

Frits Kalshoven

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CONSTRAINTS  
**CONSTRAINTS**  
ON THE  
WAGING  
**OF WAR**

An Introduction to International Humanitarian Law



ICRC

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Frits Kalshoven and Liesbeth Zegveld,  
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# CONSTRAINTS ON THE WAGING OF WAR

An Introduction to International Humanitarian Law



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*I must retrace my steps, and must deprive those who wage war of nearly all the privileges which I seemed to grant, yet did not grant to them. For when I first set out to explain this part of the law of nations I bore witness that many things are said to be 'lawful' or 'permissible' for the reason that they are done with impunity, in part also because coercive tribunals lend to them their authority; things which nevertheless, either deviate from the rule of right (whether this has any basis in law strictly so called, or in the admonitions of other virtues), or at any rate may be omitted on higher grounds and with greater praise among good men.*

Grotius: *De jure belli ac pacis*  
Book III, Chapter X, Section 1.1.

(English translation: Francis G. Kelsey, Oxford, 1925).

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## PREFACE

Nearly fifteen years have passed since the International Committee of the Red Cross (ICRC) first published Prof. Frits Kalshoven's *Constraints on the Waging of War*. The need for an introductory textbook on the subject, which includes its origins and its most recent developments, is now greater than ever.

Once again, Prof. Kalshoven, whose expertise in humanitarian law is universally recognized, succeeds in bringing together, in a book of limited length, the principal rules of humanitarian law, and doing so in a style whose accuracy and thoroughness will appeal to specialists and whose clarity will make the book accessible to students turning to the subject for the first time. The blending of theory with actual practice renders this book not only extremely useful, but most interesting to read.

In this new edition the authors bring *Constraints on the Waging of War* up to date with the important developments of recent years, especially concerning the rules governing weapons and in the field of international criminal law.

It is a great pleasure for the ICRC to publish this third edition of Prof. Kalshoven's *Constraints* and to welcome Liesbeth Zegveld to this endeavour, which will do much to promote knowledge of the rules of international humanitarian law on which so many lives depend.



**Dr. Jakob Kellenberger**

President

International Committee of the Red Cross



## FOREWORD

**C**onstraints on the Waging of War was first published in 1987, and a second edition in 1991. The publication in English actually had been preceded by two editions in Dutch (1974 and 1985) under the title *Zwijgt het recht als de wapens spreken?* (questioning the correctness of the oft-quoted maxim *inter arma silient leges*); and these, in turn, by a stencilled text about ‘international law – war’ written for the instruction of naval cadets at the Royal Dutch Naval Institute at Den Helder. The version of that stencilled text in my possession dates back to 1963, when I had been teaching international law at that Institute for several years.

Like on all those earlier occasions, the text of the present edition of *Constraints* has been adapted to new developments. These were especially numerous and far-reaching in the closing decade of the 20th century, both in the field of international humanitarian law proper and in the ever more closely related fields of human rights law and international criminal law. As one self-evident consequence, the third edition is somewhat more voluminous than its predecessor and has finally reached the 200-page mark.

By far the most important difference setting this edition apart from all the previous ones is, however, that for the first time, two authors figure on the title page. This has two reasons.

One is the expanding scope of international humanitarian law, reaching out into the areas of human rights and international criminal law: this strongly suggested co-operation with someone well-versed in those subjects. The other reason is that by now I have been tending for *Constraints* in its various manifestations for so long that I was looking for someone to whom I might eventually hand over that task.

Along came Liesbeth Zegveld, whom I got to know through her work on a doctoral thesis on *Armed Opposition Groups in International Law: The Quest for Accountability*. Already well-versed in human rights and international criminal law, through the work on her thesis she rapidly became acquainted with the field of international humanitarian law as well. (She defended her thesis, with honours, at the Erasmus University, Rotterdam, in 2000; the book will become generally available in 2001.)

I therefore was most pleased to find her prepared, not just to co-operate in drafting the parts of *Constraints* that required specialist knowledge in the fields of human rights and international criminal law, but to be enrolled as co-author of the whole

book as well. (Indeed, the use throughout *Constraints* of the phrase ‘armed opposition groups’ to indicate non-state parties to an internal armed conflict goes back to this co-operation.) I welcome her here particularly in the latter capacity. I am convinced that more publications will follow from her hand in the sphere of international humanitarian law, whether or not linked to human rights or criminal law as the other main spheres of her present interest.

I add a note of gratitude to Erasmus University, which after Liesbeth Zegveld had so successfully defended her thesis kept her on the payroll for half a year to work on *Constraints*.

Finally, also on behalf of Liesbeth Zegveld, I thank the International Committee of the Red Cross for its continuing willingness to utilise *Constraints* as one of its instruments for the dissemination of international humanitarian law. A special word of thanks goes to Emanuela-Chiara Gillard and Jean Perrenoud of the ICRC Legal Division, who energetically and enthusiastically helped along the production of the book in its final stages – including the most daunting task of all, putting together the index.

Frits Kalshoven  
Wassenaar, January 2001

## CHAPTER I

# INTRODUCTION

Events such as the armed conflicts in the territory of the former Yugoslavia, between Ethiopia and Eritrea, in Sudan, Rwanda, the Congo, Sri Lanka, Colombia and many other places confront us day after day with the cruelty of war and the suffering, death and destruction it entails. They also raise an obvious question: is the behaviour of the parties to such armed conflicts subject to any restrictions? The answer to this question is not hard to give: such restrictions do exist, even though they may not always be crystal-clear nor completely unequivocal. Confining ourselves to the realm of law (rather than to that of morality alone) they are, indeed, manifold: the law of the United Nations Charter, human rights law, environmental law, the law of neutrality, and, last but not least: the ‘law of war’, which is specifically designed to ‘constrain the waging of war’.

The law of war nowadays is often referred to by a phrase better suited to express its object and purpose, such as ‘international humanitarian law applicable in armed conflict’ or ‘humanitarian law’ – we shall be using these terms interchangeably, as we do with ‘war’ and ‘armed conflict’. The present book aims to provide some basic information about the origin, character, content and current problems of this body of law. In the process, we shall come across the other aforementioned, relevant bodies of law as well, but our main focus is on the law of war in its proper sense.

This undertaking seems useful for two reasons. For one thing, the law of war depends for its realisation on the degree to which it is known to the largest possible number of people. For another, the activities of diplomatic conferences and institutions like the United Nations and the Yugoslavia and Rwanda Tribunals have in recent times brought important developments to this body of law, and information about these developments should be spread as widely as possible. Prior to entering into the substance of the matter, however, this Introduction is the place to discuss some fundamental questions connected with the notion of ‘international humanitarian law of armed conflict’.

## I 1 OBJECT AND PURPOSE

Humanitarian law aims to mitigate the human suffering caused by war, or, as it is sometimes put, to ‘humanise’ war. But, one may ask, is this purported goal not entirely at variance with the very essence of war; indeed, is it even a desirable aim?

The answer to the first half of this question is that humanitarian law does not by any means purport to turn war into a ‘fashionable’ and basically humane activity, comparable more or less to a medieval jousting tournament. Rather, and far more modestly, it aims to restrain the parties to an armed conflict from wanton cruelty and ruthlessness, and to provide essential protection to those most directly affected by the conflict. Even so, war remains what it always was: a horrifying phenomenon.

The second half of the above question, whether mitigation of the suffering caused by war is at all desirable, requires a somewhat more detailed answer. There is, first, the argument that war, far from being ‘humanised’, should be completely abolished. It seems safe to say that in the eyes of the promoters of humanitarian law, as of everyone else, recourse to war itself needs to be avoided as much as possible. The question is to what extent it can be avoided; is it not the case that resort to armed force may at times appear not merely unavoidable, but entirely justifiable? Should it be categorically condemned even when fundamental human rights are at issue: even, for instance, when the liberation of an enslaved people or the removal of an oppressive government is at stake? Should, in the post-World War Two period, the guerrilla fighters who took part in the ‘wars of national liberation’ in Algeria, Indonesia, Vietnam, Mozambique and elsewhere, have been told to lay down their arms because war is bad? This certainly seems a daring suggestion.

Similarly, one needs a good dose of presumption to maintain that with the last remnants of colonialism removed, no other just cause for recourse to armed force could ever arise again. There is, for one thing, the Charter of the United Nations which expressly legitimises the authorisation of use of armed force by the Security Council in order to restore peace. It is moreover apparent that thus far, the United Nations has not acquired a monopoly on force, leaving the possibility that individual actors may feel justified to have recourse to armed action. The conclusion must be that war, whether in the shape of international or internal armed conflict or as United Nations enforcement action, cannot be relegated to the shelves of history.

But even so, can it not be argued that by mitigating the suffering it causes, war is made more acceptable, more endurable – that, in other words, the very existence of the humanitarian law of armed conflict contributes to perpetuating the phenomenon of war? Would war made ‘unbearable beyond endurance’ make mankind realise that the situation cannot go on unchanged and war in all its manifestations, no matter how just its cause, must be effectively banned from the face of the earth?

In response to such questions, one may point to the many historical instances of wars waged for the sake of religion or similar noble causes, but waged with every conceivable cruelty and without so much as a moment's compassion for the enemy: evidently, none of those events has resulted in a categorical ban on recourse to war. However, one might object, those wars, no matter how horrible, were restricted at least in the respect that they did not directly, or even marginally, affect mankind as a whole: might the effect not be different if such were the case?

In an era characterised by the existence of nuclear weapons, this very question appears to be utterly at variance with fundamental aspects of human nature. The present authors cannot conceive of anyone who would seriously contemplate the possibility of putting the matter to the test by subjecting mankind as a whole to the terror of really unlimited war.

Another, less far-reaching argument, sometimes advanced against the very existence of humanitarian law, is that a war fought in accordance with given humanitarian rules will last longer than one fought without any restraints. As to this, we should probably acknowledge that such an effect cannot be ruled out in all circumstances (although a more likely cause of prolonged war is the incapacity or unwillingness of the parties to terminate it). But does it follow that all restraints should therefore be removed? What ought one to prefer: a longer war or a worse war?

In this respect, the following observations seem pertinent. Supposing that a fairly insignificant improvement in the situation of the victims of a war can only be bought with an indefinite prolongation of that war, the price is clearly too high and it is better to call the 'deal' off. But this is not a very plausible hypothesis. The core rules of humanitarian law, those which make the real difference between limited and unlimited warfare, are concerned with absolutely essential matters: whether the civilian population will be exposed to unrestricted bombardment or otherwise maltreated or exterminated, whether chemical or bacteriological means of warfare will be utilised, whether captured enemies will be systematically tortured and slaughtered, and so on. Whoever feels that the removal of all restrictions in these areas will significantly reduce the duration of war, and who then, for the sake of this hypothetical effect, is prepared to accept any conceivable barbarism, is best left to his own delusions.

The present authors, for their part, find the argument hard to follow, let alone to accept. Was world public opinion, in raising its voice in protest against the American bombardments of Vietnam, totally misguided because the bombardments could possibly have contributed to a speedier termination of the hostilities? Were the United Nations entirely wrong when they demanded time and again that the liberation fighters in the Portuguese and other colonies be treated as prisoners of war: should they have urged the belligerent parties, rather, to conduct the war with maximum cruelty and ruthlessness? Even to put such questions on paper is repugnant. In other words: the assertion that humanitarian law may prolong war and therefore ought to be abolished, is

nothing but a purely theoretical, abstract thesis; once translated into the practical terms of the concrete behaviour of combatants, it is seen to be as untenable as it is abhorrent. The thesis is, moreover, totally a-historic, in that it denies and attempts to set aside the development of centuries.

