section 13(1), the court may order the forfeiture to the State of:

- (a) any goods or other article upon or in connection with which an emblem, designation, sign, signal, design or wording was used by that person; and*
- (b) any identity cards, identification cards, insignia or uniforms used in the commission of the offence.*

Where an offence against section 12(1) committed by a body corporate is proved to have been committed with the consent or connivance of a director, manager, secretary or other officer of the body corporate, or a person purporting to act in any such capacity, he or she, as well as the body corporate, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(4) Proceedings under section 12(1) shall not be instituted without the consent in writing of the [Attorney-General].

SECTION 14: SAVING

In most States which have adopted the red cross as the distinctive emblem, the Geneva Conventions Act contains a provision permitting use of the emblem and designation of the red crescent and the red lion and sun authorized by trade mark registered before the Act's coming into force. Section 14 of the Model Act follows this approach.

Saving

14. *In the case of a trade mark registered before the passing of this Act, sections 12 and 13 do not apply by reason only of its consisting of or containing a sign specified in subparagraph 12(1)(b) or (c) or a design resembling such a sign, and where a person is charged with using such a sign or design for any purpose and it is proved that the person used it otherwise than as, or as part of, a trade mark so registered, it is a defence for the person to prove:*
- (a) that the person lawfully used that sign or design for that purpose before the passing of this Act; or*
 - (b) in a case where the person is charged with using the sign or design upon goods or any other article, that the sign or design had been applied to the goods or that article before the person acquired them or it by some other person who had manufactured or dealt with them in the course of trade and who lawfully used the sign or design upon similar goods or articles before the passing of this Act.*

PART V: REGULATIONS

SECTION 15: MAKING OF REGULATIONS

This must be a general enabling provision under which regulations may be made to implement the provisions of the Act. Some countries have found it necessary or helpful to supplement their Geneva Conventions Acts with detailed regulations on the use of the emblems or on the disciplinary regime applicable to prisoners of war. Where such regulations facilitate the full and proper implementation of the Conventions and Protocols, they are of course to be encouraged. It is therefore recommended that a provision on the drafting of relevant regulations be given serious consideration. Section 15 of the Model Act includes both specific and general regulation-making powers.

PART V – REGULATIONS

Regulations

15. *[INSERT NAME OF REGULATION-MAKING AUTHORITY] may make regulations —*
- (a) prescribing the form of flags, emblems, designations, signs, signals, designs, wordings, identity cards, information cards, insignia or uniforms for use for the purposes of giving effect to the Conventions or the Protocols or both, and regulating their use;*
 - (b) prescribing the penalty that may be imposed in respect of contravention of, or non-compliance with, any regulations made under paragraph (a) of this section, which may be a fine not exceeding [INSERT MAXIMUM FINE] or imprisonment for a term not exceeding [INSERT MAXIMUM PERIOD OF IMPRISONMENT] or both; and*
 - (c) providing for such other matters as are required or permitted to be prescribed, or that are necessary or convenient to be prescribed, for carrying out or giving effect to this Act.*

SCHEDULE

These are the full texts of the four Geneva Conventions and their Additional Protocols. Given the general obligation to disseminate the Conventions and their Protocols as widely as possible (see GC I, Art. 47; GC II, Art. 48; GC III, Art. 127; GC IV, Art. 144; P I, Art. 83; and P II, Art. 19), publication of the texts as schedules to the Act is helpful, and States are therefore encouraged to include the Conventions and the Protocols in full. This also ensures that national courts will have before them the entire scheme of the Conventions and Protocols in applying the Act. As these instruments are cited in certain sections of the Act, reference to the schedules will be necessary in applying the relevant provisions.

The Conventions may be scheduled without their annexes, as reference to them will not be necessary for their proper application. Annex 1 to Protocol I (“Regulations Concerning Identification”), including the amendments made pursuant to Article 98 of the Protocol, which entered into force on 1 March 1994, should be included as it provides for the civil defence sign and other protective symbols and distinctive signals. This is reflected in the definition of Protocol I, which provides that it is reproduced with Annex 1.

There has been some discussion as to whether the full texts of the Conventions and Protocols, as schedules to a Geneva Conventions Act, may be considered to be part of national law and thus directly invoked before the courts. This will depend on the approach to legislative interpretation followed in the country concerned. It should, however, be noted that Geneva Conventions Acts usually refer only to certain provisions of the Conventions and Protocols — they do not expressly provide that the entire texts are to be part of domestic legislation. The only judicial authority on this point is the 1967 English High Court case, *Cheney v Conn* [1968] 1 All ER 779 which held that the United Kingdom *Geneva Conventions Act* did not make the scheduled Conventions part of the law.

SCHEDULE

1. *The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted at Geneva on 12 August 1949;*
2. *The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted at Geneva on 12 August 1949;*
3. *The Geneva Convention relative to the Treatment of Prisoners of War, adopted at Geneva on 12 August 1949;*
4. *The Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted at Geneva on 12 August 1949;*
5. *The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), done at Geneva on 10 June 1977 (including Annex I, “Regulations Concerning Identification”);*
6. *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), done at Geneva on 10 June 1977.*

CHAPTER 7

JURISDICTION OF MILITARY LAW AND COURTS OVER WAR CRIMES

7.1 INTRODUCTION

States party to the 1949 Geneva Conventions and their 1977 Additional Protocols, other international humanitarian law treaties and certain arms control and disarmament treaties must ensure that national law provides for punishment of violations of these treaties. These treaty obligations are reviewed in Chapter 2. Chapter 5 examines the legislative approach taken by common law States to ensure that alleged offenders can be prosecuted in national courts.

Notwithstanding the requirements of international law, the national law of many States does not adequately provide for punishment of violations of international humanitarian law and arms control and disarmament treaties. In some States, this gap may be partly remedied through the military justice system; courts-martial or military tribunals may be able to try members of the military (and associated personnel) for conduct that amounts to a grave breach of the Geneva Conventions or Additional Protocol I or that constitutes a violation of other treaty obligations.

It must be stressed that this only partly fills the gap. First, courts-martial or military tribunals usually have jurisdiction over military personnel only, whereas grave breaches and other violations may be committed by civilians as well as the military. Secondly, it is unusual for the military legislation of common law States to specifically create an offence termed “war crimes”, which means that conduct amounting to a grave breach or other violation of international humanitarian law will have to be tried either as a “like” or “corresponding” military offence (such as murder, assault, causing grievous bodily harm, property offences) or under one of a number of possible catchall provisions in the State’s military law.

There are both advantages and disadvantages to dealing with military personnel through the military justice system. The most obvious advantage is that it may be more likely to institute proceedings than the civil courts, and may therefore offer a better prospect of those suspected of war crimes or other treaty violations being brought to justice. A second possible advantage is that military investigators and courts may have greater

familiarity with the rules of international humanitarian law. One possible disadvantage is that the penalties available if a grave breach (or other treaty violation) is charged as a military offence may not adequately reflect the seriousness of the crime. Another is that it may be inappropriate for conduct which amounts to a grave breach or a treaty violation to be dealt with in this way. This is particularly the case for grave breaches or violations which have no obvious equivalent military offence, and which therefore have to be dealt with under catchall provisions.

This chapter examines:

- the scope and application of military law — over soldiers, civilians accompanying the armed forces on active service, and prisoners of war (section 7.2);
- the military offences which may be used to prosecute grave breaches and other violations of international humanitarian law (section 7.3);
- the jurisdiction of military and civil courts over civil offences (section 7.4);
- certain safeguards applicable to prisoners of war (section 7.5).

7.2 MILITARY LAW AND JURISDICTION OF MILITARY TRIBUNALS

7.2.1 Scope and application of military law

The military law of many common law States consists primarily of a Defence Act or an Armed Forces Act dealing with:

- the structure and organization of the armed forces;
- the conditions of service of members of the armed forces;
- the application of military law (by specifying those who are subject to the Act);
- military offences (by listing conduct which constitutes a “military offence”);
- the jurisdiction of military and civilian courts in relation to members of the armed forces and others who are subject to military law (including the capacity of military courts to try “civil offences”);
- the constitution and procedures of courts-martial, including penalties and sentencing.

Military law applies, in the first instance, to members of the State's armed forces. In many common law States, civilians may also be subject to military law if they are employed in the service of the armed forces or accompany them on active service.

7.2.2 Jurisdiction over the military — military and civil offences

A feature of the law of common law States is to impose liability on those subject to military law for civil as well as purely military offences. This is perceived to have three practical advantages.

1. A soldier may be tried for any offence for which a civilian would be liable. This may be particularly important in an armed conflict, since it brings in the entire criminal law of the State, including offences against the person and more specific offences such as torture, genocide, crimes against humanity, war crimes, including grave breaches of the Geneva Conventions and Additional Protocol I, and violations of other treaties such as the Ottawa Convention, the Biological Weapons Convention and the Chemical Weapons Convention.
2. It enables trial (or other disciplinary procedures) to take place under the military justice system. It is common to grant a court-martial the power to sit in any place and to adjourn it to sit somewhere else. It therefore possesses the flexibility that may be required by military action.
3. Jurisdiction is extra-territorial. The soldier carries the law of his State with him wherever he goes. Liability under this law is thus wider than that applying to a person not subject to military law. In consequence, a soldier may be liable for any offence against the "ordinary" criminal law committed outside the territory of his State (and not merely those offences giving rise to extra-territorial jurisdiction).

This may be particularly important in some States where jurisdiction over what may be considered to be "armed conflict" offences is *not* extra-territorial. Examples in the United Kingdom would be the *Genocide Act 1969* and the *Biological Weapons Act 1974*. (Compare the Australian *Crimes (Biological Weapons) Act 1976*, which provides jurisdiction over acts by Australian citizens abroad.)

7.2.3 Jurisdiction over civilians

During active service, civilians may be subject to military law if they are employed in the service of the armed forces or accompany them; in these

circumstances, they would come within the scope of the military legal regime described above. Otherwise, civilians will be liable to the criminal law of their State and any limitations it imposes in respect of extra-territorial crimes.

7.2.4 Jurisdiction over prisoners of war

Article 82 of the Third Geneva Convention provides that prisoners of war shall be subject to the laws in force in the armed forces of the detaining power. To comply with this requirement, it is recommended that prisoners of war be subject to the same justice system as members of the State's armed forces. The treatment of prisoners of war is discussed in greater detail in section 7.5 below.

7.3 MILITARY OFFENCES

7.3.1 Introduction

In relation to war crimes or other violations alleged to have been committed, or ordered to be committed, by military personnel, there are three possible ways of bringing an alleged offender to justice.

1. If the conduct complained of is covered by the State's ordinary criminal law — as is the case, in many common law States, for grave breaches of the Geneva Conventions and Additional Protocol I, and violations of the Ottawa Convention and other treaties such as the Chemical Weapons Convention — both the civil and military authorities will have jurisdiction. The jurisdiction of military and civil courts over civil offences is discussed further in section 7.4.
2. Where the conduct does not amount to a grave breach or is not otherwise covered by the State's criminal law, often the only possibility will be a military charge — for example, of looting or disobedience to standing orders. Military offences are discussed further in section 7.3.2.
3. Where the conduct is not covered by the State's ordinary criminal law and does not constitute a specific military offence, it will be necessary to look to catchall provisions such as:
 - (a) “scandalous, disgraceful or unbecoming conduct” or “conduct prejudicial to good order and military discipline” (section 7.3.3);
 - (b) breach of standing orders or failure to comply with lawful commands (section 7.3.4).

7.3.2 Military offences

The Armed Forces or Defence Act of common law States, in addition to giving military tribunals power to hear charges of civil offences against members of the military, creates a wide range of “military offences”: offences in relation to the enemy; mutiny; insubordination and disobedience; desertion, fraudulent conduct and absence without leave; disgraceful conduct; drunkenness; offences in relation to persons in custody; offences in relation to property; offences relating to courts-martial.

There are two situations in which a violation of international humanitarian law may be charged as a military offence. The first is where the conduct is not covered by the State’s criminal law; in these circumstances, the only possibility will be a military charge. The second is where the military decides to charge a soldier who is alleged to have committed a violation of international humanitarian law with a military offence, even though the conduct could be charged as a civil offence (for example, as an offence against the Geneva Conventions Act “grave breach” provisions or as an offence under implementing legislation for the Ottawa Convention or the Statute of the International Criminal Court).

A recent publication, *Court Martial and Military Matters* by Brigadier Nilendra Kumar, includes a table showing how certain violations of international humanitarian law may be charged as military offences under the *Indian Army Act*.⁶⁹ For example, “appropriation of property” may be charged as “breaking into any house or other place in search of plunder”, and “attacking and causing destruction of historic monuments, works of art or places of worship” may be charged as “committing an offence against the property or person of any inhabitant or resident of the country in which serving”.

7.3.3 Scandalous, disgraceful or unbecoming conduct and conduct to the prejudice of good order and military discipline

Given that in most common law countries the provisions of a treaty will not become part of the national criminal law unless implemented by legislation, charges such as “scandalous, disgraceful or unbecoming conduct” or “conduct to the prejudice of good order and military discipline” may be useful for dealing with conduct which may not be specifically made criminal. One example might be killing or wounding an enemy combatant

⁶⁹ Kumar, N., *Court Martial and Military Matters*, Manas Publications, New Delhi, 1999, p. 188.

using a dum-dum bullet or poisoned weapons or otherwise in breach of Article 23 of the Regulations annexed to Hague Convention IV of 1907. Another might be killing, injuring or capturing by resort to perfidy contrary to the prohibition in Article 37 of Additional Protocol I.