This brings us to yet another point. Even if one accepts that over the course of time a body of international law has developed which we call the humanitarian law of armed conflict, what value can this have in an era like the present, when both technological and ideological factors in many ways appear to be conducive to ‘total war’?

In this respect, it is doubtless true, for instance, that civilian populations often suffer the consequences of war far more directly today than they did in certain other periods of history. This is as true in a major international armed conflict, with its possibility of massive aerial bombardment deep into enemy territory, as it is in guerrilla warfare, with its scattered military activities all over the territory. It would evidently be futile and totally unrealistic to lay down rules purporting to abolish aerial bombardment or guerrilla warfare, or suggesting that the law could guarantee the civilian population total immunity from the effects of war.

There are, however, quite a few possibilities between the two unacceptable extremes of total abandonment of the civilian population on the one hand, and its absolute immunity on the other. To find and realise those possibilities, to a feasible extent, precisely at a time like the present when the fate of the civilian population is all too easily jeopardised, is a major goal of those who occupy themselves with promoting the cause of humanitarian law. And protection of the civilian population – one of the fundamental aims of contemporary international humanitarian law – is but one example out of many; in other words, the need is as great as ever to save the world from the absurd savagery of ‘total war’.

With this we return to our point of departure: that the conduct of war is subject to legal restraints. These are referred to in the title of this book, with a term borrowed from Grotius’ *De iure belli ac pacis*, as ‘constraints on the waging of war’. Writing at the time of the Thirty-Years War (1618-1648), in his famous treatise Grotius compared the practice of conducting virtually unrestricted war – all the barbaric things belligerents could do, as he said, with impunity as far as the positive law of his time was concerned – with another, more commendable mode of waging war, respecting the ‘rule of right’ and refraining from certain modes of acting ‘on higher grounds and with greater praise among good men’. The *temperamenta belli*, or ‘moderations of war’, which he then expounded as requirements of a higher, moral order correspond in many respects with the rules of humanitarian law as we know it today.

It should be emphasised once again that without such legal restraints, war may all too easily degenerate into utter barbarism. The result need not only be that the impact of the ‘scourge of war’, referred to with such evident horror in the Charter of the United Nations, becomes immeasurably more devastating and the loss of human dignity for those actively engaged in hostilities commensu-



rately greater; another likely effect is that after the war, the restoration of peace between parties that have fought each other with such utter ruthlessness will be that much more difficult – so much so that it may have become virtually impossible.

## 1.2 CUSTOM AND TREATY

The law of armed conflict, although of relatively recent origin in its present shape, has a long history behind it. Even in a distant past, military leaders occasionally ordered their troops to spare the lives of captured enemies and treat them well, and to spare the enemy civilian population; and upon the termination of hostilities, belligerent parties might agree to exchange the prisoners in their hands. In the course of time, such practices gradually developed into customary rules of war; rules, that is, which parties to an armed conflict ought to respect even in the absence of a unilateral declaration or reciprocal agreement to that effect.

For a long time, the scope and content of these customary rules of war, like customary international law in general, remained somewhat elusive and uncertain. The most effective way for states to remove such uncertainty is by treaty-making, that is, by negotiating agreed versions of the rules and embodying these in internationally accepted, binding instruments. These are generally called treaties; some bear other names, such as convention, declaration or protocol. While treaties can be concluded between two states (bilateral treaties), we are concerned here with treaties concluded between a number of states (multilateral treaties).

Multilateral treaty-making developed into an important instrument for the regulation of international relations in the 19th century. The number of states was much smaller than it is today, and there was no United Nations nor anything comparable to it. Multilateral treaty-making was therefore a matter for *ad hoc* international conferences.

The early development of the law of war as treaty law began in this manner too. Twice in the 1860s an international conference convened to draw up a treaty on a single, specific aspect of the law of war: one, in 1864 in Geneva, on the fate of wounded soldiers on the battlefield; the other, in 1868 in St. Petersburg, on the use of explosive rifle bullets. These modest beginnings are at the root of two distinct (though never entirely separate) currents in this body of law, each characterised by their own particular perspective. One, usually (and for reasons to be explained below) known as the law of The Hague, relates to the conduct of war and permissible means and methods of war; it is discussed in chapter II 1. The other, styled the law of Geneva, is more particularly concerned with the condition of war victims in enemy hands (such as prisoners of war, or interned civilians); this part of the law is dealt with in chapter II 2.

Over the years, the body of treaty law of armed conflict has become ever more complete and all-encompassing; so much so that it tends to overshadow

custom as a source of this law. One particular set of treaties, the Geneva Conventions of 1949 for the protection of war victims, have so many parties (virtually all existing states) that one may lose sight of the fact that a good part of their content may belong to customary law too. With other treaties in this field which have less parties, it is well to remember that they bind only states parties. At the same time, rules in these treaties that already belonged to customary law, or that have developed into rules of customary law after the conclusion and entry into force of the treaty, are also binding on states that are not parties to the treaties as well as on armed opposition groups, i.e., non-state parties to an internal armed conflict. In recent years, judicial bodies such as the Yugoslavia and Rwanda Tribunals and the International Court of Justice, have increasingly found occasion to determine that given rules of treaty law had indeed acquired this character of customary law. It may be noted here that in 1995 the 26th International Conference of the Red Cross and Red Crescent invited the ICRC to prepare a report on the customary law rules of international humanitarian law applicable in international and non-international armed conflicts. The ICRC is expected to publish its study in 2001.

A crucial aspect in all this treaty-making relating to the conduct of war and the protection of war victims is whether those who engaged in this activity were realistic enough to avoid writing down rules that belligerent parties could not reasonably be expected to respect. In this regard, it is worth mentioning that usually, state delegations to conferences convened for this purpose were composed not only of diplomats, but of military officers as well, whose task was to contribute their military expertise and thus guarantee that the requirements of their profession (the element of ‘military necessity’) were duly taken into account.

Another important aspect is that until the middle of the 20th century, treaty-making in the sphere of the law of war was confined to what was considered ‘war’, that is, international armed conflict. Beginning in 1949, rules have also been written for ‘civil wars’ or internal armed conflicts; and indeed, even some of those rules are now considered to have entered into the body of customary international law of armed conflict. Multilateral treaty-making in this particular area too is and remains, of course, a prerogative of the states as the primary international lawmakers.

### **13 IMPLEMENTATION AND ENFORCEMENT**

It is one thing for the representatives of states to negotiate rules of international humanitarian law, and even to be convinced that in doing so they have taken realities into account to such a degree that there will be no basis for invoking ‘military necessity’ in justification of a deviation from the rules. It is another thing to ensure that the rules are applied in practice.

A number of factors may exert a negative influence on the implementation of the rules. Starting at the top: it may be decided at the highest level of authority that certain rules will be disregarded. Examples include the decisions, taken on

both sides in the Second World War, to make the enemy civilian population a target of aerial bombardment; the decision taken towards the end of that war by President Truman of the United States to use the atomic bomb against Japanese cities; the decision, taken early in the confrontation between Israel and Palestinian groups by the leader of the Popular Front for the Liberation of Palestine, Dr. Habash, that the Front would respect no rule whatever. While these are comparatively rare cases, another – and more important – negative factor obtains when a situation develops that is more than normally conducive to modes of combatant behaviour in violation of applicable rules. This occurs, for instance, when particularly heavy emphasis is laid on the alleged ideological or religious character of the war, or the adversary is depicted as barbarian; or the conduct of hostilities is turned into a technical operation carried out at long distance (the bomber operating at high altitudes, the long-range missile) or, again, the armed forces involved in a guerrilla-type war depend on massive fire power or other tactics that expose the civilian population to enhanced risk.

For another thing, it would be a sheer miracle if all members of the armed forces were angels, or even simply law-abiding combatants – and if they remained so through every phase of the war. Factors such as insufficient or wrongly oriented training programmes or a lack of discipline may play a role in this respect. Yet another factor which lies at the root of many violations of humanitarian law (and which operates at all levels, from the highest political and military leaders to the common soldier) is sheer ignorance of the rules.

In the face of so many adverse factors, what can be done to improve the record of respect for the humanitarian law of armed conflict? A first point to note is that this is first and foremost the responsibility of the states concerned, and, in an internal armed conflict, of the armed opposition groups as well. It has long been realised, however, that this would not be enough and outside help would be necessary. Reference should be made to the International Committee of the Red Cross, the Geneva-based, Swiss organisation active world-wide which, from its inception in 1863 has been the main promoter, initially, of the law of Geneva but in more recent times of all humanitarian law. Other instruments and methods have developed, both inter-state and in the context of international organisations, that contribute to the promotion and, if necessary, enforcement of international humanitarian law. We shall come across these various devices and means as they become relevant in the subsequent chapters.

## **I 4 STRUCTURE**

It remains to explain the structure of this book. As in the previous editions, the material is divided into historical periods, for two reasons. One is that the body of humanitarian law as we know it has developed first and foremost as treaty law. Since a treaty applies between the parties to it and is not necessarily set aside by a later treaty on the same subject, the situation arises frequently where some states are party to the new treaty whereas others are party only to the older

one. Therefore, for the present book to be useful for all parties it is necessary to present the subject-matter in chronological order. Even so, we occasionally include a reference to subsequent developments, which then are more fully treated further down in their relevant historical framework.

Our chosen approach serves another purpose as well: to enable today's commentators, or the media, to find out what law was applicable to events they are reviewing. This may help prevent the sometimes too easy comment that measures events of the past against the yardstick of today. To give just one example: the treatment of populations under German occupation in the Second World War, was governed by the relevant rules of the Hague Regulations of 1899/1907, complemented by such rules of customary law as might have developed since the Regulations but prior to the war; not, therefore, by the rules of occupation law laid down in the 1949 Fourth Geneva Convention 'Relative to the Protection of Civilian Persons in Time of War', which is subsequent to the war and was drafted to take into account the experiences gained in that unhappy period.

With these considerations in mind, the division of the subject-matter across the chapters is as follows. Chapter II provides a broad sketch of trends in the historical development of humanitarian law. Chapter III deals with somewhat greater precision with the law as it stood prior to 1977 (the year two Protocols Additional to the Geneva Conventions of 1949 were adopted). Chapter IV describes the legal situation as it arises from these Protocols. Chapter V discusses subsequent developments in the sphere of substantive law (including prohibitions or restrictions on use of weapons, protection of cultural property, and naval warfare), and chapter VI, the developments in implementation and enforcement mechanisms. By way of conclusion, chapter VII summarises some basic features of the humanitarian law of armed conflict.

## CHAPTER II

# THE MAIN CURRENTS: THE HAGUE, GENEVA, NEW YORK

As noted in chapter I 2, the present chapter begins by treating the development that commenced in the 1860s, of two ‘branches’ of humanitarian law, the law of The Hague (chapter II 1) and the law of Geneva (chapter II 2).

Just about a century after those early beginnings, in the 1960s and 1970s, the United Nations began to take an active interest in the promotion and development of the law of armed conflict, under the heading ‘human rights in armed conflict’. Apart from enabling the incorporation of the subject under an existing agenda item, this marked the increasingly important relationship between the law of armed conflict and human rights law. This ‘current of New York’ is the subject of chapter II 3.

In chapter II 4, it is shown how these three ‘currents’ of The Hague, Geneva and New York, without losing their identities, have progressively converged into a single movement and later on, in the 1990s, have developed close links with the field of international criminal law as well.

### II 1 THE HAGUE

The development of the branch of the law of armed conflict usually referred to as the ‘law of The Hague’ did not begin in The Hague at all but, rather, in two localities a long way from that city: Washington and St. Petersburg.

Washington was the place where in 1863, in the course of the American Civil War (1861-1865), the President of the United States of America (the Northern side in the war) promulgated a famous order entitled ‘Instructions for the Government of Armies of the United States in the Field’. The text had been prepared by Francis Lieber, an international lawyer of German origin who had emigrated to America. The Instructions (or Lieber Code, as they are often called) provide detailed rules on the entire range of land warfare, from the conduct of war proper and the treatment

of the civilian population to the treatment of specific categories of persons such as prisoners of war, the wounded, *franc-tireurs*, and so forth.

Although technically a purely internal document written to be applied in a civil war, the Lieber Code has served as a model and a source of inspiration for the efforts, undertaken later in the 19th century on the international level, to arrive at a generally acceptable codification of the laws and customs of war. It thus has exerted great influence on these subsequent developments.

St. Petersburg was where, in 1868, another remarkable document saw the light: the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. In more than one respect, it was the antipode of the Lieber Code. While the Code was a unilateral piece of domestic legislation covering an extremely broad range of issues, the Declaration was an international treaty bearing on a single, highly specific aspect of the conduct of war. The question at issue was the employment of certain recently developed light explosive or inflammable projectiles. The explosive rifle projectile in particular had already proved its effects on enemy *matériel*. When used against human beings, however, it was not more effective than an ordinary rifle bullet: it could put just one adversary *hors de combat*. Owing to its design, however, it caused particularly serious wounds to the victim.

The International Military Commission which, on the invitation of the Russian Government, met in St. Petersburg in 1868 'to examine the expediency of forbidding the use of certain projectiles in time of war between civilised nations', did not take long to conclude that the new projectiles must be banned from use. The Commission based its case on an interesting argument. Starting from the proposition that 'the progress of civilisation should have the effect of alleviating as much as possible the calamities of war', it considered that 'the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy'. For this purpose it would be 'sufficient to disable the greatest possible number of men', and 'this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable'. The employment of such weapons 'would, therefore, be contrary to the laws of humanity'.

As in the eyes of the Commission the projectiles at issue uselessly aggravated sufferings or rendered death inevitable, it remained for the Commission to fix 'the technical limits at which the necessities of war ought to yield to the requirements of humanity'. This was done with ostensibly mathematical precision: 400 grammes was to be the critical weight. The limit was more or less arbitrary: rifle bullets weighed far less, and the artillery shells of the time were considerably heavier. Yet, the relevant point is that the dividing line lay somewhere between these two. Although explosive artillery shells were likewise apt to inflict extremely grave wounds, to the point of 'rendering the death of disabled men inevitable', they could disable more than one man at a time and therefore were not in the same class as rifle bullets. Moreover, and perhaps more importantly, the shells were designed to be used against entirely different targets as well. Accordingly, they had to remain outside the scope of

the prohibition: in their case, the balance between military utility and the requirements of humanity worked out differently.

A last point addressed in the Declaration of St. Petersburg concerns the question of future developments in weaponry. Here again the text is worthy of note: 'The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.'

With this we finally arrive at The Hague, where in 1899, once again on the initiative of the Russian Government (and this time on the invitation of the Dutch Government), delegates of twenty-nine of the then existing states met to discuss matters of peace and war. The stated main purpose of this First Hague Peace Conference was to create conditions precluding further wars. The hope was to bring this about by making it compulsory for states to submit their disputes to international arbitration, coupled with the convening at regular intervals of an international conference to discuss any problems that might arise in connection with the maintenance of peace. The Conference failed to achieve its goal: while it was generally agreed that arbitration was an excellent means for settling inter-state disputes, quite a few states were not prepared to waive the right to decide in future, with respect to each dispute as it presented itself and in the light of all prevailing circumstances, whether to submit it to arbitration or not.

While the maintenance of peace might have been its main goal, the initiators of the Conference were sufficiently realistic not to exclude the possibility of future armed conflicts. With a view to that possibility, the Conference was asked to discuss a number of proposals relating to the conduct of war.

One proposal was for a codification of the 'laws and customs of war on land'. It was largely based on a text drafted by an earlier international conference, held in Brussels in 1874. This 'Declaration of Brussels of 1874', which had never entered into force, had in turn been strongly influenced by the Lieber Code. Inspired by these earlier examples as, indeed, by the spirit of the Declaration of St. Petersburg of 1868, the Conference of 1899 succeeded in adopting a Convention with Respect to the Laws and Customs of War on Land, with annexed Regulations. The Regulations ('the Regulations on Land Warfare', or 'Regulations') provide rules concerning all aspects of land warfare on which the contracting states had been able to agree, such as: the categories of persons that were to be regarded as combatants (referred to as 'belligerents'); the treatment of prisoners of war; restrictions on the adoption of means and methods of waging war, including some basic rules on the protection of civilian populations (notably, in Article 25, a prohibition to bombard undefended towns) and cultural objects; restrictions on the behaviour of an Occupying Power, etc. (The Regulations do not include provisions on the treatment of the sick and wounded, as that matter was already the subject of the Geneva Convention of 1864.)

The delegates at the Conference had not been able to reach agreement on all questions. One vexed and ultimately unresolved question concerned the position of members of the civilian population who, in the course of an enemy occupation, took up arms against the occupant: was the Occupying Power obliged to recognise these resistance fighters as combatants, or could it summarily execute them as *franc-tireurs*? On this question, the small Powers opposed the big ones: while the former realised that in any future armed conflicts their territories would be the probable theatres of military occupation and therefore strongly advocated a right of resistance of the occupied population, the major Powers held that, even though the inhabitants of occupied territory engaging in armed resistance might be heroes in the eyes of some, they could not be recognised as combatants and therefore would always act at their peril.

With the question thus remaining unresolved, a significant spin-off of the debate was the inclusion in the preamble of the Convention, of a rightly famous paragraph which, as a tribute to the Russian delegate who proposed it, has become known as the Martens clause. Recognising that it had not been possible to resolve all problems, the contracting parties stated that it was not their intention 'that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders': on the contrary, in such unforeseen cases both civilians and combatants would 'remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience'.

This phrase, although formulated especially with a view to the thorny problem of armed resistance in occupied territory, has acquired a significance far exceeding that particular problem. It implies no more and no less than that, no matter what states may fail to agree upon, the conduct of war will always be governed by existing principles of international law.

While the reference to the 'laws of humanity' already points to the Declaration of St. Petersburg as a source of inspiration, the preamble of the Convention of 1899 refers even more directly to that document when it states that the wording of the Regulations 'has been inspired by the desire to diminish the evils of war, as far as military requirements permit'. The principle expressed in this preambular paragraph (and found once again in the Regulations, in the form of a general prohibition to use weapons which cause unnecessary suffering) reflects the principle at the root of the work of the International Military Commission of 1868: namely, that military necessity must be balanced against the requirements of humanity.

Continuing the work begun in 1868 also in a practical manner, the First Peace Conference adopted a Declaration prohibiting the use of yet another recently developed type of rifle ammunition, called dum-dum bullets. These bullets, which 'expand or flatten easily in the human body', were apt to cause wounds as horrible as those of the light explosive or inflammable projectiles, prohibited in 1868. The new prohibition was one clear application of the idea, expressed



by the delegates at St. Petersburg, that new weapon developments needed to be evaluated 'in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity'.

In 1907, the Second Hague Peace Conference convened according to plan. The main goal, ensuring international peace, once again remained beyond reach. Indeed, any existing illusions in this respect were rudely shattered with the outbreak, in 1914, of the First World War, an event which effectively prevented the convening of the planned Third Peace Conference.

The activities of the Second Peace Conference with respect to the law of land warfare were confined to a minor revision of the Convention and Regulations of 1899. One important item concerned the bombardment of undefended towns. Besides artillery shelling, bombardment from the air was beginning to loom as another possibility. Although still no more than a rudimentary technique, with bombs being thrown from balloons, the mere contemplation of the possibility was sufficient ground for the Conference of 1907 to add to the existing prohibition in Article 25 of the Regulations the words 'by whatever means'.

The Conference also actively occupied itself with various questions of naval warfare. One important result was the Convention (IX) Concerning Bombardment by Naval Forces in Time of War. In its opening article it repeats the prohibition to bombard undefended towns. Article 2 then provides a definition of those objects (such as naval establishments, or works which could be utilised for the needs of the hostile fleet) which, although situated within such undefended towns, would be military objectives and therefore subject to bombardment. This reminds us that at the time, naval guns could be used for a task the airforce would be able to perform only much later: the accurate bombardment of military objectives located at a considerable distance from the battle area. The rule in Article 2 is therefore of interest because it foreshadows those later developments. (Unfortunately, Article 3 of the Convention also permitted the bombardment of entire undefended towns, merely on the ground that the local authorities 'decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question': decidedly a rather less felicitous provision in modern eyes).

Other results of the Second Hague Peace Conference in the sphere of naval warfare include the Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines (which placed certain restrictions on the use of such mines and of torpedoes, mostly in the interests of merchant shipping) and several Conventions on (neutral and enemy) commercial shipping interests. Prominent among these was the Convention (XII) relative to the Creation of an International Prize Court. However, there was no agreement among the most interested states on the substantive rules the Court should apply with respect to matters such as blockade, contraband, visit and search, and destruction of merchant vessels; and this entire area of disagreement remained untouched in 1907. A few years later, in 1909, a Naval Conference was held in London, which found agreed solutions for the outstanding questions and embodied these in a Declaration Concerning the Law of Naval War. Unfortunately, the

Declaration failed to be ratified. As the Convention on the International Prize Court also remained unratified, the Court was never established.

The League of Nations, established after the First World War, never paid much attention to the development of the law of armed conflict. After all, the organisation was supposed to maintain peace, and war would no longer occur, at least in Europe; on the contrary: in the framework of the League, the world would disarm and the arms trade be brought under control. A conference convened to that end in Geneva in 1925 did in effect adopt a treaty on supervision of the international arms trade. This failed to be ratified, however, and hence never entered into force.

The Conference of 1925 had more success with what actually was a by-product of its proceedings: the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. The Hague Regulations of 1899 had already codified the ancient prohibition on the use of 'poison or poisoned weapons'; but the use of various chemical agents (such as chlorine, phosgene, and mustard gas) in the First World War had clearly demonstrated the inadequacy of this prohibition. As noted in the preamble of the Protocol of 1925, public opinion had sharply condemned this use of chemical means of warfare, and the participants in the Conference of 1925 did not hesitate to ban it once and for all. The prohibition on the use of 'bacteriological means of warfare' they added with foresight: at the time, such means of warfare were no more than a theoretical possibility.

Also worthy of note in the sphere of the 'law of The Hague' was a set of Draft Rules of Air Warfare, produced in 1923 by a Commission of Jurists at the request of some states. Taking into account the experiences of the First World War, the text, among other things, set severe limits to aerial bombardment. The Rules, although influential, remained a non-binding instrument. Even so, in 1938, in reaction to bombardments from the air on localities in Spain and elsewhere, the League Assembly adopted a resolution stating the illegality of intentional bombing of the civilian population and laying down ground rules for aerial attacks on military objectives.