The military laws of most common law States provide for charges of this nature. There may, however, be disadvantages in widespread use of such charges for dealing with war crimes and other violations of international humanitarian law. First, there may be certain difficulties of proof, particularly in relation to a charge of “conduct to the prejudice of good order and military discipline”; it may be difficult to prove that the soldier’s conduct would have this effect. Secondly, although conviction on a charge of “scandalous, disgraceful or unbecoming conduct” or “conduct to the prejudice of good order and military discipline” may lead to a sentence of imprisonment, the maximum period of imprisonment permitted may not reflect the seriousness of the crime. Thirdly, it may be undesirable, from a policy and educational point of view, for war crimes or violations of international humanitarian law to be treated in this way when they might otherwise be charged as recognizable war crimes.

7.3.4 Breach of standing orders and failure to comply with orders

A more practical method of dealing with the less serious international humanitarian law offences under the military legal system would be by charging a soldier with breach of standing orders. Such breaches could also be charged as a failure to comply with military orders. Breach of standing orders is an offence commonly found in the military laws of common law States. It would be wide enough to cover a breach of the rules of engagement issued (often in the form of an easily understood card) to soldiers by superior authorities and would thus cover a large area of international humanitarian law. Obviously this will be possible only if compliance with the rules of engagement is included in the standing orders.

7.4 JURISDICTION OVER CIVIL OFFENCES: POSSIBLE CONFLICT BETWEEN CIVIL AND MILITARY AUTHORITIES

7.4.1 Introduction

Military courts have exclusive jurisdiction over military offences committed by members of the armed forces. Under military law, military

courts also have jurisdiction over civil offences committed by members of the armed forces. This jurisdiction is shared with civil courts in the following manner.

- *Civil offences committed in the home State:* As a general rule, the military and civil courts have concurrent jurisdiction to try civil offences committed by members of the armed forces in the home State. In most common law States there is an exception to this general rule for particularly serious offences, such as murder, rape (and, in some States, manslaughter), and grave breaches. These are within the exclusive jurisdiction of the civil courts (unless committed “on active service”).
- *Civil offences committed abroad:* Military and civil courts have concurrent jurisdiction to try civil offences committed by members of the armed forces abroad if these offences give rise to extra-territorial jurisdiction. If that is not the case, only the military courts will have jurisdiction.

These situations are discussed in further detail in sections 7.4.2 and 7.4.3 below. The military offences which may be used to charge violations of international humanitarian law are discussed in section 7.3 above.

7.4.2 Offences committed by soldiers in the home State

As a general rule, military courts have jurisdiction to try members of the military (and associated personnel) for both civil and military offences. There is an exception to this general rule for certain particularly serious offences — such as grave breaches, murder, rape (and, in some States, manslaughter) — committed within the territory of the State. It is common practice in common law States for military courts to be denied jurisdiction, within the territory of the home State, over these offences. In relation to grave breaches, it is the Geneva Conventions Act which prevents military courts from trying members of the military for such offences committed on the State’s territory. In relation to murder and rape (and, where applicable, manslaughter), it is the Defence or Armed Forces Act.

While recognizing that the civil courts should ordinarily exercise jurisdiction in these cases, before deciding to give the civil courts exclusive jurisdiction over offences committed on the State’s territory it should be considered whether this would be appropriate for offences committed within the territory by soldiers during a situation of armed conflict. In this regard, it is interesting to note that section 59(2) of the Bangladesh *Army Act 1952* gives the civil and military courts concurrent jurisdiction where such

offences are committed in Bangladesh while the Army is “on active service”.

7.4.3 Offences committed by soldiers abroad

If the conduct complained of is covered by the State’s ordinary criminal law — as is the case, in many common law States, for grave breaches of the Geneva Conventions and Additional Protocol I, and violations of the Ottawa Convention and other treaties such as the Chemical Weapons Convention — both the civil and military authorities will have jurisdiction. Where the conduct does not amount to a grave breach or is not otherwise covered by the State’s criminal law, often the only possibility will be a military charge — for example, looting or disobedience to standing orders. Military offences are discussed in section 7.3 above.

Where both civil and military courts have jurisdiction, it will be necessary to decide whether the civil or military justice system should take charge of the investigation and conduct proceedings. In most States, the matter is likely to be resolved by negotiation between the civil and military authorities. The issue of the most appropriate means of investigation (civil or military) will often determine the most appropriate form of trial. A decision should be made at the outset as to whether the civil or military police should lead the investigation, with the other probably assuming a supporting role.

Where the conflict is ongoing, and the soldier alleged to have committed the offence is in the hands of the military, it is likely that the military will be expected to deal with the offender in accordance with its own procedures. The chief reason for this is that it will generally be easier for the military authorities to conduct an investigation and establish a court-martial abroad than it would be for the civil authorities to bring the alleged offender back to the home State, along with witnesses. In cases such as these, the civil authorities are unlikely to seek to invoke their jurisdiction unless there is a particular reason for doing so. This might be the case, for example, if there has been publicity about the incident in the press or on television.

Where the conflict is over and the alleged offender is no longer subject to military law, the civil authorities alone may have jurisdiction. In this regard, it is important to note that there is no statute of limitations, in common law States, for grave breaches or other violations of international humanitarian law or arms control and disarmament treaties.

If the alleged offender is a civilian or an enemy soldier, any prosecution is likely to be brought in the civil courts (unless the enemy soldier is a

prisoner of war, in which case the same law and procedures should apply as would apply to a member of the State's armed forces charged with a like offence).

7.4.4 Recommendations in relation to war crimes investigations

On the basis of experience in investigating and prosecuting war crimes, the following measures are recommended.

- Members of the armed forces must be aware of their duty, under military regulations, to report suspected war crimes.
- In cases where the military and civil courts have concurrent jurisdiction over war crimes alleged against military personnel, a rapid decision as to which authorities should lead the investigation is crucial. This will allow a properly coordinated investigation to commence without delay. In war crimes investigations, as in all criminal investigations, delay makes the task of collecting evidence and interviewing witnesses more difficult and the evidence and witness statements obtained potentially less reliable.
- Specialist investigators should be employed, with proper training and access to expert legal advice. In cases where the civil authorities are leading the investigation, military police investigators should be used in a supporting role. They may be able to provide valuable insights and advice where it is necessary to question military personnel.
- When investigations are conducted abroad, care needs to be taken in collecting evidence and taking witness statements to ensure compliance with the admissibility requirements of the national system. In this regard, it is also essential to ensure accuracy in translation and interpretation. Where witnesses need to be questioned through an interpreter, it is essential to ensure that questions and responses are accurately relayed.

7.4.5 Proceedings by both military and civil authorities

It is interesting to note the differences of approach to concurrent jurisdiction adopted by different countries. In some common law States, a soldier tried by the military authorities for a civil offence may be tried again by the civil courts for the same offence, although the military punishment must be taken into account in sentencing. This is the case, for example, in Nigeria and Kenya. In other countries, there is equality between military and civil courts in respect of civil offences and the

principle of *autrefois convict/acquit* applies. This is the case, for example, in the United Kingdom.

7.5 LAW APPLICABLE TO PRISONERS OF WAR

7.5.1 Prisoners of war subject to the laws of the detaining power

Article 82 of the Third Geneva Convention provides that prisoners of war shall be subject to the laws in force in the armed forces of the detaining power. Further protection is afforded prisoners of war by this Convention, which provides that they:

- shall be tried by military courts unless the detaining power's law permits members of its armed forces to be tried by the civil courts for the same offence (Article 84);
- may not be sentenced to penalties other than those provided for the detaining power's armed forces for the same acts (Article 87), shall not be subjected to more severe treatment than would be applied to members of the detaining power's armed forces (Article 88), and shall serve their sentences in the same establishments and in the same conditions as members of the detaining power's armed forces (Article 108);
- shall not be kept in confinement awaiting hearing unless a member of the detaining power's armed forces would be so kept for a similar offence (Articles 95 and 103);
- can be validly sentenced only if the sentence has been pronounced by the same courts and according to the same procedures as apply to members of the detaining power's armed forces (Article 102);
- shall have the same right of appeal as members of the detaining power's armed forces (Article 106).

Returning to Article 82, which requires prisoners of war to be subject to the same laws as the armed forces of the detaining power, it is interesting to look at the US *Uniform Code of Military Justice*, which explicitly provides that prisoners of war are subject to the Code. The Canadian *Geneva Conventions Act* similarly provides that prisoners of war are subject to the Canadian *Code of Service Discipline*. This is not the case in many common law States, where the Defence or Armed Forces Act does not make prisoners of war subject to the State's military law. It is recommended that thought be given to the trial of prisoners of war by the same type of court-martial that would try a member of the State's own armed forces.

7.5.2 Prisoners of war disciplinary regulations

While prisoners of war must be subject to the same laws and tribunals as members of the State's armed forces, there are certain offences — such as escaping from custody or conduct prejudicial to good order and discipline among prisoners — which can be committed only by prisoners of war. To proceed against such offences, detailed disciplinary regulations will be necessary. These regulations should conform to the provisions of the Third Geneva Convention, which distinguishes between judicial and disciplinary proceedings (escape attempts, for example, are liable to disciplinary punishment only) and which requires the protecting power to be notified of a decision to institute judicial proceedings. These matters are covered, in the United Kingdom, by the *Prisoners of War (Discipline) Regulations 1958*. Other common law States have similar regulations.

7.5.3 Determination of the status of prisoners of war in case of doubt

Where there is doubt as to whether an individual is to be treated as a prisoner of war, Article 5 of the Third Geneva Convention states that the person is entitled to be treated as such “until such time as [his or her] status has been determined by a competent tribunal”. To comply with their obligations under Article 5, States Parties must establish a tribunal to decide such cases. Such a tribunal will need to refer to the definitions of prisoner of war contained in Article 4 of the Third Geneva Convention and, where applicable, Article 44 of Additional Protocol I (as well as the specific exclusion of spies and mercenaries in Articles 46 and 47 of the Protocol).

Examples of procedures adopted in common law States to give effect to this obligation are the possibility in the United Kingdom of convening a board of inquiry;⁷⁰ the Canadian system, whereby a tribunal consists of one officer of the Legal Branch of the Canadian Forces;⁷¹ and the possibility, in Australia, of a person whose status is in doubt making an application to the Supreme Court of the State or Territory in which he or she is held in custody for a declaration that he or she has the status of a protected prisoner of war.⁷²

⁷⁰ United Kingdom *Prisoner of War (Determination of Status) Regulations 1958*.

⁷¹ Canadian *Prisoner-of-War Status Determination Regulations, 1991*.

⁷² Australian *Geneva Conventions Act 1957*, sec. 10.

PART 5

**BRINGING A CASE
TO TRIAL**

CHAPTER 8

BRINGING A CASE TO TRIAL — CRIMINAL PROCEEDINGS

8.1 INTRODUCTION

The punishment of war crimes, crimes against humanity and genocide, regardless of where they are committed, is essential if international law is to be respected and justice served. States need to ensure that their substantive and procedural law, and their administrative, judicial and investigative systems, enable them to prosecute these offences and to provide such assistance as might be necessary where proceedings are under way abroad. In addition to these legal and practical aspects of enforcement, there must be the political will to bring alleged offenders to justice.

The focus of this chapter is on national enforcement of international humanitarian law, in particular war crimes trials. It is worth recalling that States have an obligation to search for, and to try or extradite, persons alleged to have committed grave breaches of the Geneva Conventions (and, where applicable, Additional Protocol I), that they are required to suppress other violations of the Conventions and Protocol I, and that other treaties of international humanitarian law and certain arms control and disarmament treaties require States Parties to prevent, and, where necessary, punish violations. A number of these treaties impose specific obligations on States Parties to enact criminal legislation to punish those responsible for violations and to afford one another the greatest measure of assistance in connection with criminal and extradition proceedings brought in respect of such offences.

Despite these obligations, there have been very few war crimes trials at the national level apart from those relating to events that occurred during the Second World War. This means that there are few precedents to guide investigators and prosecutors, other perhaps than proceedings in military tribunals or courts-martial.

It would appear that this situation is starting to change. Events in the early 1990s, which led to creation of the ad hoc Tribunals for the former Yugoslavia and Rwanda, have led also to an increasing willingness to investigate and bring prosecutions for war crimes, genocide and crimes against humanity in national courts. With the adoption of the Statute of the

International Criminal Court, and the changes in national criminal law which are occurring as States amend their law to ensure that their own courts will have jurisdiction over the crimes within the Court's jurisdiction, this trend is likely to continue.

In preparing a case and bringing it to trial, there are a number of crucial steps. This chapter examines:

- issues relevant to a decision to prosecute, including, in relation to grave breaches of the Geneva Conventions and Additional Protocol I, the need to obtain the Attorney-General's consent to prosecution (section 8.2);
- the importance of mutual assistance in preparing a case, bringing a case to trial and enforcement of decisions (section 8.3);
- questions of proof and evidence which may arise in preparing a case, including proof of the existence of an armed conflict through production of a certificate by the Minister for Foreign Affairs (section 8.4);
- judicial guarantees which apply in war crimes trials (section 8.5).

8.2 DECISION TO PROSECUTE

Violations of international humanitarian law may be committed by members of the armed forces or civilians. They may occur within the national territory or abroad, in international or non-international armed conflict. In deciding whether to prosecute, the relevant authorities⁷³ will need to follow a number of steps.

1. First it has to be determined whether the conduct complained of is an offence in the national legal system — in the ordinary criminal law or under military law — and whether the national courts have jurisdiction over the alleged offender and the crime.

The question of jurisdiction is particularly important in relation to crimes committed abroad. The State's legislation must provide for universal jurisdiction over grave breaches of the Geneva Conventions and Additional Protocol I and, for States party to the Second Protocol to the 1954 Hague Cultural Property Convention, certain serious

⁷³ To date, private prosecutions have not been used to bring alleged offenders before the courts in common law jurisdictions.

violations of the Convention and the Protocol. It must also provide for extra-territorial jurisdiction over violations of Amended Protocol II to the 1980 Conventional Weapons Convention, the 1993 Chemical Weapons Convention and the 1997 Ottawa Convention. Consideration should also be given to providing for universal jurisdiction over other serious violations of international humanitarian law, crimes against humanity and genocide.

2. Assuming the conduct alleged is an offence under national law and the national courts have jurisdiction, it will have to be decided whether the case should be brought to trial. The most important factor in the decision to prosecute will be the strength of the evidence and the likelihood of a conviction. War crimes trials, and trials for crimes against humanity and genocide, pose particular problems for investigators — particularly where the events giving rise to the charge took place abroad. In these cases, it may be necessary to have access to evidence, witnesses and defendants abroad.

Where the alleged offender is a member of the State's armed forces, it will have to be decided whether the case should be charged as a military or a civil offence and whether it should be brought before the military or civil courts. The choice between the two systems is discussed in Chapter 7.

3. In addition to the ordinary considerations or procedures that are applied to determine whether a case should be brought to trial, common law States impose an additional requirement in relation to grave breaches of the Geneva Conventions or Additional Protocol I. To bring such a charge before the ordinary criminal courts, the consent or authorization of the Attorney General or Director of Public Prosecutions is necessary. This is the effect of the "grave breach" provision of the various Geneva Conventions Acts, which stipulates that proceedings for an offence against the section shall not be instituted except by or on behalf of, or with the consent of, the Attorney-General or the Director of Public Prosecutions.

The requirement of the consent of the Attorney-General, the Director of Public Prosecutions or an equivalent officer may obviate vexatious prosecutions or the bringing of actions that are not founded in law. The State must not, however, make use of this requirement to bring political considerations into play or to evade its duty to search for, and try or extradite, an alleged offender.

8.3 MUTUAL ASSISTANCE

8.3.1 Introduction

For the system of national repression of international crimes to function effectively, States must be able to assist one another in connection with criminal proceedings for these offences. A variety of forms of assistance may be required: executing requests received from foreign judicial authorities; serving documents; obtaining evidence abroad; taking testimony or statements; providing records; producing documents; locating persons; arranging for the appearance of a witness or experts before the court; extraditing a suspect for trial or a convicted person for execution of the sentence; providing judicial records; enforcing foreign judgments.

8.3.2 Mutual assistance obligations

The need for mutual assistance is particularly clear in relation to crimes for which States have an obligation to try or extradite violators — crimes such as grave breaches of the Geneva Conventions and Additional Protocol I, and, for States party to the Second Protocol to the 1954 Hague Cultural Property Convention, certain serious violations of the Convention and the Protocol. It is not surprising that these treaties contain specific provisions on mutual legal assistance and extradition.

Article 88(1) of Protocol I additional to the Geneva Conventions requires States Parties to “afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches”. This covers assistance for criminal proceedings conducted abroad and enforcement of foreign judgments. In addition to the general duty of mutual assistance, Article 88(2) of Additional Protocol I imposes a specific duty to cooperate in extradition proceedings. Articles 18 and 19 of the Second Protocol to the 1954 Hague Cultural Property Convention deal with extradition and mutual legal assistance.

Even where there is *no express treaty obligation* to cooperate in matters of mutual assistance or extradition, States should be aware — as noted in General Assembly resolution 3074 (XXVIII) of 3 December 1973, “Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity” — of “the special need for international action in order to ensure the prosecution and punishment of persons guilty of war crimes and crimes against humanity”. This resolution provides that States shall cooperate with each other with a

view to halting and preventing war crimes and crimes against humanity, that they shall assist each other in detecting, arresting and bringing to justice suspected offenders, and that they shall cooperate on questions of extradition and in the collection and exchange of information and evidence.

8.3.3 Extradition

War crimes, crimes against humanity and genocide are crimes which offend the conscience of humanity and which may be tried by all States. For this to be possible, States must ensure that their extradition legislation and arrangements with other States permit them to extradite alleged offenders and to respond to extradition requests from third States.

Between Commonwealth States, the *Commonwealth Scheme for the Rendition of Fugitive Offenders* applies. Extradition between States in the European Union is relatively easy since the adoption of simplified extradition procedures. Where there are no such multilateral arrangements, extradition is ordinarily governed by bilateral treaties.

Extradition arrangements are usually subject to certain limitations such as the double criminality requirement (the conduct constitutes a crime in both the requested and the requesting State), the political offence exception (extradition may be refused where the offence is of a political nature), and the rule of speciality (the person extradited may be charged only for the offence in relation to which extradition was sought). In some States, extradition is only possible where the conduct complained of appears on a list of “extraditable offences”.

To ensure that war crimes, crimes against humanity and genocide may be prosecuted, States must ensure that their national law permits them to extradite (and seek extradition of) suspected offenders. They should also ensure that the double criminality requirement and the political offence exception are not used to prevent prosecutions for these crimes.

8.3.4 Cooperation and judicial assistance — international tribunals

This Guide focuses on *national* enforcement of international humanitarian law and the focus in this section is, therefore, on mutual *assistance between States*. For the sake of completeness, it is important to mention that the Statutes of the ad hoc Tribunals for the former Yugoslavia and Rwanda both contain provisions on cooperation and judicial assistance, which require States to cooperate with the tribunals in the investigation and prosecution of

persons accused of committing crimes within their jurisdiction. States are also required to comply, without undue delay, with any request for assistance or any order issued by a Trial Chamber, including, but not limited to, identification and location of persons, taking of testimony and production of evidence, service of documents, arrest or detention of persons, and surrender or transfer of the accused to the Tribunal. Many States have adopted a specific law to facilitate cooperation with the Tribunal.

The Statute of the International Criminal Court contains more extensive provisions, with the whole of Part 9, “International Cooperation and Judicial Assistance”, devoted to matters of assistance and cooperation. Article 86 imposes a general obligation to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”. Successive provisions give concrete form to this general duty to cooperate, with Article 88 requiring States Parties to ensure that there are procedures available under their national law for all of the forms of cooperation specified in Part 9. States which ratify the Rome Statute will need to adopt legislation to facilitate cooperation with the Court.

8.3.5 Difficulty of gathering evidence abroad

The trial of offences committed abroad gives rise to particular problems relating to the gathering of evidence and the defendant’s right to test that evidence. In providing for universal jurisdiction, it is important to address the issue of gathering and evaluating evidence and, where necessary, to introduce appropriate procedures.⁷⁴ This may include, for example, provisions for taking evidence by video link, dispatching letters of request or conducting rogatory commissions abroad. It may also require the strengthening of arrangements for international judicial cooperation.

8.4 PREPARING THE CASE — QUESTIONS OF EVIDENCE

8.4.1 Introduction — elements of the offence

If there is sufficient evidence to bring a case to trial, and a decision has been made to prosecute, the prosecution, in order to establish the defendant’s guilt, will need to demonstrate that:

⁷⁴ See, for example, Australia’s *Crimes (Child Sex Tourism) Offenders Act 1994*, which permits the court to take evidence by video link.

- the acts complained of took place in the course of an armed conflict (or in a situation of total or partial occupation);
- the conduct would, if proved, constitute a violation of international humanitarian law;
- the accused committed, or ordered to be committed, a violation of international humanitarian law (or was otherwise responsible in accordance with the principles of secondary liability outlined in section 4.2);
- the act was committed with the requisite mental element.

For violations of the Geneva Conventions and their Additional Protocols, the 1954 Hague Cultural Property Convention and its 1999 Protocol, and Amended Protocol II to the 1980 Conventional Weapons Convention, the existence of an armed conflict is an essential element of the case. The Geneva Conventions Acts of most common law States include a provision intended to assist the court with this question; the court may receive in evidence a certificate from the Minister for Foreign Affairs (or equivalent). This is discussed in greater detail in section 8.4.2 below.

The questions of criminal responsibility raised by the third and fourth elements are discussed in Chapter 4.

8.4.2 Certificate from the Minister for Foreign Affairs as evidence of conflict

In proceedings under a Geneva Conventions Act for a grave breach of the Geneva Conventions or Additional Protocol I, a question may arise under Article 2 of the Conventions or Article 1 or 3 of the Protocol as to whether there is an *international armed conflict* to which these instruments apply. In those States where the Geneva Conventions Act permits prosecutions for violations other than grave breaches, questions may also arise as to whether there is a *non-international armed conflict* within the meaning of Article 3 of the Convention or Article 1 of Additional Protocol II.

Section 8 of the Australian *Geneva Conventions Act 1957* provides that, when a question arises as to the circumstances in which the Conventions or Protocol I apply, a certificate under the hand of the Minister of State for Foreign Affairs and Trade certifying to any matter relevant to that question is *prima facie* evidence of the matter certified. The Geneva Conventions Acts of Ireland, Malawi, Malaysia, New Zealand, Nigeria, Singapore, Uganda, the United Kingdom and Zimbabwe provide that the question shall be

determined by the Minister, and that a certificate with the Minister's determination "shall be received in evidence". In Papua New Guinea, such a certificate is "evidence of that matter". In Canada, it is "proof of the facts so stated". In Kenya and the Seychelles, it is "sufficient evidence of the determination". In India, it is "conclusive evidence of the matter so certified".

The same question — concerning the existence of an armed conflict — may arise in relation to the 1954 Hague Cultural Property Convention and its Second Protocol, and Amended Protocol II to the 1980 Conventional Weapons Convention. In these instances, the court may need to make a decision without the assistance of a certificate from the Minister for Foreign Affairs.

8.5 JUDICIAL GUARANTEES IN INTERNATIONAL HUMANITARIAN LAW

Any war crimes trial or similar proceedings, at the international or national level, must respect certain fundamental judicial guarantees. States will need to ensure that these are fully reflected in their national law and procedures.

The main judicial guarantees laid down in international humanitarian law treaties are the following:

- the right of the accused to be judged by an independent and impartial court (GC III, Art. 84(2); P I, Art. 75(4); P II, Art. 6(2));
- the right of the accused to be informed of the offences with which he or she is charged (GC III, Art. 104; GC IV, Art. 71(2); P I, Art. 75(4)(a); P II, Art. 6(2)(a));
- the rights and means of defence, such as the right to be assisted by a qualified lawyer chosen freely and by a competent interpreter (GC III, Arts 99 and 105; GC IV, Arts 72 and 74; P I, Art. 75(4)(a) and (g); P II, Art. 6(2)(a));
- the principle of individual penal responsibility (GC III, Art. 87; GC IV, Art. 33; P I, Art. 75(4)(b); P II, Art. 6(2)(b) and Art. 50 of the Regulations annexed to 1907 Hague Convention IV);
- the principle of *nullum crimen sine lege* (no crime without law) (GC III, Art. 99(1); GC IV, Art. 67; P I, Art. 75 (4)(c); P II, Art. 6(2)(c));
- the presumption of innocence (P I, Art. 75(4)(d); P II, Art. 6(2)(d));

- the right of the accused to be present at the trial (P I, Art. 75(4)(e); P II, Art. 6(2)(e));
- the right of the accused not to testify against himself or herself or to confess guilt (P I, Art. 75(4)(f); P II, Art. 6(2)(f));
- the principle of *non bis in idem* (no punishment more than once for the same act) (GC III, Art. 86; GC IV, Art. 117(3); P I, Art. 75(4)(h));
- the right of the accused to have the judgment pronounced publicly (P I, Art. 75(4)(i));
- the right of the accused to be informed of his or her rights of appeal (GC III, Art. 106; GC IV, Art. 73; P I, Art. 75(4)(j); P II, Art. 6(3));
- the prohibition on passing sentences and carrying out executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as being indispensable by civilized peoples (Article 3 common to the Geneva Conventions);
- the right of an alleged enemy spy not to be punished without previous trial (Art. 30 of the Regulations annexed to 1907 Hague Convention IV).

PART 6

CONCLUSION

CHAPTER 9

CONCLUSION

The starting point for preparation of this Guide was a meeting of experts held by the ICRC to discuss, and foster the development of, national law for the prosecution and punishment of individuals alleged to have committed violations of international humanitarian law. The meeting also considered national measures to punish other serious international crimes such as genocide and crimes against humanity.