For the rest, repeated attempts were made in this period to curb the use of submarines, in view of the great risks to 'the lives of neutrals and noncombatants at sea in time of war' ensuing from the operations against merchant shipping of these dangerous though themselves vulnerable warships. The quoted words are from the abortive Treaty relating to the Use of Submarines and Noxious Gases in Warfare, concluded in 1922 in Washington but which failed to enter into force. In a next attempt, Article 22 of the 1930 Treaty of London for the Limitation and Reduction of Naval Armaments, laid down 'as established rules of international law' that 'In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject' and, except in case of a persistent refusal to stop or active resistance, 'may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers

in a place of safety'. These 'rules', reaffirmed in the 1936 *Procès-Verbal* of London, although widely accepted, have never proved very effective.

All these efforts in the League period are evidence of a growing concern about developments in the war-making capacities of states, which exposed civilians on land as at sea to ever greater risks from the conduct of hostilities. The ultimate, desperate effort to stem these developments, the Disarmament Conference of 1932-34, foundered miserably in the political storm gathering over Europe which, when it finally broke in 1939, destroyed many more things, including the League of Nations itself.

The horrors of the Second World War inspired a stream of important developments of general international law as well as in the law of armed conflict. Of outstanding importance, and to be mentioned before all others, was the adoption of the Charter of the United Nations, in 1945, establishing the United Nations as successor to the League of Nations.

Another major feat was the creation and work of the International Military Tribunals for the prosecution of the major war criminals of the Axis countries, in Nuremberg and Tokyo (which, for one thing, declared that the principles and rules embodied in the Hague Convention and Regulations on Land Warfare of 1899/1907 had, by the time of the outbreak of the Second World War, been so widely accepted by states that they had become part of international customary law).

Also high on the agenda of the United Nations from the first days of its existence, was the 'atomic bomb'. The very first Resolution ever adopted by the UN General Assembly, Resolution 1 (I) of 24 January 1946, provided for the establishment of an Atomic Energy Commission, with as one of its tasks the formulation of proposals for the elimination of nuclear weapons from national armaments.

Apart from these and a few other aspects of contemporary warfare (that because of their wider implications will be discussed hereafter in chapters II 3 and II 4) the position of the UN initially remained the same as that of the League of Nations: focus on the maintenance of peace, little interest for the development of the law of armed conflict in general, and even less for the 'law of The Hague' in particular.

One noticeable exception to this lack of interest of the UN concerns the protection of cultural property in the event of armed conflict. This was the theme of an intergovernmental conference which met in 1954 at The Hague under the auspices of UNESCO (the United Nations Educational, Scientific and Cultural Organisation). The conference adopted the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, with annexed Regulations, as well as a Protocol specifically dealing with the export of cultural property from occupied territory. Compared with the scant provisions on this subject in the Regulations on Land Warfare, these instruments signified an important step forward in the protection of cultural property in time of war.

## II 2 GENEVA

Around the middle of the 19th century the circumstances of wounded soldiers on the battlefield left nearly everything to be desired. Care for the wounded was primitive and insufficient in all respects: there was a dearth of military, medical and auxiliary personnel; surgery and other treatment usually had to be carried out in very primitive conditions; insight into the need for sterile wound treatment was lacking; antibiotics and blood plasma had not been discovered yet; and so on and so forth. Nor was this all: perhaps the worst of all was that the Napoleonic wars of the beginning of the century had brought an end to the customary practice of sparing the enemy's field hospitals and leaving both the medical personnel and the wounded untouched.

Instead, field hospitals were shelled and doctors and stretcher-bearers on the battlefield subjected to fire; and whoever fell into enemy hands, whether wounded or not and regardless of whether he belonged to the fighting forces or to the medical or auxiliary personnel, was taken prisoner. The net result was that often, upon the approach of enemy forces, or even when their approach was merely rumoured, doctors and nurses in the field hospitals fled with the primitive ambulances at their disposal, taking with them as many wounded as they could and leaving the others unattended.

Aid for the wounded could not always be expected from the inhabitants of nearby localities either: one could never be entirely sure which way the fortunes of battle would go, and anyone who tended a wounded soldier of one party ran the risk of being regarded as an active supporter of that party by the other side.

The disastrous consequences of this accumulation of adverse factors were widely known. Yet it took the initiative of a Genevan businessman, J. Henry Dunant, for the world to take effective steps about it. In 1859, in the aftermath of the battle of Solferino in northern Italy, Dunant found himself, more or less by accident, amidst the thousands of French and Austrian wounded who had been brought to the nearby village of Castiglione. For days, he and a few other volunteers did what they could to treat the wounded and alleviate the sufferings of the dying.

Then, deeply affected by the misery he had witnessed, he retired for a while from active life and wrote his experiences down in a book to which he gave the title *Un souvenir de Solferino* (A Memory of Solferino). Published in 1862, the book created an immediate stir throughout Europe, especially in elite circles where the realisation was sharp that the existing situation could no longer be left unchanged. In effect, Dunant had indicated in his book the two steps he regarded as indispensable: first, the establishment in each country, of a national private aid organisation to assist military medical services in a task they were insufficiently equipped to perform; secondly, the adoption of a treaty that would facilitate the work of these organisations and guarantee a better treatment of the wounded.

The realisation of both ideas took surprisingly little time. As early as 1863 a few Genevan citizens, with Henry Dunant among them, established the 'Inter-

national Committee for Aid to the Wounded’, with the self-appointed task of promoting the twin aims of the creation of national aid societies and the adoption of a treaty facilitating their work. (The Committee was soon renamed International Committee of the Red Cross; and it shall be referred to as the ‘ICRC’). In the same year, the first national society was established in Wurttemberg; Oldenburg, Belgium and Prussia followed in 1864, and The Netherlands in 1866. These early national societies were succeeded in the course of the years by similar societies in nearly every country, under the name of Red Cross or Red Crescent societies.

The desired treaty was hardly longer in coming. A group of enthusiastic propagandists – an action group, one is tempted to say – seized every opportunity to spread the idea that such a treaty was urgently needed. As a result of their efforts, and on the invitation of the Swiss Government, a diplomatic conference convened in 1864 in Geneva which, on 22 August, adopted the ‘Convention for the Amelioration of the Condition of the Wounded in Armies in the Field’.

The most important features of the Convention (ten articles long!) may be summarised as follows: In war on land, ambulances and military hospitals would be ‘recognised as neutral, and as such, protected and respected by the belligerents as long as they accommodate wounded and sick’; hospital and ambulance personnel, far from being taken prisoner or made the target of fire, would have ‘the benefit of the same neutrality when on duty, and while there remain any wounded to be brought in or assisted’; ‘wounded and sick combatants, to whatever nation they may belong, shall be collected and cared for’; last but not least, ‘hospitals, ambulances and evacuation parties’ would be distinguished by a uniform flag bearing ‘a red cross on a white ground’.

This first, modest beginning in the course of the years was followed by a long range of further steps developing the ‘law of Geneva’, and either expanding the categories of protected persons, or improving the rules in the light of acquired experience. In 1899, a treaty was concluded rendering the principles of the treaty of 1864 applicable to the wounded, sick and shipwrecked at sea. 1906 saw a first revision of the treaty of 1864, and in 1907 the treaty of 1899 was adjusted to the revision of 1906.

In 1929, on the initiative of the ICRC and again by invitation of the Swiss Government, a diplomatic conference convened in Geneva. It adopted, first, a much improved treaty on the treatment of the wounded and sick on land, taking into account the experiences of the First World War. Secondly, it negotiated a separate Convention on the treatment of prisoners of war.

The latter treaty significantly expanded the categories of persons protected under the law of Geneva. As briefly mentioned above, rules relating to the status of prisoners of war did already exist: having initially developed as rules of customary law, they had been incorporated in 1899 in the Hague Regulations on Land Warfare. Yet, the First World War, with its long duration and huge numbers of prisoners of war on both sides, had brought to light the need for

more detailed regulation of their protection. The Convention of 1929 achieved this goal. Particularly important improvements on the existing law included: far greater clarity and completeness of the rules and principles on capture and captivity; the introduction of a categorical ban on reprisals against prisoners of war, and acceptance of the principle that application of the agreed rules would be open to international scrutiny.

The tragic events, successively, of the Spanish Civil War and the Second World War provided the incentive for yet another major revision and further development of the law of Geneva. To this end a diplomatic conference met in 1949 in Geneva, once again at the instigation of the ICRC and by invitation of the Swiss Government. The three Geneva Conventions in force (one of 1907 and two of 1929) were substituted by new ones, improving many existing rules and filling *lacunae* that practice had brought to light. To give just one example, the often ruthless treatment of armed resistance fighters in countries under German occupation during the Second World War led to the express recognition that members of organised resistance movements which fulfilled a number of (stringent) conditions would qualify as prisoners of war.

Then, the law of Geneva was enriched by an entirely novel Convention on the protection of civilian persons in time of war. It protects two categories of civilians in particular: enemy civilians in the territory of a belligerent party, and the inhabitants of occupied territory; categories of civilians, that is, who as a consequence of the armed conflict find themselves in the power of the enemy. With this latest addition the law of Geneva had come to comprise four Conventions, dealing with the wounded and sick on land; the wounded, sick and shipwrecked at sea; prisoners of war; and protected civilians.

The Diplomatic Conference of 1949 produced two further innovations of such major importance that they need to be mentioned here. One concerns the scope of application of the Conventions. The earlier Geneva Conventions, like the Hague Conventions on land warfare and similar instruments, had always been regarded as drafted primarily for application in wars between states. The Spanish Civil War had demonstrated the difficulty, and the need, to make the parties to internal armed conflicts respect the basic principles of humanitarian law. In the light of this experience the Conference decided to introduce into all four Conventions of 1949 a common Article 3, 'applicable in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties', and laying down a list of fundamental rules each party to the conflict is 'bound to apply, as a minimum' in the event of such a conflict. The adoption of the article represented a tremendous step forward in that it proved the possibility of agreeing on rules of international law expressly addressing situations of internal armed conflict. Another intriguing aspect of common Article 3 is the evident influence of nascent notions of human rights on this provision.

The other major innovation was the introduction, again in all four Conventions, of provisions requiring contracting states to take the necessary penal, disciplinary and organisational measures to deal with grave breaches and other serious violations of the Conventions.

In the course of the years, the four Conventions of Geneva of 1949 in their turn began to show shortcomings, for instance, with respect to the treatment of captured guerrilla fighters in so-called wars of national liberation. The endeavour to cope with these new problems coincided with developments in the other areas of the law of armed conflict and will therefore be dealt with in chapter II 4.

### II 3 NEW YORK

As mentioned above, the United Nations in its early years displayed very little interest in the development of the law of armed conflict. In 1949, the International Law Commission, as the organ especially charged with the codification and progressive development of international law, gave expression to this negative attitude when it decided not to place the law of armed conflict on its agenda, as any attention devoted to that branch of international law might be considered as indicating a lack of confidence in the capacity of the United Nations to maintain international peace and security.

Even so, two specific subjects attracted attention in this period: the prosecution of war criminals and the problems posed by the atomic bomb, as the most recent and particularly horrifying addition to arsenals.

The issue of individual responsibility for war crimes had been the focus of attention ever since the Allied Powers in the course of the war, in 1943, had made it known that the war criminals of the Axis Powers would in due course be made to answer for their evil deeds. As mentioned above, two Tribunals were set up shortly after the war for the prosecution and punishment of these criminals: one, in 1945, for the major war criminals of the European Axis (usually referred to as the Nuremberg Tribunal after its venue); the other, in 1946 and with its seat in Tokyo, to try the major Japanese war criminals.