The purpose of the Guide is to provide a practical reference work for lawmakers and other authorities directly involved in incorporating provisions for the punishment of these crimes into national legal systems. To this end, the Guide addresses issues of international and national law relevant to prosecutions for these crimes. In the domain of international law, the Guide reviews the international crimes which should be punished at the national level, the basis on which States should exercise jurisdiction, and the principles of criminal responsibility applicable. At the national level, the Guide reviews different approaches or legislative models adopted in common law States to punish these crimes — with a specific chapter on how to incorporate the Geneva Conventions and their Additional Protocols into domestic law (including a model Geneva Conventions Act, based on the Geneva Conventions Acts in force in over 25 common law States). The Guide also examines certain practical matters associated with prosecutions, including the relationship between the civil and military justice systems and the importance of adequate procedures (mutual legal assistance, extradition, gathering of evidence) to successfully bring a case to trial.

Prevention as well as punishment

While the focus of this Guide is punishment of violations of humanitarian law, it is essential to bear in mind that States have an obligation to prevent as well as to punish such violations. For those caught in the midst of armed conflict, prevention of violations is immeasurably preferable to punishment of offenders. Respect for humanitarian law during an armed conflict can reduce the human suffering caused by the conflict. It can, in addition, contribute to the peace-building process which must follow any conflict. Where the rules of humanitarian law are respected, a certain understanding,

dialogue and confidence between the parties can help them work towards a durable peace.

In accordance with this idea, the Guide concludes with a reminder of States' fundamental obligation to respect and ensure respect for humanitarian law, and to prevent violations of its provisions. Combatants must receive instruction in humanitarian law so that they can abide by its rules in their behaviour. The military manuals, rules of engagement, and standing orders of the armed forces must conform to the requirements of humanitarian law. The armed forces should have legal advisers available to assist military commanders in applying the law and providing appropriate instruction for the armed forces. Furthermore, it is not only the armed forces that are required to respect humanitarian law; it is crucial that the civilian population also be familiar with its provisions. Civil servants, government officials, students and teachers, medical personnel, and members of the media, in particular, should learn its principles.

There are other administrative and practical measures which need to be taken to ensure the effective application of humanitarian law: marking of protected medical facilities with the red cross or red crescent emblem; marking of cultural property, civil defence property and personnel, and works and installations containing dangerous forces with the distinctive signs provided for under humanitarian law; when choosing the location of military objectives making sure that they are not within or near densely populated areas; analysis of new weapons and methods of warfare to ensure that they comply with humanitarian law.

Alternatives to prosecution

International law requires that those responsible for serious violations of humanitarian law and other serious international crimes such as genocide and torture be tried and punished. The prosecution option is not, however, the only one available to countries attempting to deal with past atrocities. In the last 30 years, some 20 countries have established commissions of inquiry, also known as "truth commissions", to inquire into past abuses. Such commissions establish a record of past misdeeds, provide some official acknowledgement of the loss and trauma suffered by victims and their relatives, and also provide an opportunity for victims and their relatives to tell their stories. They may also make recommendations for reform so as to guard against a repetition of such abuses, establish a basis for compensation for victims, and garner information which may be used in subsequent prosecutions.

It is essential to ensure that there is no safe haven for those who have committed serious violations of humanitarian law or other crimes such as genocide, torture and crimes against humanity. Prosecution of perpetrators on the basis of universal jurisdiction is one way to ensure that they do not find a safe haven and that their acts do not go unpunished. In some countries, the immigration and citizenship laws may also be relevant. They may bar immigration or, where persons who have been granted citizenship failed to disclose past abuses, provide for loss of citizenship and the possibility of subsequent deportation.

While the prosecution and punishment of offenders constitutes an essential element of any attempt to come to terms with past abuses, the needs of victims — for justice, acknowledgement and compensation — are another. Countries which have experienced a period of human rights abuses and violations of humanitarian law may establish a system of compensation for victims. In some countries, it is possible for victims to seek compensation in civil proceedings against perpetrators.

These alternatives to prosecution are additional possibilities in the fight against impunity for heinous crimes such as genocide, crimes against humanity, war crimes and other violations of humanitarian law. They should not be seen as a substitute for the trial and punishment of those responsible, and States should ensure that they may try and punish the perpetrators of these crimes under their national criminal (or military) law.

National law to punish violations

When deciding how to frame their criminal law to deal with these crimes, States must ensure that they comply with their obligations under the treaties to which they are party by enacting criminal legislation and exercising jurisdiction over violations in accordance with their provisions. They should also consider which other violations of treaty or customary law they wish to establish as criminal offences in their domestic law.

There are legal, practical and policy considerations which might lead a State to enact criminal legislation that goes further than the minimum required by humanitarian law treaties. From the legal viewpoint, it is important to remember that States have an obligation to ensure compliance with treaties binding on them. Passing legislation to provide punishment for violations, and prosecuting alleged offenders if violations occur, is an important means of ensuring respect for the law and preventing violations. An additional reason why States might choose to enact legislation relating to these crimes

is the adoption, in 1998, of the Statute of the International Criminal Court. Many States have already started reviewing their criminal law to ensure that the crimes within the jurisdiction of the Court (genocide, crimes against humanity, and war crimes) are covered in their domestic law.

From a practical standpoint, States which enact legislation to punish serious violations of humanitarian law and human rights law may find that it deters offenders from seeking refuge or “safe haven” on their territory. The existence of civil remedies for victims, and immigration and citizenship restrictions, may also be useful in this regard. From a policy point of view, States which pass legislation to punish persons alleged to have committed such acts, or to have ordered them to be committed, send an important signal that these crimes are regarded as abhorrent and as warranting punishment — like any other crime.

PROGRAMME OF THE MEETING

Wednesday 11 November 1998

- 08h45 – 09h15 Registration
- 09h15 – 09h35 **Opening of the meeting**
Mr Yves Sandoz, ICRC Director for International Law and Communication
- 09h35 – 09h55 **The importance of respect for international humanitarian law (IHL)**
Mr Cornelio Sommaruga, ICRC President
- 09h55 – 10h15 **Enforcing IHL at the national level, the work of the ICRC's Advisory Service on IHL, and the 1997 meeting of civil law experts on national enforcement of IHL**
Ms María Teresa Dutli, Head, ICRC Advisory Service on IHL
- 10h15 – 10h45 Coffee break
- 10h45 – 12h30 **Some common law approaches to national enforcement of IHL and the punishment of war crimes, genocide and crimes against humanity, followed by discussion**
Chaired by Professor Tim McCormack, Australian Red Cross Professor of International Humanitarian Law, University of Melbourne
- Military law approach to prosecutions for violations of IHL**
Brigadier Nilendra Kumar, Joint Judge Advocate General, Indian Army
- The United States approach — War Crimes Act 1996**
Mr Edward Cummings, Legal Adviser, Permanent Mission of the United States of America, Geneva

The Canadian approach — Geneva Conventions Act, Criminal Code and Trade Marks Act

Lieutenant Colonel Anthony Johnston, Deputy Judge Advocate General (Europe), Ministry of Defence, Canada

12h30 – 14h00 Lunch

14h00 – 17h30 **Substantive law and jurisdiction — working groups**

Group 1: The Geneva Conventions and their Additional Protocols, and other IHL conventions

Facilitator: Colonel Alexander Donkor, Legal Adviser, Ghana Defence Force

Group 2: Other breaches of IHL in international armed conflict (laws and customs of war), genocide and crimes against humanity

Professor Ruth Lapidot, Professor of International Law, Law Faculty, Hebrew University

Group 3: Non-international armed conflict

Facilitator: Mr Paul Berman, Assistant Legal Adviser, Foreign and Commonwealth Office, United Kingdom

Dinner hosted by the ICRC

Thursday 12 November 1998

09h00 – 11h00 **Substantive law and jurisdiction — presentation of each working group's discussions and conclusions by the group's rapporteur, followed by discussion (40 minutes for each group)**

11h00 – 11h30 Coffee break

11h30 – 12h00 **The role of the military legal system in war crimes investigations, followed by discussion**

Major-General Gordon Risius, Director of Army Legal Services, British Army

12h00 – 12h30 **Lessons from the ad hoc international tribunals for national trial proceedings, followed by discussion**

Mr Bill Fenrick, Senior Legal Adviser, Office of the Prosecutor, International Criminal Tribunals for the former Yugoslavia and Rwanda

- 12h30 – 14h00** Lunch
- 14h00 – 17h30** **Potential difficulties and ways to overcome them — working groups**
- Group 4: The relationship between civil and military law, jurisdiction and courts**
Facilitator: Professor Peter Rowe, Head of the Department of Law, Lancaster University
- Group 5: Prosecution and the political context**
 (certification by Foreign Affairs; Attorney-General's consent clause; training; financing; federal system; alternatives to prosecution; rights of victims; potential impact of the International Criminal Court)
Facilitator: Mr Julius Kandie, Deputy Solicitor General, Kenya
- Group 6: Procedural and evidentiary issues**
 (defences; procedural protection; rules of evidence; extradition)
Facilitator: Mr Jeffrey Chan Wah Teck, Head, Civil Division, Attorney-General's Chambers, Republic of Singapore
- Friday 13 November 1998**
- 09h00 – 11h00** **Potential difficulties and ways to overcome them**
 — presentations of each working group's discussions and conclusions by the group's rapporteur, followed by discussion (40 minutes for each group)
- 11h00 – 11h30** Coffee break
- 11h30 – 12h00** **The International Criminal Court: possible implications for national enforcement of IHL, followed by discussion**
Ms Louise Doswald-Beck, Head, ICRC Legal Division
- 12h00 – 12h30** **The South Africa Truth and Reconciliation Commission, followed by discussion**
Ms Miranda Joubert, Senior State Counsel, Department of Foreign Affairs, Pretoria, South Africa
- 12h30 – 13h30** Conclusions presented by the Chairperson

AIM AND OBJECTIVES

Aim

Through a meeting of common law experts in international humanitarian law (IHL) and criminal law and procedure from States whose legal system is based on the common law, to produce a report providing practical advice to such States on the enforcement of IHL through national criminal and military law.

The report will identify the provisions of IHL which require or permit enforcement at the national level, examine and assess different approaches which have been adopted, and outline some of the difficulties which may be encountered in criminal proceedings for violations of IHL and suggest practical ways to overcome them.

Objectives

1. To raise awareness of the impact of IHL on the national legal system, particularly of those provisions which require or permit criminal enforcement at the national level in the case of war crimes or other violations of IHL.
2. To examine and assess the advantages and disadvantages of different approaches to criminalization of violations of IHL and existing provisions in national legislation.
3. To consider difficulties which may be encountered in criminal proceedings for violations of IHL and suggest practical ways to overcome them.
4. To foster the development of national law for the prosecution and punishment of individuals alleged to have committed violations of IHL.

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WORKING GROUP QUESTIONS

(Each group should refer to the statement of the aim and objectives of the meeting. This should ensure that discussions in the working groups are not only interesting, but also serve to develop practical advice for common law States on the enforcement of IHL through national criminal and military law. *Concentration should be on non-World War II trials.*)

Working Group 1

The Geneva Conventions and their Additional Protocols, and other IHL Conventions

A common pattern is for States to enact legislation making it a criminal offence to commit a grave breach of the Geneva Conventions of 1949 and (where relevant) of Additional Protocol I of 1977, protecting the red cross and red crescent emblems, and specifying trial procedures for protected persons. The Conventions and (where relevant) the Protocols are then scheduled to the Act. This is the pattern adopted by, for example, Australia, Botswana, India, Ireland, Kenya, Malawi, Malaysia, New Zealand, Papua New Guinea, Singapore, Uganda, UK and Zimbabwe (although Australia has scheduled only Additional Protocol I).

Incorporation into national law

1. Have there been arguments that by scheduling the whole of the Conventions and (where relevant) the Protocols these instruments become, in their entirety, part of the national law? Note *Cheney v. Conn (Inspector of Taxes)* [1968] 1 All ER 779, 782: “the title and preamble relied upon 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 [the UK *Geneva Conventions Act, 1957*] does not provide material which can be relied on as being in conflict with the Finance Act 1964”, *per* Ungoed-Thomas J.

2. The reasons why (if this be the case) such treaties as the Hague Declaration concerning Expanding Bullets 1899, the Hague Conventions of 1907, the Cultural Property Convention 1954, the Conventional Weapons Convention (with its Protocols) 1980 have not been provided for in national legislation.¹ Is this because it is believed that the “ordinary” criminal law and military law are adequate to punish any breaches?

In this regard, it is important to note that the Cultural Property Convention,² amended Protocol II (landmines) to the Conventional Weapons Convention³ and the Ottawa Convention⁴ contain provisions requiring States to impose penal sanctions.⁵

Substantive law and jurisdiction

Generally speaking, the Geneva Conventions Acts provide for punishment of grave breaches of the Geneva Conventions and (where relevant) Additional Protocol I on the basis of universal jurisdiction.

The Irish *Geneva Conventions Act 1962*, as amended, provides also for punishment of “minor breaches” of the Conventions and Protocols within Ireland (by any person, regardless of nationality) or outside Ireland (by Irish

¹ Note that the definition of “war crimes” in the US *War Crimes Act* includes conduct prohibited by Articles 23, 25, 27 or 28 of the Annex to the Hague Convention IV of 1907 and wilfully killing or causing serious injury to civilians in violation of amended Protocol II (the Mines Protocol) to the 1980 Conventional Weapons Convention.

² Cultural Property Convention, Article 28 (Sanctions): The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all and 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.