The basis for the prosecution of the war criminals of the European Axis was the London Agreement of August 1945, with the annexed Charter establishing the Tribunal. The Charter defined three categories of crimes falling within the jurisdiction of the Tribunal and for which there would be individual responsibility: crimes against the peace, war crimes, and crimes against humanity. It also defined applicable principles of individual criminal liability, notably, that the official position of defendants would ‘not be considered as freeing them from responsibility or mitigating punishment’, and that an order would not free a defendant from responsibility but might be ‘considered in mitigation of punishment if the Tribunal determines that justice so requires’.

In 1946, the UN General Assembly in Resolution 95 (I) reaffirmed these principles, as reformulated by the Tribunal in its judgment (and therefore usually referred to as the ‘Nuremberg principles’) as generally valid principles of international law. Believing moreover that the time had come to set about drafting a code of international criminal law, in the same Resolution, the General Assembly also directed the International Law Commission to prepare a



Draft Code of Offences Against the Peace and Security of Mankind. Yet, as will be shown in chapter II 4, it would take until the 1990s for the problems attending these efforts to come closer to a solution.

The other specific subject, mentioned above, that became a matter of urgent concern of the United Nations in its early days was the 'atomic bomb'. As mentioned before, General Assembly by Resolution 1 (I) of 24 January 1946 established the Atomic Energy Commission, charged *inter alia* with the task of formulating proposals designed to eliminate nuclear weapons from national arsenals. In the years that followed, the disarmament aspect, apparent in these terms of reference (as opposed to the actual use of the weapons), largely dominated the debate, both in the Commission and in the General Assembly.

An exception to this trend was the adoption, on 24 November 1961, of General Assembly Resolution 1635 (XVI), which focused specifically on the use of nuclear weapons. It declared that such use would be utterly unlawful, on a number of grounds. The effect of this firm opening statement was considerably reduced, however, by part two of the Resolution, which somewhat lamely requested the Secretary-General 'to consult the Governments of Member States to ascertain their views on the possibility of convening a special conference for signing a convention on the prohibition of the use of nuclear and thermo-nuclear weapons for war purposes', and to report on the results at the next session. (Needless to say, the consultations remained without result.) The authority of the Resolution was undermined even further by the fact that a significant number of states (including the United States, the United Kingdom and France, all three nuclear Powers) voted against or abstained; the vote was 55 in favour, 20 against and 26 abstentions. Yet, despite these shortcomings, the Resolution gave expression to a majority opinion in the General Assembly. (Much later, in 1996, the International Court of Justice, on the request of the General Assembly, was to hand down an advisory opinion which gives a more balanced view on the issue of legality of use of nuclear weapons.)

1968, the 'Human Rights Year', marked the beginning of a broader and more active interest of the United Nations in the law of armed conflict more generally. The International Conference on Human Rights, which met under its auspices from 22 April to 15 May in Teheran, adopted, towards the end of its sessions and without much debate, Resolution XXIII on 'human rights in armed conflicts', requesting the General Assembly to invite the Secretary-General to study steps 'to secure the better application of existing humanitarian international conventions and rules in all armed conflicts'. The Resolution also requested an enquiry into the 'need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners of war and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare'.

The General Assembly endorsed the initiative and on 19 December 1968, by Resolution 2444 (XXIII), invited the Secretary-General, in consultation with the ICRC, to undertake the studies requested in the Teheran Resolution. The



Resolution was entitled 'Respect for Human Rights in Armed Conflicts', and many of the UN activities relating to the law of armed conflict have since been placed under that banner. As noted before, with this title the UN may be said not only to have indicated the historical origin of its active interest in the law of armed conflict, but to have provided a justification for its radical change of course: under the Charter, the promotion and protection of human rights are among its main functions.

The activities of the United Nations with respect to the development of the law of armed conflict undertaken since the adoption of Resolution 2444, fall into two entirely distinct categories. On the one hand, in a series of annual reports, the Secretary-General provided a broad overview of the law of armed conflict (in UN terms, of human rights applicable in armed conflicts), making many interesting suggestions for the development of this body of law. These reports were usually followed by General Assembly resolutions expressing general support for the work in progress. On the other hand, the General Assembly and its various commissions repeatedly engaged in debates and adopted resolutions, focusing on a few narrowly defined specific questions, notably, the protection of women and children, the position of journalists, and the condition of liberation fighters in wars of national liberation.

Wars of national liberation were of particular concern to the United Nations, and understandably so, as they concerned two issues which through the years have deeply stirred the Organisation: viz., the situation in the Middle East (with the various groups constituting the Palestinian Liberation Organisation acting as liberation fighters) and the decolonisation process. As far as the latter issue is concerned, it suffices to mention the often drawn-out conflicts in the former Dutch East Indies, in Algeria, in a series of colonies in Africa, and in Indochina. In Africa the last remnants of colonialism appeared to be particularly persistent: the Portuguese colonies achieved independence only after a change of régime in the mother country, and the situation in southern Africa has even more recently been brought to a solution.

With respect to this process of decolonisation the United Nations took sides with ever greater insistence. Time and again, resolutions of the General Assembly and other main organs underscored the right of self-determination of the peoples involved, and appealed to the authorities in power no longer to oppose its realisation. As the use of force appeared increasingly unavoidable in the liberation of the territories under colonial domination, the resolutions declared, ever more unambiguously, that the use of force in these 'wars of national liberation' was justified, and they appealed to other countries to lend aid and support to the liberation fighters. The resolutions also – and this brings us back to our subject – repeatedly stated that the liberation wars were international armed conflicts, and demanded that captured liberation fighters be regarded as prisoners of war and treated as such. In this manner in particular, the UN had a stimulating effect on the negotiations that had commenced elsewhere, in Geneva, with respect to the position of guerrilla fighters.

Another series of resolutions adopted by the General Assembly in the 1970s had a bearing on the question of possible prohibitions or restrictions on the use of specified 'conventional weapons'. The term refers to weapons other than those belonging to the class of so-called weapons of mass destruction (that is, nuclear, chemical and bacteriological weapons). While, as we shall see, the real debate on this subject too had been taking place for a long time in a different forum, the resolutions of the General Assembly were important in that they effectively kept the subject in the public eye.

In sum, the activities of the United Nations relating to the reaffirmation and development of the law of war in the 1970s have been significant in three respects. First and foremost, they contributed to cutting through the taboo on the subject. Secondly, they highlighted the idea of protection of the fundamental rights of human beings even in times of armed conflict. And thirdly, they made a valuable contribution to the debate on a number of specific questions, notably that of the position of guerrilla fighters in wars of national liberation.

#### II 4 CONFLUENCE: 1977 AND BEYOND

As noted before, General Assembly Resolution 2444 (XXIII) had invited the Secretary-General to carry out his studies 'in consultation with the International Committee of the Red Cross'. It may be surprising at first sight to see the ICRC thus mentioned in connection with an undertaking which, once underway, would certainly not be limited to the 'law of Geneva'. Yet this was not so surprising after all. As long ago as the 1950s the ICRC had embarked on a road which had taken it beyond that specific branch of the law and to the domain referred to as the 'law of The Hague': in 1955 and once again in 1956 it had tabled a set of draft rules for the area where the law of The Hague was most blatantly inadequate, viz., the protection of the civilian population against the effects of war. These proposals, tabled at the height of the Cold War, had not led to any positive results: at the time, many governments were simply not prepared to engage in a discussion of a subject as delicate as the detailed regulation and limitation of aerial bombardment. Their negative reactions were enhanced by the fact that the draft rules contained an only thinly veiled condemnation of nuclear weapons.

A decade later, the ICRC took a new initiative along an entirely different line: no detailed proposals this time about precise rules, but a statement of some fundamental principles of the law of war, the validity of which no-one would dare to deny. This approach was successful: the 20th International Conference of the Red Cross and Red Crescent, held in Vienna in 1965,\* adopted Resolution XXVIII which 'solemnly declares that all Governments and other

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\* Although the 25th International Conference in 1995 was the first to be referred to as the 'International Conference of the Red Cross and Red Crescent', previous conferences being merely 'International Conferences of the Red Cross', to avoid confusion we shall use the term 'International Conferences of the Red Cross and Red Crescent' for all conferences, regardless of when they took place.

authorities responsible for action in armed conflicts should conform at least to the following principles':

- that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
- that it is prohibited to launch attacks against the civilian populations as such;
- that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;
- that the general principles of the Law of War apply to nuclear and similar weapons.

With the adoption of this Resolution (precisely in the year that the United States began its bombardments of North Vietnam) an important break-through had been brought about. Governmental delegations of states party to the Geneva Conventions participate in International Conferences of the Red Cross and Red Crescent with full voting rights, and the fact that the Vienna Conference adopted the Resolution was a clear indication that besides Red Cross and Red Crescent circles, governments were also prepared to take up the matter of the reaffirmation and development of the law of armed conflict.

This readiness was even more evident with the adoption in December 1968 of General Assembly Resolution 2444 (XXIII). This not only requested the Secretary-General to carry out his studies 'in consultation with the International Committee of the Red Cross': it also repeated and reaffirmed the principles for the protection of the civilian population, embodied in the Vienna Resolution (with the sole exception of the fourth and last principle, which was considered redundant in view of the earlier statement in General Assembly Resolution 1653 (XVI) that the use of nuclear weapons was unlawful). With the adoption of Resolution 2444, the General Assembly had once and for all rejected the idea of 'coercive warfare', as the method of waging war against a population in its entirety, in an attempt to force the adverse party to surrender. (It may be noted in passing that the principles set forth in Resolution 2444 have since been widely recognised as belonging to the realm of customary law.)

With the Resolution, the starting gun had been fired for an accelerated movement which brought the three currents, The Hague, Geneva and New York, together into one main stream. Governments, the UN and the ICRC participated in it, and the debate concerned the rules of combat in the sense of Hague law as well as the protection of the victims of war in the sense of Geneva law, as much as the promotion of the idea of international protection of human rights in armed conflicts. The development signified a recognition of the close interaction between these main parts of the humanitarian law of armed conflict, especially in the circumstances of contemporary warfare.

This accelerated development eventually culminated in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which convened in 1974 in Geneva

at the invitation of the Swiss Government. In four yearly sessions on the basis of draft texts submitted by the ICRC, the Conference drew up the text of two treaties styled Protocols Additional to the Conventions of Geneva of 1949. Protocol I relates to the protection of victims of international armed conflicts, and Protocol II, to the protection of victims of internal armed conflicts; both contain a mixture of Hague and Geneva law with important human rights elements. The Conference adopted the Protocols on 8 June 1977. Signed on 12 December 1977 at Bern by numerous states, they have been ratified since by a vast majority of states. The Protocols entered into force on 7 December 1978, six months after two instruments of ratification had been deposited with the Swiss Government acting as depositary.

The Protocols of 1977 are silent on the subject, referred to towards the end of chapter II 3, of possible prohibitions or restrictions on the use of certain conventional weapons (such as napalm and other incendiary weapons, and mines and booby-traps). At the time of the Diplomatic Conference, in 1974-1977, the debate on this subject (which again belongs as much to Hague as to Geneva law, with strong human rights overtones) began to assume the character of negotiations; but it proved impossible to bring these to a conclusion at the same time as the negotiations on the Protocols. The subject was subsequently taken up by a UN Conference convened for that purpose, which held two sessions, one in 1979 and the second in 1980. On 10 October 1980, it adopted the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, with three annexed Protocols (on 'non-detectable fragments', 'mines, booby-traps and other devices', and 'incendiary weapons'). The Convention with annexed Protocols entered into force on 2 December 1983, six months after the 20th instrument of ratification had been deposited with the Secretary-General of the United Nations, who acts as depositary of this Convention.