³ Protocol II (amended) to the Conventional Weapons Convention, 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 1 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.

⁴ Ottawa Convention, Article 9 (national implementation measures).

⁵ 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.

citizens).⁶ The Nigerian *Geneva Conventions Ordinance 1960* includes a power to provide, by order, for punishment of breaches of the Conventions other than grave breaches.⁷

3. Is section 4 of the Irish *Geneva Conventions Act 1962*, as amended, which applies to “minor breaches” of the Conventions and Protocols, a useful precedent? Is it too uncertain as a criminal provision?
4. Is there a reluctance on the part of States to go beyond that which they are obliged to implement in multilateral treaties? Should, for instance, other breaches be deemed to be or treated as grave breaches for national law purposes? Examples might be Article 42 (no person parachuting from an aircraft in distress shall be made the object of attack) and Article 37 (it is prohibited to kill, injure or capture an adversary by resort to perfidy) of Additional Protocol I.

Prosecutions

5. Have there been any proceedings (whether resulting in trial, or otherwise) of any person for an offence under the relevant Geneva Conventions Acts? Would it be more likely that members of the armed forces would be charged with a military offence, rather than a

⁶ 4(1) Any person, whatever his nationality, who, in the State, commits, or aids, or abets or procures the commission in the State by any other person of, any minor breach of any of the Scheduled Conventions or of Protocol I or Protocol II shall be guilty of an offence.

4(1A) Any person, whatever his or her nationality, who, in the State, fails to act, when under a duty to do so, to prevent the commission by another person of a minor breach of any of the Scheduled Conventions or Protocol I or Protocol II shall be guilty of an offence.

4(2) Any citizen of Ireland who, outside the State, commits, or aids, or abets or procures the commission outside the State by any other person of, any minor breach of any of the Scheduled Conventions or of Protocol I or Protocol II shall be guilty of an offence.

4(2A) Any citizen of Ireland who, outside the State, fails to act, when under a duty to do so, to prevent the commission by another person of a minor breach of any of the Scheduled Conventions or Protocol I or Protocol II shall be guilty of an offence.

The term “minor breach” is defined in section 4(4) as a contravention of the Conventions and Protocol I which is not a grave breach or a contravention of Protocol II.

⁷ Under section 4 of the Ordinance, the Governor-General may by order provide that any person who commits or aids, abets or procures the commission of “any breach of the Conventions which may be specified in the order other than one punishable under section 3 [the grave breach provision]” is liable to imprisonment for a term not exceeding 7 years. This may be any person, regardless of nationality, who in Nigeria commits, or aids, abets or procures the commission within or outside of Nigeria of such an offence or any person being a Nigerian citizen, member of the Nigerian armed forces, a person covered by the Nigerian Military Forces Ordinance or a member of a recognized Nigerian voluntary aid society who in or outside Nigeria commits, or aids, abets or procures the commission within or outside of Nigeria of such an offence.

grave breach of the Geneva Conventions of 1949 or Additional Protocol I? See, for instance, section 54 of the *Armed Forces Act 1962* of Ghana, which provides that “Any act, conduct, disorder or neglect to the prejudice of good order and discipline shall be an offence and every person convicted thereof shall be liable to dismissal with disgrace from the Armed Forces or any less punishment provided by this Act.”⁸

⁸ See also section 68 of the *Armed Forces Act 1968* (Kenya); section 69 of the *Army Act 1955* (UK).

Working Group 2

Other breaches of IHL in international armed conflict (laws and customs of war), genocide and crimes against humanity

*(this excludes trials in respect of events
which occurred during World War II)*

Incorporation into national law

1. It is common for States to pass a Genocide Act to implement the Genocide Convention of 1948.⁹ For those States that have not done so, what practical problems lie in the way of doing so? Is there any practical advice that may be offered by those States that have such legislation?
2. Can a charge be brought for violating the laws and customs of war? Is this too vague a criminal charge under national jurisdiction?
3. Can a charge be brought for a crime against humanity? Is this too vague a criminal charge under national jurisdiction?

Substantive law and jurisdiction

In relation to each of 1, 2 and 3 above, consider the following:

4. Is, or should, jurisdiction be extra-territorial?
5. Could members of the armed forces be tried for such offences or something similar under military law? Could civilians be charged?
6. Is there a reluctance on the part of States to find drafting and/or parliamentary time for legislation providing for punishment of genocide, violations of the laws and customs of war and crimes against humanity? If so, any suggestions? Would a consolidating measure to include all relevant implementing provisions be practical?

⁹ Genocide Convention, Article V:
The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.

7. If legislation were to be introduced to make 1, 2 and 3 statutory offences what are the likely grounds of any opposition in parliament? Would parliament be unwilling to be seen to be encouraging other States to adopt extra-territorial jurisdiction for fear that their own soldiers might be affected by it? Would parliament be likely to say that such legislation is unnecessary since members of its own forces are subject to military law, which can always provide a suitable charge?

If your State has passed legislation providing for punishment of genocide, violations of the laws and customs of war or crimes against humanity, it would be helpful if you could bring a copy of the legislation (extra copies can be provided by the secretariat).

Working Group 3

Non-international armed conflict

In the case of an armed conflict *not of an international character*, Article 3 common to the Geneva Conventions provides:

Art. 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.

Additional Protocol II of 1977 adds to these obligations. Neither common Article 3 nor Protocol II makes any provision for grave breaches. Breaches of common Article 3 and Protocol II do not normally come under the national criminal laws of States by virtue of the Geneva Conventions Acts (or similar).¹⁰ International law has accepted that there can be individual criminal liability for a breach of common Article 3 before an international court.¹¹

Incorporation into national law

1. Should States adopt legislation making breaches of common Article 3 and Protocol II criminal offences (similar to grave breaches of the Geneva Conventions of 1949 and Additional Protocol I)? Are the US, UK and Irish examples which follow useful precedents?

In the US, the *War Crimes Act 1996* was amended on 9 November 1997 by striking out the phrase “grave breach of the Geneva Conventions” and replacing it with “war crime” which was then defined, *inter alia*, as any conduct “which constitutes a violation of common article 3 of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention [sic] to which the United States is a party and which deals with non-international armed conflict”. The US *War Crimes Act* provides for punishment of war crimes not on the basis of universal jurisdiction but in respect of war crimes committed by or against members of the US armed forces or US nationals.

In the UK, a Bill introduced by Lord Avebury in the House of Lords in 1997 was to insert a new section 1A into the *UK Geneva Conventions Act 1957* in the following terms:

- (1) Any person, whatever his nationality, who, outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of any act in breach of article 3 of any of the scheduled conventions shall be guilty of an offence and on conviction on indictment —

¹⁰ Ireland and Nigeria are exceptions in this regard.

¹¹ See, for instance, Article 4 of the Statute of the International Tribunal for Rwanda (1994) and Article 8 of the Statute of the International Criminal Court.

- (a) in the case of such an act involving the wilful killing of a person protected by the convention in question, shall be sentenced to imprisonment for life;
 - (b) in the case of any other such act, shall be guilty of an offence and on conviction shall be liable to imprisonment for a term not exceeding fourteen years.
- (2) This section shall not apply to a person subject to the provisions of the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.
(Note that this Bill never became an Act.)

In Ireland, the Irish *Geneva Conventions Act 1962*, as amended, provides for punishment of “minor breaches” of the Conventions and Protocols (that is, contraventions of the Conventions and Protocol I other than “grave breaches” and contraventions of Protocol II):

- 4(1) Any person, whatever his nationality, who, in the State, commits, or aids, or abets or procures the commission in the State by any other person of, any minor breach of any of the Scheduled Conventions or of Protocol I or Protocol II shall be guilty of an offence.
- 4(1A) Any person, whatever his or her nationality, who, in the State, fails to act, when under a duty to do so, to prevent the commission by another person of a minor breach of any of the Scheduled Conventions or Protocol I or Protocol II shall be guilty of an offence.
- 4(2) Any citizen of Ireland who, outside the State, commits, or aids, or abets or procures the commission outside the State by any other person of, any minor breach of any of the Scheduled Conventions or of Protocol I or Protocol II shall be guilty of an offence.
- 4(2A) Any citizen of Ireland who, outside the State, fails to act, when under a duty to do so, to prevent the commission by another person of a minor breach of any of the Scheduled Conventions or Protocol I or Protocol II shall be guilty of an offence.

Substantive law and jurisdiction

2. Should the offence apply only if committed extra-territorially? See, for example, the UK Bill referred to above.
3. Should the offence be limited to nationals as perpetrators or victims (as in the US *War Crimes Act 1996*)? Compare the UK Bill.
4. Should the offence exclude members of the armed forces (who are subject to their own military law) as in the UK Bill? Compare the US *War Crimes Act 1996*.
5. Even if it is considered desirable to enact legislation to provide for punishment of common Article 3, what might be the practical difficulties of attempting to do so (e.g., collection of evidence, appearance of witnesses)?

Working Group 4

The relationship between civil and military law, jurisdiction and courts

The general principles of military law are not dissimilar in many common law countries. Thus, military law will apply to members of the armed forces, who are also likely to be subject to the civil (non-military) law of their own State. In a number of States, those subject to military law may also be tried under that system for the commission of civil offences.¹² It is common for this jurisdiction to be extra-territorial.¹³

1. Are there any problems over a conflict of jurisdiction between the civil and military authorities where the jurisdiction is concurrent during an armed conflict? If so, how should they be resolved? Is there need for legislation or would an informal agreement between the military and civil authorities suffice? A case study might involve a soldier who, during an international armed conflict, wilfully kills a prisoner of war (PoW) where the incident is reported in the media. Since it is relatively easy to move a soldier from the scene (even in a zone of operations) for trial, is there an overwhelming reason why the trial *must* be a military one?
2. Could the offence consisting of an act, conduct or neglect to the prejudice of good order and service discipline¹⁴ be used to deal with any breach of IHL which is not a separate specific offence? Is this a useful “sweeping up” provision?
3. Is it necessary to retain a provision similar to section 144(1)(c) of the *Armed Forces Act 1968* (Kenya)¹⁵ that a person subject to service law shall not be tried by court-martial or have the case dealt with summarily where the offence has been condoned by that individual’s commanding officer? Could a commanding officer condone an offence involving a breach of IHL (as translated into the national military law) in circumstances where a civilian judge could not?

¹² See, for example, section 69 of the *Armed Forces Act 1968* (Kenya); section 77 of the *Armed Forces Act 1962* (Ghana); sections 69 and 70 of the *Army Act 1950* (India); section 70 of the *Army Act 1955* (UK).

¹³ *Ibid.*

¹⁴ Section 68 of the *Armed Forces Act 1968* (Kenya); section 69 of the *Army Act 1955* (UK).

¹⁵ See also section 134 of the *Army Act 1955* (UK).

4. Are prisoners of war subject to the laws in force in the armed forces of the detaining State?¹⁶ Is legislation (or delegated legislation) required to ensure that prisoners of war are subject to the military law (with suitable amendments) of the detaining power? This may deal with the trial of prisoners of war for acts committed prior to capture as well as crimes and disciplinary offences committed after capture. Crimes committed after capture may occur in the PoW camp as well as during an escape attempt.¹⁷
5. Is legislation (or delegated legislation) required to implement the requirement in Article 5 of the Third Geneva Convention of 1949¹⁸ that, where there is doubt as to whether a person is to be treated as a prisoner of war, he/she is to be protected by the Convention until “such time as their status has been determined by a competent tribunal”? In the UK this is governed by the *Prisoner of War (Determination of Status) Regulations 1958*.
6. Is legislation (or delegated legislation) required to implement the requirement in Article 30 of the Regulations Annexed to Hague Convention (IV) 1907 that an alleged enemy spy is entitled to a trial? What provisions are there in national law to implement this if the armed forces are operating outside the territory of their own State? Such a person is unlikely to be subject to the military law of the State that captures him since, under IHL, he will not have the right to the status of a prisoner of war.¹⁹
7. Is there a statutory definition in national law of a member of the armed forces?²⁰

¹⁶ Article 82 of the Third Geneva Convention of 1949 (prisoners of war).

¹⁷ For the UK, see the *Prisoner of War (Discipline) Regulations 1958*. These Regulations purport to implement Articles 41, 42, 49-57, 78, 82, 83, 86-90, 92-98, 101-108 and 129 of the Third Geneva Convention.

¹⁸ And Article 45(1) of Additional Protocol I.

¹⁹ Article 46(1) of Additional Protocol I.

²⁰ Article 43(1) of Additional Protocol I.

Working Group 5

Prosecution and the political context

1. What are the legal, political and other factors that would determine whether a person is to be prosecuted for a violation of IHL (as implemented directly or as “translated” into an ordinary criminal or military offence):
 - (i) under the civil law;
 - (ii) under military law?
2. Where the Attorney-General’s consent is required for a prosecution to proceed, how limiting is this likely to be in practice? Is it necessary any longer? Should this requirement be built into new implementing legislation?
3. Where, in proceedings in respect of a grave breach of the Conventions or Protocol I, a question arises as to the application of the Conventions or that Protocol, how should this question be decided? In general, the Geneva Conventions Acts provide for a certificate from the Minister for Foreign Affairs to be submitted as evidence on this question. Have there been proceedings where it has been necessary to have recourse to this procedure? How has it functioned in practice?
4. What are the possible implications of the International Criminal Court on national prosecutions for war crimes and national legislation for the prosecution of war crimes (particularly in view of the more extensive definition of “war crime” in the Statute of the International Criminal Court than in the Geneva Conventions and Additional Protocol I)?
5. Should special training be provided to those in the criminal justice system who may be confronted with war crimes trials? If so, what matters should this training cover?
6. If a prosecution is not to be mounted in an individual case, what practical alternatives are there?
7. If a prosecution has an “educating effect”, how could this be achieved otherwise than through prosecution?