In 1995, a fourth Protocol was attached to the Convention, on 'blinding laser weapons'; and in 1996, the Mines Protocol was thoroughly amended. One year later, a separate Convention was adopted completely prohibiting the possession and use of anti-personnel mines (the 1997 Ottawa Convention).

The adoption and entry into force of the Additional Protocols of 1977 inspired two other developments that need to be briefly mentioned here. One concerns the protection of cultural property. The Hague Convention of 1954 and its related instruments, mentioned at the end of chapter II 1, had proved inadequate to achieve its purpose, necessitating thorough amendment. Solutions that had been introduced in the Protocols for the protection of civilians enabled the finding of comparable solutions for problems inherent in the protection of cultural property in times of armed conflict. The end result of the combined efforts of UNESCO and a number of actively interested governments was the adoption, on 26 March 1999, of the Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict (not yet in force). Between the states that become party to it, it will largely set aside the systems of protection of cultural property established under the 1954 Convention.

The other area is the law of warfare at sea, a branch of the law of armed conflict that long has proved immune to any significant developments (except, of course, for the Geneva part of the law, crowned in 1949 with the adoption of the Second Convention). In effect, since the abortive attempts of 1907 and 1909 to create an International Prize Court with the rules it should apply, and the practically equally unsuccessful attempts in the 1930s to curb the dangers submarine warfare posed to merchant shipping, no international conference has met to put on paper rules, for instance, for the 'protection of civilians and civilian objects against the effects of hostilities' at sea. However, an international group of lawyers and naval officers under the aegis of the San Remo-based International Institute of Humanitarian Law and working in close co-operation with the ICRC, succeeded in producing, in 1994, the San Remo Manual on International Law Applicable to Armed Conflicts at Sea. Although not a treaty, it deserves our attention, if only because of the effort and expertise that have gone into it and that make it a significant contribution to the development of the law of naval warfare.

A last area of 'confluence' of Hague, Geneva and New York law, may be seen in the recent developments regarding the prosecution and punishment of violations of humanitarian law. It may be recalled that in the aftermath of the Second World War, two events occurred that are relevant to this topic. One was the introduction into the 1949 Geneva Conventions of provisions on grave breaches and other violations. The 'grave breach' provisions single out specific, very serious violations that contracting states are obliged to prosecute. A similar provision was subsequently included in Protocol I of 1977. The provisions were only intended to apply in respect of violations committed in international conflicts, and neither the Conventions nor the Protocol provide for the possibility of an international criminal procedure. Prosecution of war criminals is left under these instruments to national courts, established under national law.

This was different with the other event: the establishment of the International Military Tribunals in Nuremberg and Tokyo, for the prosecution and punishment of the major war criminals of the Axis Powers. Yet after that, attempts to build on these experiences were long frustrated by political factors, and the work on the topic in the International Law Commission (ILC, a subsidiary organ of the UN General Assembly) remained completely stalled.

The notion of international criminal enforcement of the law of armed conflict gained momentum again in the last decade of the 20th century. The Security Council (which, together with the Secretary-General, was showing a much greater active interest in matters of human rights and humanitarian law) twice resorted to the establishment of an *ad hoc* International Criminal Tribunal: in 1993, for the prosecution of persons responsible for serious violations of international humanitarian law committed since 1991 in the territory of the former Yugoslavia; and in 1994, for the prosecution of persons responsible for genocide and other such violations committed in that year in the territory of Rwanda, or of Rwandan citizens responsible for such violations elsewhere.

The establishment of these two *ad hoc* tribunals gave a new impetus to the work of the ILC. This resulted in the adoption, by a United Nations Diplomatic Conference in 1998, of the Statute of the International Criminal Court (ICC). This Statute, often referred to as the Rome Statute after the venue of the Conference, applies to crimes committed in both international and internal conflicts, and the Court's jurisdiction encompasses breaches of Hague, Geneva and New York law, thus rendering the distinction between these three fields ever more blurred.

The ICC will be established and assume its seat at The Hague once the Statute has entered into force. This requires 60 ratifications; at the time of writing, 28 states had ratified the Statute.

## CHAPTER III

# THE LAW BEFORE THE PROTOCOLS OF 1977

This chapter provides a survey of the law of armed conflict as it emerged from the historical developments, described in the previous chapter, up to the Diplomatic Conference of 1974-1977. Two topics of general importance are dealt with first: the character of the law (chapter III 1), and its scope of application (chapter III 2). These are followed by the main aspects of the law of The Hague and of Geneva, respectively (chapter III 3 and 4). The chapter concludes with a discussion of implementation and sanctions in the event of non-implementation (chapter III 5).

### III 1 CHARACTER OF THE LAW

As noted, states must respect their obligations under international law, whether arising from treaties they are party to or from customary law. This applies with equal force to the law of armed conflict. The thesis one occasionally hears that application of the rules of this body of law may be sacrificed to overriding military necessity runs counter to the very character of these rules.

The preamble to the Hague Convention on Land Warfare of 1899, as reiterated and reaffirmed in 1907, emphasises that the wording of the Regulations ‘has been inspired by the desire to diminish the evils of war, as far as military requirements permit’. This implies that in drafting the rules as they did, the authors have taken the element of military necessity fully into account, and that a given rule can only be set aside on grounds of military necessity when it expressly so permits. To give just one example of such an express waiver in the Regulations: Article 23(g) prohibits ‘To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war’.

The language of the Geneva Conventions of 1949 is, if anything, even more explicit on this point. Common Article 1 obliges states parties ‘to respect and to ensure respect for the present Convention in all circumstances’. Like the Hague

Regulations, these Conventions provide some examples of rules accompanied by an express reservation of military necessity. Thus, Article 12 of the First Convention (concerning the wounded and sick of armed forces in the field) provides that a belligerent party ‘which is compelled to abandon wounded or sick to the enemy shall, as far as military considerations permit, leave with them a part of its medical personnel and material to assist in their care’. But once again, when no such reservation is specified, the provisions apply without exception.

### III 2 SCOPE OF APPLICATION

The law of armed conflict is applicable in the event of war; this may appear a matter of course. The point is made explicit, for instance, in the Geneva Gas Protocol of 1925, speaking of ‘the use in war’ of chemical means of warfare.

The scope of the Hague Convention in the version of 1899 is defined in similar terms: Article 2 lays down that the Convention with annexed Regulations shall be ‘binding on the Contracting Powers, in case of war between two or more of them’. (The article adds the proviso that the instruments in question ‘shall cease to be binding from the time when, in a war between Contracting Powers, a non-Contracting Power joins one of the belligerents’; this so-called *si omnes* clause has lost its relevance, though, since the contents of the Convention and Regulations are assumed to have become binding on all states as customary law.)

The wording of Article 2 already provides an answer to a question which might arise from the use of the term ‘war’: evidently, the type of armed conflict which the contracting parties of those days had in mind was an inter-state war. This is not to say that they would have regarded the rules they established or recognised as unsuitable to be applied in civil wars. Rather, the idea that treaty rules could be laid down for such an internal situation simply had not yet entered their minds.

Matters were different in 1949; the question of whether the Geneva Conventions would be applicable in their entirety to situations of internal armed conflict was expressly raised – and equally expressly answered in a negative sense. States were not prepared to accept an obligation to apply the fullness of the detailed and complicated provisions of the Conventions in such internal situations. Instead, a separate article was introduced into all four Conventions (Article 3), laying down a set of minimum rules specifically applicable ‘in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. (Article 3 is discussed in chapter III 4.7.)

The Geneva Conventions of 1949 also differ from the older treaties in that they no longer refer exclusively to ‘war’. Common Article 2 provides that the Conventions shall apply in full ‘to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them’. While states had in the past been able to argue that a situation not expressly recognised as a



war did not constitute a war in the legal sense, the authors of the new formula hoped to have done away once and for all with the possibility for states to place such a narrow construction on the single word 'war', and to have replaced it with a factual, objectively ascertainable notion.

Subsequent events have shown that even the new formulation was not watertight. When in the early 1950s a conflict between the Netherlands and Indonesia about (then) Dutch New Guinea (now a part of Indonesia named Papua) reached its peak and a considerable number of Indonesian infiltrators were falling into Dutch hands, the Netherlands saw fit to deny the applicability of the Prisoners of War Convention of 1949, on the ground that both parties chose not to regard the situation as an armed conflict. The drafters of the 1954 Hague Convention on the Protection of Cultural Property removed the possibility of this last subterfuge by adding two words to the closing part of the above phrase: 'even if the state of war is not recognised by one or more of them' (Article 18).

The fact remains that thus far, the qualification of a situation as an armed conflict has largely been left to the discretion and the good faith of the parties concerned and to their perceived interest in respecting their treaty obligations. Yet the objective formula accepted in 1949 represents a significant improvement over the previous situation, in that it provides third parties – such as states not involved in the conflict, organs of the United Nations and, in practice, first and foremost the ICRC – with a tool for exerting pressure on the parties to apply the treaties. In the conflict between the Netherlands and Indonesia, it was the incessant insistence of the ICRC which ultimately resulted in the Dutch authorities changing their position and applying the Prisoners of War Convention to the captured infiltrators.

While the above concerns the application of the law during an armed conflict and by the parties to it, a different matter is application in an international judicial procedure. In such a procedure, it is for the court or tribunal involved to determine whether it considers the conflict to be, or to have been, an international or internal armed conflict in the sense of the relevant rules of treaty or customary law.

Always under the heading of 'scope of application', reference must be made to an issue that has arisen in the post-Second World War period in connection with the UN peacekeeping or peace-enforcing activities. The issue specifically concerns the possibility or, rather, the impossibility for the UN to become party to the Geneva Conventions, which obviously were drafted in the traditional manner as inter-state treaties without making provision for accession by non-state entities. The ICRC nonetheless has incessantly urged the UN to find ways formally to subscribe to the Conventions, an urging the UN equally consistently opposed, accepting only that its forces would be instructed to comply with the 'principles and spirit' of humanitarian law. For the rest, it would be for each state contributing forces to a UN operation to ensure compliance by these forces with the rules of humanitarian law in force for that state.

As we shall see, this was the position until quite recently, when in 1999 the Secretary-General issued an instruction that at least partially satisfies the need of greater clarity concerning the specific rules the UN is willing to impose on its forces (see chapter VI 3).

### III 3 THE HAGUE

In this chapter, the traditional, pre-1977 Hague law is discussed under the following headings: the qualification as combatant (chapter III 3.1); rules on means and methods of warfare (chapter III 3.2 and 3.3); the notion of ‘military objective’ and, in that connection, the protection of the civilian population (chapter III 3.4); some specific problems attending the use of nuclear weapons (chapter III 3.5); and protection of cultural property (chapter III 3.6).

#### 3.1 Combatants

Persons entitled to perform acts of war are, first, members of the armed forces (with the exception of non-combatants such as military medical and religious personnel). Next, Article 1 of the Hague Regulations refers to ‘militia and volunteer corps’ which fulfil a set of four conditions, viz.:

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

Article 2 adds one further category: ‘The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organise themselves in accordance with Article 1.’ Persons who take part in such a *levée en masse* need only respect the last two conditions: they ‘shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war’. (It should be noted that in those years the term ‘belligerent’ was used not only for a state party to an armed conflict but also for the individuals whom we now refer to as ‘combatants’).

The reference to ‘militia and volunteer corps’ and the *levée en masse* reflects nineteenth-century practice, notably that of the Franco-German War of 1870. These categories have since lost virtually all practical significance, as opposed to the category of resistance fighters in territory under enemy occupation – a category which the Regulations do not even mention. As explained in chapter II 1, it had proved impossible in 1899 to arrive at an agreement on the question of whether such persons should be recognised as combatants or, alternatively, could be regarded as *franc-tireurs* and hence, according to a widespread view of the time, be executed without trial.

Obviously, the latter view and form of treatment cannot be reconciled with modern ideas about human rights, in particular the rights to life and to a fair trial,

even in time of war. Yet, even if such drastic treatment is prohibited and the resistance fighter therefore spared his life, it makes quite some difference whether he remains liable to be put on trial for his warlike activities, or, conversely, is recognised as a combatant and as such not liable to punishment for his participation in hostilities. In 1949, the latter solution was obtained at least for those members of ‘organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied’ who fulfil all four of the above conditions: the Prisoners of War Convention provides that they then must be treated as prisoners of war. Had this rule been in force at the time of the Second World War, the members of most resistance movements fighting German occupation in Europe would still have failed to fulfil the conditions for treatment as prisoners of war. Notable exceptions might have been the *maquisards* of the French Forces of the Interior, and the resistance army of Marshall Tito in Yugoslavia.

It may be recalled in this connection that in 1899 the Martens clause had been inserted in the preamble to the Hague Convention on Land Warfare, precisely in an attempt to forestall the conclusion that the treatment of captured resistance fighters, as an ‘unforeseen case’ on which a ‘written undertaking’ had not been achieved, was therefore ‘left to the arbitrary judgment of military commanders’ (see chapter II 1).

### 3.2 Means of warfare

The most basic tenet of humanitarian law with respect to the employment of means of warfare is the rule laid down in Article 22 of the Hague Regulations: ‘The right of belligerents to adopt means of injuring the enemy is not unlimited.’ The principle was reaffirmed in Resolution XXVIII of the 20th International Conference of the Red Cross and Red Crescent (Vienna, 1965) and subsequently, in 1968, in Resolution 2444 (XXIII) of the UN General Assembly.

Several principles have been deduced from this most general precept (which, with some justification, has been identified as the foundation of the entire humanitarian law of armed conflict). One is the prohibition on the employment of ‘arms, projectiles, or material calculated to cause unnecessary suffering’, embodied in Article 23(e) of the Regulations. In this formula, ‘unnecessary’ signifies that the suffering caused by a particular means of warfare is not justified by its military utility, either because such utility is entirely lacking or at best negligible, or because in weighing utility against suffering the scale dips to the latter side and, in so doing, to prohibition of the means of warfare in question.

The rule on unnecessary suffering, which goes back to the Declaration of St. Petersburg of 1868, is too vague to produce by itself a great many practical results. Apart from cases in which states expressly agree to forbid employment of a specified weapon (as they did in 1868 with respect to the explosive or inflammable projectiles weighing less than 400 grammes) states have not been

known to lightly decide unilaterally to discard a weapon, once introduced into their arsenals, because it is considered to cause unnecessary suffering.

As for the 1868 Declaration, subsequent technical developments and state practice have made the prohibition on use of the light explosive or inflammable projectiles lose much of its significance. Other prohibitory rules, dating from the period of the Hague Peace Conferences and which have retained their validity, concern the employment of dum-dum bullets, and of poison and poisoned weapons.

The Declaration of the First Hague Peace Conference which prohibits the use of dum-dum bullets, defines them as 'bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions'. This technical description does not explain the rationale underlying the prohibition, which is that bullets meeting the description are apt to produce effects comparable to those of the light explosive or inflammable projectiles prohibited in 1868; in the human body, they cause injuries far graver than those normally caused by an ordinary bullet, and that are not in effect necessary to put an adversary *hors de combat*. Thus, the prohibition represents a clear instance of application of the rule forbidding the use of weapons causing 'unnecessary suffering'.

The prohibition on the use of poison or poisoned weapons embodied in Article 23(a) of the Hague Regulations, although not without all relevance even to contemporary warfare, nonetheless is of mainly historical interest. Of greater remaining importance is the Geneva Gas Protocol of 1925; this proclaims that 'the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilised world', and adds the agreement of the contracting states 'to extend this prohibition to the use of bacteriological methods of warfare'. (It should be mentioned that much later, two treaties have been concluded by which the states party thereto completely ban, not merely the use, but the possession, production etc. of such weapons: a Convention of 1972 on bacteriological (biological) and toxin weapons, and a 1993 Convention on chemical weapons; also, the pre-existing ban on use of these weapons is now widely regarded as customary and therefore binding on all states and parties to a conflict. For these developments, see chapter V 2.)

The Geneva Protocol of 1925 has always given rise to a number of problems. First, a significant number of states never ratified it (the United States only did so as late as 1975). Secondly, many states attached to their ratification of the Protocol, a reservation to the effect that the Protocol would apply on condition of reciprocity and would cease to be binding if any party on the other side of the conflict used chemical weapons. This effectively reduced the prohibition to one of 'first use'. This, combined with the fact that some of the modern chemical agents are far from militarily insignificant, still induces some states to prepare for the eventuality of use of chemical weapons of war. It should be noted however that a number of the reserving states have meanwhile withdrawn their reservations.

Yet another question relating to the Protocol of 1925 concerns the correct construction of its wording, in respect of two types of chemical agent in particular: tear gas and similar, not necessarily lethal gases, and herbicides. Must these chemical agents be regarded as included in the prohibition? Many experts plead in favour of an affirmative answer, and, at least as far as the non-lethal gases are concerned, they have strong arguments on their side. Perhaps the most convincing argument is that, while the fact that a gas used by one party is non-lethal may not be immediately apparent, the fact of a use of 'gas' is, and the other party may react to that use even before having determined the nature of the 'gas'; thus, even the use of tear gas in a battle situation may set a process in motion which may rapidly lead to the suspension of the Protocol for the duration of the armed conflict.

The United States has never accepted that the Protocol should be construed in such a manner as to bring tear gas and herbicides within its terms. In this connection, it is of interest to note that, when in 1975 the President, 'with the advice and consent of the Senate,' ratified the Protocol, he maintained this traditional US stance, adding however his decision to renounce, 'as a matter of national policy,' the 'first use of herbicides in war' (except in or around military bases and installations) and the 'first use of riot control agents in war except in defensive military modes to save lives'. A subsequent Executive Order elaborated and clarified the exceptions to some degree. One example of use of 'riot control agents' (i.e. tear gases) which the Executive Order exempted from the 'voluntary' renunciation was use against rioting inmates of a prisoners-of-war camp – a use which is surely closer to normal police use of tear gas than to warlike use, and which need not entail the risk of retaliation by the enemy and the consequent possible suspension of the entire prohibition on the use of chemical weapons.

While the above principles and rules on the use of weapons are either of general application in all warfare or apply more specifically to the conduct of war on land, mention should be made of one rule laid down in the 1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines (which serves to restrict, rather than prohibit, the use of such mines and of torpedoes). Article 2 prohibits 'to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping'. The International Court of Justice has applied this rule in its Judgment in the case of *Nicaragua v. the United States*, holding that by laying such mines off the coast of Nicaragua the United States had violated this provision.

This concludes the discussion of the pre-1977 prohibitions on use of specific weapons. Use of various modern, and often criticised, explosive and incendiary weapons such as napalm and 'fragmentation bombs', was not expressly prohibited, and neither was the wartime use of nuclear weapons. The problems posed by the existence and possible use of nuclear weapons are discussed in chapter III 3.5, and again, in the light of Protocol I, in chapter IV 1.5i. The post-1977 restrictions on the use of certain modern 'conventional' means of warfare are discussed in chapter V 1.

### 3.3 Methods of warfare

The Hague Regulations contain only a few rules relating to methods of warfare. Thus, Article 23(b) prohibits ‘To kill or wound treacherously individuals belonging to the hostile nation or army.’ At the same time, Article 24 informs us that ‘Ruses of war ... are considered permissible’. As far as they go, these rules are unassailably correct. The only problem is determining what constitutes a ruse of war and what a treacherous mode of acting. Article 23(f) provides some examples of the latter: ‘improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention’; (the flag of truce is a white flag, used to protect a negotiator or messenger; the ‘distinctive badge of the Geneva Convention’ is the armet with a red cross or a red crescent on a white ground). For the rest, one might find a general guideline in what was noted by Kant some two centuries ago and subsequently repeated by Lieber in the Instructions for the Armies of the United States: treacherous is all such conduct which undermines the basis of trust which is indispensable for a return to peace. Even so, the difficulty of resolving the question in concrete instances remained.

The Hague Regulations also prohibit, not so much on account of their treacherous nature as because of the cruelty and lowered standard of civilisation they betray: ‘To kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion’, Article 23(c); ‘To declare that no quarter will be given’ – meaning that no prisoners shall be taken, Article 23(d); and ‘pillage of a town or place, even when taken by assault’, Article 28. With respect to the former two rules it should be pointed out that these are not simply the same as saying that prisoners of war must not be killed: while they do include that prohibition, they also, and more importantly, bridge the gap which may lie between the moment a combatant becomes *hors de combat* (by laying down his arms or from any other cause) and the moment he is effectively taken prisoner.

### 3.4 Military objectives and protection of the civilian population

‘The only legitimate object which states should endeavour to accomplish during war’ is, in the words of the 1868 St. Petersburg Declaration, ‘to weaken the military forces of the enemy’. One method by which a belligerent party may seek to accomplish this goal is by eliminating those objects which may be regarded as ‘military objectives’ in the narrowest, most literal sense of the term: e.g., units of the enemy armed forces, their armoured cars and mobile artillery, and military installations such as fixed gun emplacements and munition depots. That all such objects represent legitimate military objectives is beyond question.

Another method consists in denying the enemy the acquisition or production of weapons. This may be done by cutting off the supply of weapons or of raw materials required for their production (by blockades, or measures of economic

warfare) or, alternatively, by selecting arms factories as targets of military operations (bombardment, sabotage). Ever since long-distance aerial bombardment became a serious possibility such objects are generally counted among military objectives. It is of interest to refer in this connection to an instrument preceding that development by a long time, viz., the 1907 Hague Convention IX Concerning Bombardment by Naval Forces in Time of War. While its opening article prohibits in general terms 'the bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings,' Article 2 provides a list of objects which may be bombarded even though they are situated within such an undefended locality. The point of interest is that besides 'military works, military or naval establishments, depots of arms or war *matériel* ... and the ships of war in the harbour,' the list also comprises 'workshops or plants which could be utilised for the needs of the hostile fleet or army'.

The inclusion of certain industrial objectives in the notion of 'military objective' gives rise to a troubling question: what industries may be regarded as military objectives, and what other ones not? The question, which may also be asked in respect of many other objects such as bridges, railroad yards, road intersections and so on, obviously derives its importance from the enhanced risks for the civilian population ensuing from such an extension of the concept of 'military objective'.

As noted before, the Hague Regulations do not provide an answer to this question. Half a century later, in the 1950s, the ICRC suggested that governments accept a list (to be adjusted periodically, if necessary) enumerating the categories of objects that could be regarded as military objectives; but its attempts remained without success. Without such an agreed, clear-cut dividing line between lawful military objectives and other objects, only a much vaguer yardstick existed, according to which each and every object could be regarded as a military objective if in the circumstances its elimination might be expected to 'weaken the military forces of the enemy', thus representing a clear military advantage to the attacker. This standard amounted to much the same thing as the principle of military economy, according to which the objects which qualify first and foremost as targets of military action are those whose destruction may be expected to have the greatest and most immediate effect on the military powers of the adversary.