Working Group 6

Procedural and evidentiary issues

1. Should the normal rules of procedure and of evidence apply in a “war crimes”²¹ trial under national law? If so, what problems are foreseen, in particular, over the admissibility of hearsay, identification evidence, corroboration (particularly if the “war crime” involved rape or other sexual offence)?
2. Would the findings of the International Fact-Finding Commission, or an enquiry under the Geneva Conventions of 1949, be admissible?²²
3. The evidential difficulties if the trial is of a prisoner of war charged, say, with a grave breach of the Geneva Conventions of 1949 committed prior to capture. He/she will, of course, find it difficult to secure the attendance of witnesses on his/her behalf.
4. Are there any difficulties from a practical point of view as to the *actus reus* or *mens rea* of the grave breach offences?²³ Is national law in this regard satisfactory in respect of secondary parties? Could a *commander* be liable under national criminal or military law if he “knew or had information which should have enabled [him] to conclude in the circumstances at the time, that [a subordinate] was committing or was going to commit such a breach [of the 1949 Conventions or Protocol I] and if [he, the commander] did not take all feasible measures within [his] power to prevent or repress the breach”?²⁴ If there are difficulties, should this be the subject of legislation or should they be solved by some other procedure?

²¹ This is taken to refer to any breach of IHL as implemented directly or indirectly into national law.

²² See Additional Protocol I, Article 90; Geneva Conventions, common Article 52/53/132/149.

²³ For example, Fourth Geneva Convention, 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.

²⁴ See Additional Protocol I, Article 86 (command responsibility). See also Article 87. Regarding “non-grave breaches”, see section 4(1A) and 4(2A) of the Irish *Geneva Conventions Act, 1962*, as amended.

5. The defences available in a national trial for a “war crime”. Is duress a defence if the victims would have been killed whatever the accused did? Suppose the accused is threatened with death there and then if he does not take part in a firing squad and the victims would have been shot whatever the decision of the accused? What other defences would be applicable? Does the national court apply the rules of *national* defences or *international* defences? If the latter, is this acceptable in a trial under *national* law?
6. Of what influence is an international war crimes tribunal in providing a precedent as to defences to a “war crime” under national law?
7. What are the difficulties, from an evidential point of view, if national law accepts extra-territorial jurisdiction in respect of non-nationals for breaches of IHL?
8. Is extradition possible and, if so, relatively easy in “war crimes” cases, or is it a stumbling block, making extra-territorial jurisdiction not worth pursuing?
9. If necessary, can the identity of witnesses be protected? Must they give evidence by way of examination-in-chief?
10. Will a statement of a witness given in judicial proceedings abroad be admissible? Will such a statement be admissible if given to the prosecution or defence team abroad for use in proceedings in national trials?

TREATY PROVISIONS REQUIRING ENACTMENT OF CRIMINAL LEGISLATION

1949 Geneva Conventions and their 1977 Additional Protocols

Grave breaches of the Conventions and Protocol I

Article 49/50/129/146 common to the four Geneva Conventions sets out the obligation for States to repress grave breaches of these Conventions committed in international armed conflict. States Parties have two obligations. They must *enact legislation* to punish grave breaches of the Conventions, and they must *search for, and try or extradite*, alleged offenders. These obligations are expressed in the first and second paragraphs of common Article 49/50/129/146 in the following terms:

“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.”

Neither the territory where the breach was committed nor the nationality of the alleged perpetrator constitutes an obstacle to prosecution, since the Conventions establish the principle of universal jurisdiction.

Additional Protocol I of 1977, which also applies to international armed conflicts, extends the category of grave breaches but does not modify the provisions relating to universal jurisdiction, which therefore apply also to grave breaches of the Protocol I. Article 85(1) of Protocol I provides that:

“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.”

For States that are party to the Conventions and Protocol I, the obligation to repress grave breaches applies not only to persons who have committed, or ordered the commission of, such breaches, but also to grave breaches which result from a failure to act when under a duty to do so (P I, Art. 86).

Conduct which constitutes a grave breach of the Conventions or Protocol I is defined in Article 50/51/130/147 common to the Conventions, and Articles 11(4) and 85 of Protocol I. A table setting out these grave breaches appears in Annex 6.

Other violations of the Conventions and Protocols

In addition to the obligation to repress grave breaches of the Conventions and Protocol I, there is an obligation to *suppress* all violations thereof. This obligation applies to violations committed in international armed conflict and, in relation to violations of Article 3 common to the Conventions, in non-international armed conflict.

Paragraph 3 of Article 49/50/129/146 common to the Conventions expresses this obligation in the following terms:

“Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention.”

The same duty applies to violations of Protocol I, by virtue of Article 85(1) of the Protocol, which provides that the provisions of the Conventions relating to repression of breaches and grave breaches apply also to the repression of breaches and grave breaches of the Protocol. For States that are party to Protocol I, the obligation to suppress all violations of the Conventions and Protocol I applies not only to persons who have committed, or ordered the commission of such breaches, but also to breaches which result from a failure to act when under a duty to do so (P I, Art. 86).

This obligation to suppress violations of the Conventions and Protocol I does not require that criminal legislation be adopted, but leaves it to States to implement appropriate administrative, disciplinary or other measures to fulfil their obligation. It forms part of the more general obligation, formulated in Article 1 common to the Conventions, that States shall respect and ensure respect for the rules set out in the Conventions. Protocol I recalls this fundamental obligation of States, providing, in Article 1(1), that States must respect and ensure respect for the provisions

of the Protocol. The duty of States Parties to take all necessary measures for the execution of their obligations under the Conventions and Protocol I is taken up again in Article 80(1) of the Protocol, which provides as follows:

“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.”

The Conventions and Protocol I give no guidance as to the basis on which jurisdiction over crimes other than grave breaches should be assumed or exercised. That being the case, a State which is framing criminal legislation to cover them will need to consider whether it will exercise jurisdiction on the basis of universal jurisdiction, as it is required to do in relation to grave breaches, or whether it will limit itself to jurisdiction over crimes committed within its territory or by or against its nationals.

Additional Protocol II, which applies in non-international armed conflict, is silent in relation to repression. States may exercise jurisdiction over serious violations of this Protocol on the basis of universal jurisdiction; jurisdiction in relation to other violations is limited to offences occurring in the State’s territory or committed by its nationals.

In addition to the obligation to repress grave breaches of the Conventions and Protocol I and to suppress other violations of the Conventions and Protocol I, it is important, for the sake of completeness, to mention that States have an obligation to prevent and repress misuse of the protective emblems of the Conventions (the red cross and red crescent) and of Protocol I (the civil defence sign and the electronic signals established by Annex I to the Protocol).

1954 Hague Convention for the Protection of Cultural Property and the Second Protocol to the Convention (adopted on 26 March 1999)

The 1954 Hague Cultural Property Convention

Article 28 of the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict provides that:

“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.”

This obligation also applies in conflicts of a non-international character, at least in so far as the provisions relating to respect for cultural property are concerned, by virtue of Article 19(1) of the Convention, which provides as follows:

“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.”

Second Protocol to the 1954 Hague Cultural Property Convention

The Second Protocol to the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict was adopted on 26 March 1999. The principal provisions having implications for a State’s national law are Article 15 (listing offences which must be made criminal), Article 21 (listing conduct which must be suppressed), and Article 9 (listing conduct which should be prohibited and prevented).

Criminalization and prosecution of conduct listed in Article 15

Under Article 15(1) of the 1999 Protocol, certain serious violations of the Protocol committed intentionally are offences, which each State Party must, by virtue of Article 15(2), establish as criminal offences under its domestic law.

The offences listed under Article 15(1) are:

- “(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.”*

The obligation to criminalize these offences is expressed in Article 15(2) in the following terms:

“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.”

The circumstances in which States must establish jurisdiction over offences are specified in Article 16(1) as follows:

- for the offences in Article 15(1)(a), (b) and (c) — when the offence is committed in the territory of that State, the alleged offender is a national of that State, or the alleged offender is present in its territory;
- for the offences in Article 15(1)(d) and (e) — when the offence is committed in the territory or the alleged offender is a national of the State.

In addition to the obligation to enact legislation to punish the offences set forth in paragraphs (a) to (e) of Article 15(1), States Parties have a duty to:

- *try, or extradite*, alleged offenders of offences in Article 15(1)(a), (b) and (c) of the Protocol (Art. 17(1)); and
- *suppress* other violations of the Convention or the Protocol (Art. 21).

Article 22 provides that the Protocol applies in non-international armed conflicts. This means that States must ensure that their criminal legislation punishing the offences listed in Article 15 applies to both international and non-international armed conflict.

Suppression of acts listed in Article 21

The obligation set out in Article 21 to suppress other violations of the Convention or the Protocol is expressed in the following terms:

“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) 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.”*

Article 21 does not *require* criminal legislation to be adopted, but leaves it to States to adopt such legislative, administrative or disciplinary measures as

may be necessary to *suppress* violations. If a State chooses to enact criminal law punishing violations of Article 21, it will need to decide which jurisdictional basis to adopt. Unlike Article 16, which specifies the jurisdictional grounds on which a State Party should enact criminal legislation over Article 15 offences, Article 21 is silent on this question.

Prohibition and prevention of conduct listed in Article 9

The obligation in Article 9(1) of the Second Protocol to prohibit and prevent certain conduct in relation to occupied territory is expressed in the following terms:

“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.”*

1972 Biological Weapons Convention

Article IV of the 1972 Biological Weapons Convention provides as follows:

“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 1 of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.”

The Convention’s prohibitions on development, production, acquisition, stockpiling, acquisition, retention or transfer apply *at all times*.

1976 Environmental Modification Techniques Convention

Article IV of the 1976 Environmental Modification Techniques Convention provides as follows:

“Each State Party to this Convention undertakes to take any measures it considers necessary in accordance with its constitutional processes to prohibit and prevent any activity in violation of the provisions of the Convention anywhere under its jurisdiction or control.”

The Convention prohibits *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.

Amended Protocol II of 1996 (Mines, Booby-Traps and other Devices) to the Conventional Weapons Convention of 1980

In its amended version of 1996, Article 14 of Protocol II on the Use of Mines, Booby-Traps and other Devices to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons requires that States Parties impose penal sanctions for violations of this Protocol:

“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.

The measures envisaged in paragraph 1 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.”

This obligation applies to offences committed in international and non-international armed conflict — but not in 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.

1993 Chemical Weapons Convention

Article VII of the 1993 Chemical Weapons Convention provides as follows:

“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.”*

The Convention’s prohibitions on development, production, acquisition, stockpiling, retention or transfer, use or engaging in military preparations to use chemical weapons apply *at all times*.

1997 Ottawa Convention banning anti-personnel landmines

Article 9 of the Ottawa Convention (the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction) requires that States Parties adopt implementation measures at the national level to prevent and put an end to violations committed by persons or on territory over which it has jurisdiction or control:

“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.”

The Convention’s prohibitions on use, development, production, acquisition, stockpiling, retention or transfer of anti-personnel landmines apply *at all times*.

**TABLE SUMMARIZING TREATY OBLIGATIONS
TO PUNISH VIOLATIONS**

TREATY (crime provision)	Scope (IAC ¹ /NIAC ² /other)	Legislation (obligation to legislate)	Jurisdiction (jurisdictional basis)	Prosecution (obligation to try or extradite)
Grave breaches of 1949 Geneva Conventions & 1977 Additional Protocol I GCI-IV Arts 50/51/ 130/147 P I, Arts 11 & 85	IAC (GC I-IV Art. 2; P I Art. 1)	Obligation to enact criminal legislation to punish grave breaches (GC I-IV Art. 49/50/ 129/146) (P I Art. 85(1))	Mandatory UJ ³ (GC I-IV Art. 49/50/ 129/146) (P I Art. 85(1))	Obligation to try/extradite (GC I-IV Art. 49/50/ 129/146) (P I Art. 85(1))
Other violations of 1949 Geneva Conventions & 1977 Additional Protocol I	NIAC (GC Art. 3) IAC (GC I-IV Art. 2; P I Art. 1)	Obligation to suppress all violations of the Conventions and Protocol I (GC I-IV Art. 49/50/ 129/146) (P I Art. 85(1))	Not specified. States may exercise jurisdiction over acts committed in their territory or by their nationals; they may exercise UJ ³ over serious violations.	

TREATY (crime provision)	Scope (IAC ¹ /NIAC ² /other)	Legislation (obligation to legislate)	Jurisdiction (jurisdictional basis)	Prosecution (obligation to try or extradite)
Violations of 1977 Additional Protocol II	NIAC (P II Art. 1)		Not specified. States may exercise jurisdiction over acts committed in their territory or by their nationals; they may exercise UJ ³ over serious violations.	
Breaches of 1954 Hague Cultural Property Convention	IAC & NIAC (although the Convention's application to NIAC is limited to provisions on respect for cultural property) (Art. 19)	Obligation to prosecute and impose penal or disciplinary sanctions (Art. 28)	Obligation to prosecute and impose sanctions applies regardless of the nationality of the alleged offender (Art. 28)	
Offences under Art. 15(1) of Second Protocol to the 1954 Hague Convention	IAC & NIAC (Art. 22)	Obligation to make offences under Article 15(1) criminal offences in domestic law (Art. 15(2))	Mandatory UJ over offences in Art. 15(1) (a-c) Nationality or territory for offences in Art. 15(1)(d-e) (Art. 16)	Obligation to try/extradite for offences in Art. 15(1)(a-c) (Art. 17)

TREATY (crime provision)	Scope (IAC ¹ /NIAC ² /other)	Legislation (obligation to legislate)	Jurisdiction (jurisdictional basis)	Prosecution (obligation to try or extradite)
Conduct in Arts 9 and 21 of Second Protocol to the 1954 Hague Convention	IAC & NIAC (Art. 22)	Obligation to suppress the conduct listed in Article 21 and to prohibit and prevent the conduct listed in Article 9 (Arts 9 & 21)	Not specified	
Violations of 1972 Biological Weapons Convention	Prohibition on biological weapons applies in all circumstances (Art. 1)	Obligation to prevent and prohibit the development, production, stockpiling, etc. of biological weapons (Art. 4)	Territory under the State's jurisdiction or control (Art. 4)	
Violations of 1976 Environmental Modification Techniques Convention	Prohibition on military or hostile use of environmental modification techniques (Art. 1(1))	Obligation to take measures State considers necessary to prohibit and prevent violations (Art. 4)	Territory under the State's jurisdiction or control (Art. 4)	

TREATY (crime provision)	Scope (IAC ¹ /NIAC ² /other)	Legislation (obligation to legislate)	Jurisdiction (jurisdictional basis)	Prosecution (obligation to try or extradite)
Violations of 1993 Chemical Weapons Convention	Prohibition on chemical weapons applies in all circumstances (Art. 1))	Obligation to enact penal legislation to punish violations (Art. 7)	Persons or territory under the State's jurisdiction or control (Art. 7)	
Wilful killing/causing serious injury to civilians in violation of Amended Protocol II of 1996 to the 1980 Conventional Weapons Convention	IAC & NIAC covered by Article 3 common to the Geneva Conventions (Art. 1(2))	Obligation to impose penal sanctions on persons who wilfully kill or cause serious injury to civilians in violation of the Protocol (Art. 14(2))	Persons or territory under the State's jurisdiction or control (Art. 14)	
Other violations of Amended Protocol II of 1996 to the 1980 Conventional Weapons Convention	IAC & NIAC covered by Article 3 common to the Geneva Conventions (Art. 1(2))	Obligation to prevent and suppress violations (Art. 14(1))	Persons or territory under the State's jurisdiction or control (Art. 14)	

TREATY (crime provision)	Scope (IAC ¹ /NIAC ² /other)	Legislation (obligation to legislate)	Jurisdiction (jurisdictional basis)	Prosecution (obligation to try or extradite)
Violations of 1997 Ottawa Convention	Prohibition on anti- personnel landmines applies at all times (Art. 1)	Obligation to impose penal sanctions (Art. 9)	Persons or territory under the State's jurisdiction or control (Art. 9)	

¹ IAC International armed conflict.

² NIAC Non-international armed conflict.

³ UJ Universal jurisdiction (i.e., regardless of the place where the offence was committed and the nationality of the alleged offender: see Chapter 3).

TABLE OF GRAVE BREACHES SPECIFIED IN THE 1949 GENEVA CONVENTIONS AND IN ADDITIONAL PROTOCOL I OF 1977

Grave breaches specified in the four 1949 Geneva Conventions (Arts 50, 51, 130, 147 respectively)	Grave breaches specified in the Third and Fourth 1949 Geneva Conventions (Arts 130 and 147 respectively)	Grave breaches specified in the Fourth 1949 Geneva Convention (Art. 147)
<ul style="list-style-type: none"> • wilful killing; • torture or inhuman treatment, including biological experiments; • wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly <p>(the last provision is not included in Art. 130, Third Geneva Convention).</p>	<ul style="list-style-type: none"> • compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile Power; • wilfully depriving a prisoner of war or a protected person of the rights or fair and regular trial prescribed in the Conventions. 	<ul style="list-style-type: none"> • unlawful deportation or transfer; • unlawful confinement of a protected person; • taking of hostages.

Grave breaches specified in Additional Protocol I of 1977 (Art. 11 and Art. 85)

- seriously endangering, by any wilful and unjustified act or omission, 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 an armed conflict, in particular physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation which are not indicated by the state of health of the person concerned or 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 in no way deprived of liberty.
- making a person the object of an attack in the knowledge that he is *hors de combat*;
- perfidious use of the distinctive emblem of the red cross and red crescent or other protective signs.

When committed wilfully and in violation of the Conventions and the Protocol:

When committed wilfully and if they cause death or serious injury to body and health:

- making the civilian population or individual civilians the object of attack;
- 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;
- 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;
- making non-defended localities and demilitarized zones the object of attack;
- 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;
- unjustifiable delay in the repatriation of prisoners of war or civilians;
- practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- attacking 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, causing as a result extensive destruction thereof, when such objects are not located in the immediate proximity of military objectives or used by the adverse party in support of its military effort;
- depriving a person protected by the Conventions or by Protocol I of the rights of fair and regular trial.

ICRC ADVISORY SERVICE INDICATIVE LIST OF COMMON LAW STATES

This is an indicative list, set out by region, of States having legal systems based on, or influenced by, the common law traditions. There is no “pure” common law system. Legal systems vary from State to State, and other legal traditions — including indigenous, religious and regional law — may form an important part of a State’s legal system. Sub-national units may also follow a different legal tradition.

The common law tradition has influenced many States and territories having historical ties with Australia, New Zealand, the United Kingdom and the United States.

All States other than those marked with an asterisk (*) are members of the Commonwealth. The Commonwealth States of Mozambique and Cameroon are not included. States whose legal systems have a strong Roman-Dutch influence are marked (D). Those having historical connections with the United States are marked (A).

Africa

Botswana	Malawi	Swaziland	
Gambia	Namibia	Tanzania	
Ghana	Nigeria	Uganda	
Kenya	Seychelles	Zambia	
Lesotho	Sierra Leone	Zimbabwe (D)	
Liberia*	South Africa (D)		17

Americas and the Caribbean

Antigua & Barbuda	Dominica	St Lucia	
Bahamas	Grenada	St Vincent and the Grenadines	
Barbados	Guyana	Trinidad and Tobago	
Belize	Jamaica	United States (& territories)*	
Canada	St Kitts & Nevis		14

Asia and the Middle East

Bangladesh	Malaysia	Pakistan	
Brunei Darussalam	Maldives	Singapore	
India	Mauritius	Sri Lanka	
Israel*	Nepal*		11

Australia and the Pacific

Australia (& territories)	Micronesia* (A) Nauru	Papua New Guinea Samoa	
Cook Islands	New Zealand (& territories)	Solomon Islands Tonga	
Fiji	Niue*	Tuvalu	
Kiribati	Palau* (A)		15

Europe

Cyprus	Malta		
Ireland*	United Kingdom (& territories)		4

MODEL GENEVA CONVENTIONS ACT
[INSERT YEAR]

An Act to enable effect to be given to certain Conventions done at Geneva on 12 August 1949 and to the Protocols additional to those Conventions done at Geneva on 8 June 1977, and for related purposes

BE it enacted by [the Parliament of INSERT COUNTRY NAME] as follows:

PART I — PRELIMINARY

Short title and commencement

1. (1) This Act may be cited as the *Geneva Conventions Act* [INSERT YEAR].
- (2) This Act shall come into force on [INSERT DATE].

Interpretation

2. (1) In this Act, unless the contrary intention appears:
 - “court” does not include a court-martial or other military court;
 - “the First Convention” means the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted at Geneva on 12 August 1949, a copy of which Convention (not including the annexes to that Convention) is set out in Schedule 1;
 - “the Second Convention” means the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted at Geneva on 12 August 1949, a copy of which Convention (not including the annex to that Convention) is set out in Schedule 2;

“the Third Convention” means the Geneva Convention relative to the Treatment of Prisoners of War, adopted at Geneva on 12 August 1949, a copy of which Convention (not including the annexes to that Convention) is set out in Schedule 3;

“the Fourth Convention” means the Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted at Geneva on 12 August 1949, a copy of which Convention (not including the annexes to that Convention) is set out in Schedule 4;

“the Conventions” means the First Convention, the Second Convention, the Third Convention and the Fourth Convention;

“prisoners’ representative”, in relation to a particular protected prisoner of war at a particular time, means the person by whom the functions of prisoners’ representative within the meaning of Article 79 of the Third Convention were exercisable in relation to that prisoner at the camp or place at which that prisoner was, at or last before that time, detained as a protected prisoner of war;

“protected internee” means a person protected by the Fourth Convention or Protocol I, and interned in [INSERT COUNTRY NAME];

“protected prisoner of war” means a person protected by the Third Convention or a person who is protected as a prisoner of war under Protocol I;

“the protecting power”, in relation to a protected prisoner of war or a protected internee, means the power or organization which is carrying out, in the interests of the power of which he or she is a national, or of whose forces he or she is, or was at any material time, a member, the duties assigned to protecting powers under the Third Convention, the Fourth Convention or Protocol I, as the case may be;

“Protocol I” means the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), done at Geneva on 8 June 1977, a copy of which Protocol (including Annex 1 to that Protocol) is set out in Schedule 5;

“Protocol II” means 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), done

at Geneva on 8 June 1977, a copy of which Protocol is set out in Schedule 6;

“the Protocols” means Protocol I and Protocol II.

- (2) If the ratification on behalf of [INSERT COUNTRY NAME] of any of the Conventions or of either of the Protocols is subject to a reservation or is accompanied by a declaration, that Convention or that Protocol shall, for the purposes of this Act, have effect and be construed subject to and in accordance with that reservation or declaration.

PART II — PUNISHMENT OF OFFENDERS AGAINST THE CONVENTIONS AND PROTOCOL I

Punishment of grave breaches of the Conventions and Protocol I

3. (1) Any person, whatever his or her nationality, who, in [INSERT COUNTRY NAME] or elsewhere, commits, or aids, abets or procures any other person to commit, a grave breach of any of the Conventions or of Protocol I, is guilty of an indictable offence.
- (2) For the purposes of this section:
 - (a) a grave breach of the First Convention is a breach of that Convention involving an act referred to in Article 50 of that Convention committed against persons or property protected by that Convention;
 - (b) a grave breach of the Second Convention is a breach of that Convention involving an act referred to in Article 51 of that Convention committed against persons or property protected by that Convention;
 - (c) a grave breach of the Third Convention is a breach of that Convention involving an act referred to in Article 130 of that Convention committed against persons or property protected by that Convention;
 - (d) a grave breach of the Fourth Convention is a breach of that Convention involving an act referred to in Article 147 of that Convention committed against persons or property protected by that Convention; and

- (e) a grave breach of Protocol I is anything referred to as a grave breach of the Protocol in paragraph 4 of Article 11, or paragraph 2, 3 or 4 of Article 85, of the Protocol.
- (3) In the case of an offence against this section committed outside [INSERT COUNTRY NAME], a person may be proceeded against, indicted, tried and punished therefor in any place in [INSERT COUNTRY NAME] as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.

Punishment of other breaches of the Conventions and Protocols

- 4. (1) Any person, whatever his or her nationality, who, in [INSERT COUNTRY NAME], commits, or aids, abets or procures any other person to commit, a breach of any of the Conventions or Protocols not covered by section 3, is guilty of an indictable offence.
- (2) Any national of [INSERT COUNTRY NAME] who, outside [INSERT COUNTRY NAME], commits, or aids, abets or procures the commission by another person of a breach of any of the Conventions or Protocols not covered by section 3 is guilty of an indictable offence.

Penalties and procedure

- 5. (1) The punishment for an offence against section 3 or section 4 is:
 - (a) where the offence involves the wilful killing of a person protected by the relevant Convention or by Protocol I — imprisonment for life or for any lesser term; and
 - (b) in any other case — imprisonment for a term not exceeding 14 years.
- (2) An offence against section 3 or section 4 shall not be prosecuted in a court except by indictment by or on behalf of the [Attorney-General/Director of Public Prosecutions].

Proof of application of the Conventions or Protocols

- 6. If, in proceedings under this Part in respect of a breach of any of the Conventions or of either of the Protocols, a question arises under:

- (a) Article 2 or Article 3 of that Convention (which relate to the circumstances in which the Convention applies);
- (b) Article 1 or Article 3 of Protocol I (which relate to the circumstances in which that Protocol applies); or
- (c) Article 1 of Protocol II (which relates to the circumstances in which that Protocol applies);

a certificate under the hand of the [Minister of State for Foreign Affairs] certifying to any matter relevant to that question is prima facie evidence of the matter so certified.

Jurisdiction of courts

- 7. (1) A person shall not be tried for an offence against section 3 or section 4 by a court other than the [INSERT NAME OF COURT].
- (2) The enactments relating to the trial by court-martial of persons who commit civil offences shall have effect for the purposes of the jurisdiction of courts-martial convened in [INSERT NAME OF COUNTRY] as if this Part had not been passed.

PART III — LEGAL PROCEEDINGS IN RESPECT OF PROTECTED PERSONS

Notice of trial of protected persons to be served on protecting power, etc.

- 8. (1) The court before which:
 - (a) a protected prisoner of war is brought up for trial for an offence; or
 - (b) a protected internee is brought up for trial for an offence for which that court has power to sentence him or her to imprisonment for a term of two years or more;

shall not proceed with the trial until it is proved to the satisfaction of the court that a notice containing the particulars mentioned in subsection (2), so far as they are known to the prosecutor, has been served not less than 3 weeks previously on the protecting power (if there is a protecting power) and, if the accused is a protected prisoner of war, on the accused and the prisoners' representative.

- (2) The particulars referred to in subsection (1) are:
- (a) the full name, date of birth and description of the accused, including his or her profession or trade; and where the accused is a protected prisoner of war, the accused's rank and his or her army, regimental, personal and serial number;
 - (b) the accused's place of detention, internment or residence;
 - (c) the offence with which the accused is charged; and
 - (d) the court before which the trial is to take place and the time and place appointed for the trial.
- (3) For the purposes of this section, a document purporting:
- (a) to be signed on behalf of the protecting power or by the prisoners' representative or by the person accused, as the case may be; and
 - (b) to be an acknowledgement of the receipt by that power, representative or person on a specified day of a notice described in the document as a notice under this section;
- shall, unless the contrary is shown, be sufficient evidence that the notice required by subsection (1) was served on that power, representative or person on that day.
- (4) A court which adjourns a trial for the purpose of enabling the requirements of this section to be complied with may, notwithstanding anything in any other law, remand the accused for the period of the adjournment.

Legal representation of certain persons

9. (1) The court before which:
- (a) any person is brought up for trial for an offence under section 3 or section 4 of this Act; or
 - (b) a protected prisoner of war is brought up for trial for any offence;

shall not proceed with the trial unless —

- (i) the accused is represented by counsel; and

- (ii) it is proved to the satisfaction of the court that a period of not less than 14 days has elapsed since instructions for the representation of the accused at the trial were first given to the counsel;

and, if the court adjourns the trial for the purpose of enabling the requirements of this subsection to be complied with, then, notwithstanding anything in any other law, the court may remand the accused for the period of the adjournment.

- (2) Where the accused is a protected prisoner of war, in the absence of counsel accepted by the accused as representing him or her, counsel instructed for the purpose on behalf of the protecting power shall, without prejudice to the requirements of paragraph (ii) of subsection (1), be regarded for the purposes of that subsection as representing the accused.
- (3) If the court adjourns the trial in pursuance of subsection (1) by reason that the accused is not represented by counsel, the court shall direct that a counsel be assigned to watch over the interests of the accused at any further proceedings in connection with the offence, and at any such further proceedings, in the absence of counsel either accepted by the accused as representing him or her or instructed as mentioned in subsection (2), counsel assigned in pursuance of this subsection shall, without prejudice to the requirements of paragraph (ii) of subsection (1), be regarded for the purposes of subsection (1) as representing the accused.
- (4) Counsel shall be assigned in pursuance of subsection (3) in such manner as may be prescribed in regulations or, in the absence of provision in the regulations, as the court directs, and counsel so assigned shall be entitled to be paid by [the Minister] such sums in respect of fees and disbursements as may be prescribed by regulations.

Appeals by protected prisoners of war and internees

- 10. (1) Where a protected prisoner of war or a protected internee has been sentenced to imprisonment for a term of two years or more, the time within which the person must give notice of appeal or notice of application for leave to appeal [to INSERT NAME OF APPEAL COURT] shall, notwithstanding anything in any

enactment relating to such appeals, be the period from the date of conviction or, in the case of an appeal against sentence, of sentencing, to the expiration of 10 days after the date on which the person receives a notice given —

- (a) in the case of a protected prisoner of war, by an officer of [the Armed Forces]; or
- (b) in the case of a protected internee, by or on behalf of the governor or other person in charge of the prison or place in which he or she is confined;

that the protecting power has been notified of his or her conviction and sentence.

- (2) Where, after an appeal against the conviction or sentence by a court of a protected prisoner of war or a protected internee has been determined, the sentence remains or has become a sentence of imprisonment for a term of two years or more, the time within which the person must apply to the [Attorney General] for a certificate authorizing an appeal [to INSERT NAME OF APPEAL COURT] shall be the period from the date of the previous decision on appeal until seven days after the date on which the person receives a notice given by a person referred to in paragraph (a) or (b), as the case may require, of subsection (1) that the protecting power has been notified of the decision of the court on the previous appeal.
- (3) Where subsection (1) or (2) applies in relation to a convicted person, then, unless the court otherwise orders, an order of the court relating to the restitution of property or the payment of compensation to an aggrieved person shall not take effect, and a provision of a law relating to the reversion of property on conviction shall not take effect in relation to the conviction, while an appeal by the convicted person against his or her conviction or sentence is possible.
- (4) Subsections (1) and (2) do not apply in relation to an appeal against a conviction or sentence, or against the decision of a court upon a previous appeal, if, at the time of the conviction or sentence, or of the decision of the court upon the previous appeal, as the case may be, there is no protecting power.

Reduction of sentence and custody of protected prisoners of war and internees

11. (1) In any case in which a protected prisoner of war or a protected internee is convicted of an offence and sentenced to a term of imprisonment, it shall be lawful for the [Attorney-General] to direct that there shall be deducted from that term a period, not exceeding the period, if any, during which that person was in custody in connection with that offence, either on remand or after committal for trial (including the period of the trial), before the sentence began, or is deemed to have begun, to run.
- (2) In a case where the [Attorney-General] is satisfied that a protected prisoner of war accused of an offence has been in custody in connection with that offence, either on remand or after committal for trial (including the period of the trial), for an aggregate period of not less than three months, it shall be lawful for the [Attorney-General] to direct that the prisoner shall be transferred from that custody to the custody of [an officer of the Armed Forces] and thereafter remain in military custody at a camp or place in which protected prisoners of war are detained, and be brought before the court at the time appointed by the remand or committal order.

PART IV — MISUSE OF THE RED CROSS AND OTHER EMBLEMS, SIGNS, SIGNALS, IDENTITY CARDS, INSIGNIA AND UNIFORMS

Use of red cross, red crescent and other emblems, etc.

12. (1) Subject to the provisions of this section, it shall not be lawful for any person, without the consent in writing of the [Minister of Defence or a person authorized in writing by the Minister to give consent under this section], to use or display for any purpose whatsoever any of the following:
 - (a) the emblem of a red cross with vertical and horizontal arms of the same length on, and completely surrounded by, a white ground, or the designation “Red Cross” or “Geneva Cross”;
 - (b) the emblem of a red crescent moon on, and completely surrounded by, a white ground, or the designation “Red Crescent”;

- (c) the following emblem in red on, and completely surrounded by, a white ground, that is to say, a lion passing from right to left of, and with its face turned towards, the observer, holding erect in its raised right forepaw a scimitar, with, appearing above the lion's back, the upper half of the sun shooting forth rays, or the designation "Red Lion and Sun";
 - (d) the emblem of a white or silver cross with vertical and horizontal arms of the same length on, and completely surrounded by, a red ground, being the heraldic emblem of the Swiss Confederation;
 - (e) the sign of an equilateral blue triangle on, and completely surrounded by, an orange ground, being the international distinctive sign of civil defence;
 - (f) any of the distinctive signals specified in Chapter III of Annex I to Protocol I, being the signals of identification for medical units and transports;
 - (g) the sign consisting of a group of three bright orange circles of equal size, placed on the same axis, the distance between each circle being one radius, being the international special sign for works and installations containing dangerous forces;
 - (h) a design, wording or signal so nearly resembling any of the emblems, designations, signs or signals specified in paragraph (a), (b), (c), (d), (e), (f) or (g) as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems, designations, signs or signals;
 - (i) such other flags, emblems, designations, signs, signals, designs, wordings, identity cards, information cards, insignia or uniforms as are prescribed for the purpose of giving effect to the Conventions or Protocols.
- (2) The [Minister of Defence or a person authorized in writing by the Minister to give consent under this section] shall not give such consent except for the purpose of giving effect to the provisions of the Conventions or Protocols and may refuse or withdraw such consent as necessary.
- (3) This section extends to the use in or outside [INSERT COUNTRY NAME] of an emblem, designation, sign, signal, design, wording, identity card, identification cards, insignia or

uniform referred to in subsection (1) on any ship or aircraft registered in [INSERT COUNTRY NAME].

Offences and penalties

13. (1) Any person who contravenes section 12(1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding [INSERT MAXIMUM FINE] or to imprisonment for a term not exceeding [INSERT MAXIMUM PERIOD OF IMPRISONMENT] or both.
- (2) Where a court convicts a person of an offence against section 12(1), the court may order the forfeiture to the State of:
 - (a) any goods or other article upon or in connection with which an emblem, designation, sign, signal, design or wording was used by that person; and
 - (b) any identity cards, identification cards, insignia or uniforms used in the commission of the offence.
- (3) Where an offence against section 12(1) committed by a body corporate is proved to have been committed with the consent or connivance of a director, manager, secretary or other officer of the body corporate, or a person purporting to act in any such capacity, he or she, as well as the body corporate, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.
- (4) Proceedings under section 12(1) shall not be instituted without the consent in writing of the [Attorney-General].

Saving

14. In the case of a trade mark registered before the passing of this Act, sections 12 and 13 do not apply by reason only of its consisting of or containing a sign specified in subparagraph 12(1)(b) or (c) or a design resembling such a sign, and where a person is charged with using such a sign or design for any purpose and it is proved that the person used it otherwise than as, or as part of, a trade mark so registered, it is a defence for the person to prove:
 - (a) that the person lawfully used that sign or design for that purpose before the passing of this Act; or

- (b) in a case where the person is charged with using the sign or design upon goods or any other article, that the sign or design had been applied to the goods or that article before the person acquired them or it by some other person who had manufactured or dealt with them in the course of trade and who lawfully used the sign or design upon similar goods or articles before the passing of this Act.

PART V — REGULATIONS

Regulations

15. [INSERT NAME OF REGULATION-MAKING AUTHORITY] may make regulations:
 - (a) prescribing the form of flags, emblems, designations, signs, signals, designs, wordings, identity cards, information cards, insignia or uniforms for use for the purposes of giving effect to the Conventions or the Protocols or both, and regulating their use;
 - (b) prescribing the penalty that may be imposed in respect of contravention of, or non-compliance with, any regulations made under paragraph (a) of this section, which may be a fine not exceeding [INSERT MAXIMUM FINE] or imprisonment for a term not exceeding [INSERT MAXIMUM PERIOD OF IMPRISONMENT] or both; and
 - (c) providing for such other matters as are required or permitted to be prescribed, or that are necessary or convenient to be prescribed, for carrying out or giving effect to this Act.

SCHEDULE

1. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted at Geneva on 12 August 1949;
2. The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted at Geneva on 12 August 1949;
3. The Geneva Convention relative to the Treatment of Prisoners of War, adopted at Geneva on 12 August 1949;

4. The Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted at Geneva on 12 August 1949;
5. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), done at Geneva on 8 June 1977;
6. 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), done at Geneva on 8 June 1977.

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MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

International humanitarian law lays down detailed rules designed to protect the victims of armed conflict and to limit methods and means of warfare. This body of law also provides for mechanisms to ensure that these rules are respected, a particularly important one being the repression of violations. Under international humanitarian law, people who commit violations, or order violations to be committed, must be held accountable for their acts, and those responsible for grave breaches must be brought to trial and punished wherever they may be.

The starting point for preparation of this Guide was a meeting of experts held by the International Committee of the Red Cross (ICRC) to discuss, and foster the development of, national law for the prosecution and punishment of individuals alleged to have committed violations of international humanitarian law.

The Guide consists of nine chapters addressing issues of international and national law relevant to prosecutions for grave breaches and other violations of humanitarian law, and international crimes such as genocide, torture and crimes against humanity. Chapters 2, 3 and 4 review the international crimes which should be punished at the national level, the basis on which States should exercise jurisdiction, and the principles of criminal responsibility applicable. The focus shifts to the national level in Chapter 5, which reviews different approaches or legislative models adopted in common law States to punish grave breaches and other violations. Chapters 7 and 8 focus on practical matters concerning prosecutions, including the relationship between the civil and military justice systems and the importance of proper procedures (mutual legal assistance, extradition, gathering of evidence) for successfully bringing a case to trial.

Chapter 6 provides guidelines for national authorities in common law States on how to incorporate the Geneva Conventions and their Additional Protocols into domestic law. It includes a Model Geneva Conventions Act, based on the Geneva Conventions Acts in force in over 25 common law States.

The ICRC's purpose in bringing out this publication is to contribute to the effort currently being made by many governments to implement humanitarian law treaties in their respective countries. The Guide is intended to be a practical reference work for lawmakers and other authorities directly involved in incorporating provisions for the punishment of violations of international humanitarian law into national legal systems. Each chapter has been written as an independent entity, so that the reader can go directly to a particular topic of interest. In addition, each chapter contains cross-references to other chapters of the Guide where appropriate.



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