Over and above this general and obviously very vague standard, certain other principles have long been recognised from which a prohibition to regard given objects as military objectives can be deduced. Particular importance attaches in this respect to the rules laid down in Resolution XXVIII of the 20th International Conference of the Red Cross and Red Crescent (Vienna, 1965) and Resolution 2444 (XXIII) of the United Nations General Assembly (1968). These Resolutions reaffirm some 'principles for observance by all governmental and other authorities responsible for action in armed conflicts,' of which the following two are of relevance here:

- (b) That it is prohibited to launch attacks against the civilian populations as such;

- (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.

These principles for the protection of the civilian population against the dangers of warfare are not found in so many words in the early treaties. On the other hand, the idea behind the principles (which, as mentioned earlier, amounts to an outright rejection of the idea of ‘coercive warfare’) may be discerned already in the statement in the St. Petersburg Declaration that the only legitimate object of war is to weaken the *military* forces of the enemy. Again, the principles clearly underlie the prescriptions of Articles 25 and 26 of the Hague Regulations, which provide that undefended towns may not be attacked or bombarded by any means and that the commanding officer of a force attacking a defended locality ‘must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities’.

The 1907 Hague Convention IX on naval bombardment contains a similar provision. Article 2 lays down that the bombardment of objects which may be destroyed although they are situated in an undefended locality must be preceded by a warning, unless ‘for military reasons immediate action is necessary’. In the latter case ‘the commander shall take all due measures in order that the town may suffer as little harm as possible’. In a similar vein, Article 6, dealing with naval bombardment in general, provides that ‘If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities’.

Subsequent developments in the techniques of warfare (such as long-distance aerial bombardment, the introduction of ballistic and guided missiles and all kinds of electronic devices, and innovations in the sphere of land mines) exposed the simple treaty provisions of 1899 and 1907 as being obviously incapable of providing the civilian population with anything like adequate protection against the dangers arising from military operations. True, it was possible to deduce from the old treaty provisions some further rules, such as the duty to identify a target prior to attack, a prohibition on area bombardment (meaning bombardment carried out against a built-up area that harbours some isolated military objectives, with no attempt to distinguish between those objectives and the rest of the area), and the rule that an attack on a military objective is unlawful if it causes damage to the civilian population out of all proportion to the military advantage gained. The lack of precision inherent in these rules was aggravated by the attempts by both sides in the Second World War to justify aerial operations that were probably unlawful in principle (such as the wholesale bombardment of enemy cities) as reprisals against earlier unlawful acts committed by the enemy.

While the aforementioned Resolutions of the International Conference of the Red Cross and Red Crescent (1965) and the General Assembly (1968) were important in that they reaffirmed the validity of the principle of protection of the civilian population against the dangers of war, it was left to the Diplomatic Conference of 1974-1977 to achieve clarity on the precise prohibitions and



restrictions states were prepared to accept in this regard, including the issue of recourse to reprisals. For further discussion on this development see chapter IV.

Other specific pre-1977 rules prohibiting the targeting of certain localities or objects, such as hospitals, transports of wounded persons, safety zones recognised by the belligerent parties, and protected cultural property, are discussed below in the relevant sections of this chapter.

### 3.5 Nuclear weapons

The use, in 1945, of ‘atomic bombs’ over Hiroshima and Nagasaki, and the subsequent development of nuclear weapons has led to a great many questions of politics, international relations and international law. We shall mostly confine ourselves here to the specific field of the law of armed conflict as it existed prior to 1977.

A controversial question has always been whether and to what extent the traditional rules and principles on use of weapons and protection of the civilian population could be regarded as applicable to the use (as opposed to any other aspects of the possession) of nuclear weapons. Those who denied the application of the rules, essentially rested their case on two arguments: the weapons were new, and they were of a different order from other weapons.

The argument of the novelty of nuclear weapons has been flawed from the outset. Rules and principles on use of weapons of war did not come into being on the implicit understanding that they would be limited to existing weapons, and they have since been regarded as applicable to the use of all kinds of new weapons without exception. (Looking far ahead, we note that the International Court of Justice in its Advisory Opinion of 1996 on the *Legality of the Threat or Use of Nuclear Weapons* authoritatively rejected the argument.)

Are nuclear weapons different? Even the two bombs of 1945 were horrendously destructive, both instantly and in their long-term effects. Since these were and remained the only instances of actual use of nuclear weapons, the discussion focused from the outset, rather than on their use, on the deterrent effect attributed to the possession and peace-time deployment of nuclear weapons. Central to this discussion was the so-called ‘counter-city strategy’, i.e., the threat of use of (megaton) nuclear weapons against enemy cities. Arguing that this threat was indispensable to the maintenance of peace and therefore could not be unlawful, the advocates of this view concluded that the wartime use of nuclear weapons should also be kept out of the scope of the existing law.

No matter what one may think of the legality of such a threat to destroy entire cities, uttered in peace time and intended to preserve peace, there was never much room for doubt that if deterrence failed and an armed conflict broke out, the actual realisation of a threatened counter-city strategy, with the destruction beyond comprehension it would entail, could not be justified with a simple reference to the ‘different character’ of nuclear weapons. As the law stood,

therefore, execution of the strategy could at best, if at all, be justified as a measure of reprisal against a comparable earlier wrong.

Other, more ‘military’ conceivable uses of nuclear weapons (for instance, against military objectives such as concentrations of enemy armed forces, missile launching pads or other very important military objectives) offered even less support to those who wished to deny the applicability of the existing law. Any such military use of nuclear weapons would have to be tested against the rules and principles in force as general standards for the military use of all weapons of war, including those relating to the protection of the civilian population.

In conclusion, application of the pre-1977 rules of Hague law to the possible wartime use of nuclear weapons does not warrant the conclusion that every conceivable use of nuclear weapons would have been prohibited in all circumstances. The limits of permissible use of weapons were sufficiently vague and flexible to leave open at least the theoretical possibility of a use of nuclear weapons that would not overstep these limits. It remains to be seen whether this has changed, either as an effect of the adoption and entry into force of Protocol I of 1977 (chapter IV 1.5i) or subsequently through the 1996 Advisory Opinion of the International Court of Justice (chapter V 2.1).

### 3.6 Cultural property

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict has been ratified or acceded to by an impressive number of states. However, it cannot be said that all of its substantive provisions are customary.

Yet, the principle underlying the Convention, that cultural objects must be spared as far as possible, may safely be stated to have general validity. It already finds expression in Article 27 of the 1907 Hague Regulations, on the siege and bombardment of defended towns, and in Article 5 of the 1907 Hague Convention on naval bombardment. In either case, protection of the cultural objects is subject to the condition that ‘they are not being used at the time for military purposes’, and the presence of the objects must be indicated by distinctive signs.

The 1954 Convention elaborates the principle into a detailed system of protection. Article 1 provides a definition of ‘cultural property’, which contains the following elements:

- a. ‘movable or immovable property of great importance to the cultural heritage of every people’, such as monuments, works of art, manuscripts, books, and scientific collections;
- b. ‘buildings whose main and effective purpose is to preserve or exhibit the movable cultural property’ defined under (a), such as libraries and museums, and refuges intended to shelter the objects in question in the event of armed conflict; and
- c. ‘centres containing a large amount of cultural property’ as defined under (a) and (b).

Protection can either be general or special. The lower standard, general protection, contains two elements: safeguard and respect (Article 2). States are required to prepare in time of peace for the safeguarding of cultural property within their territory against the foreseeable effects of an armed conflict (Article 3). To this end they may, for instance, construct refuges, or make preparations for transport of the property to a safe place, or again (as provided in Article 6) mark cultural property with a distinctive emblem. The emblem is described in Article 16 as ‘a shield, pointed below, per saltire blue and white’; for those not initiated in the heraldic arts the article adds the following transcription into common language: ‘a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle’.

The Netherlands, making this type of peace-time preparation, has attached shields fitting the description to a great variety of buildings, usually somewhere near their entrance. Unfortunately, the authorities gave the shields very modest dimensions (about 10 centimetres high), so that one must be rather observant to notice them at all. This leaves one wondering what the protective value of such a shield may be in the event of armed conflict. A salient detail is that among the buildings thus identified as cultural property is the Ministry of Defence in The Hague – a building which in view of its function would definitely not qualify for protection in time of war.

Article 4 obliges contracting states to ‘respect’ cultural property, both within their own territory and within that of other contracting states. In either case, the obligation is, first, to refrain from ‘any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict’. As far as a state’s own territory is concerned, these words may imply an obligation to refrain from such use even in time of peace. To the best of our knowledge, no potential adversaries have ever protested against the identification of the Dutch Ministry of Defence as cultural property, however.

This little problem of interpretation does not arise in regard of the other part of the undertaking to respect, which is to refrain ‘from any act of hostility directed against such property’. Either obligation ‘may be waived only in cases where military necessity imperatively requires such a waiver’.

Article 4 furthermore obliges contracting states ‘to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property’, and prohibits ‘any act directed by way of reprisal’ against such property. Then, importantly, Article 19 provides that in a non-international armed conflict as well, ‘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’.

‘General protection’ clearly provides only limited protection. More complete protection may be expected of a system of ‘special protection’; but such a

system obviously must be of limited application. Article 8 accordingly restricts the possibility of placing objects under special protection to ‘a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, centres containing monuments and other immovable cultural property of very great importance’; and, in order to qualify, such an object must be situated at an adequate distance from any important military objective or (in the case of a refuge) ‘be so constructed that, in all probability, it will not be damaged by bombs’; and the object must not under any circumstance be ‘used for military purposes’.

As provided in Article 8, an object is brought under special protection by its entry in the International Register of Cultural Property under Special Protection. The Register is kept by the Director-General of the United Nations Educational, Scientific and Cultural Organisation (UNESCO). Requests for registration may be objected to by other contracting states, on the ground that the object either does not qualify as cultural property at all, or does not comply with the conditions mentioned in Article 8.

‘Special protection’ applies from the moment of registration of an object. It entails the obligation on contracting states to ‘ensure the immunity’ of the object, by refraining from ‘any act of hostility’ directed against the object as well as (with one exception that needs not be mentioned here) ‘from any use of such property or its surroundings for military purposes’ (Article 9). While this ‘immunity’ already goes somewhat further than the rules on general protection, it is reinforced by the requirement to mark the object with the distinctive emblem ‘repeated three times in a triangular formation (one shield below)’ and by control on the part of UNESCO during the armed conflict (Articles 10, 16).

Another distinctive feature of the system of special protection lies in the rules on ‘withdrawal of immunity’. According to Article 11, this may come about in two types of circumstance. One is violation by a contracting state of its obligations under Article 9: that releases the other party from its obligation to ‘ensure the immunity’ of the object; even so, ‘whenever possible’, it ‘shall first request the cessation of such violation within a reasonable time’.

The other circumstance is ‘unavoidable military necessity’ – apparently a more stringent requirement than the ‘imperative military necessity’ of the rules on general protection. The effect of ‘unavoidable military necessity’ applies ‘only for such time as that necessity continues’, and the necessity can only be established ‘by the officer commanding a force the equivalent of a division in size or larger’. The party withdrawing immunity is moreover obliged to inform the Commissioner-General for Cultural Property of this, ‘in writing, stating the reasons’. (The Commissioner-General for Cultural Property is a person chosen by the Parties concerned or appointed by the President of the International Court of Justice, from an international list of qualified persons nominated by the contracting states.)

Both systems of general and special protection have shown important shortcomings in practice. To mention just one, the rules on special protection

are hard to implement in densely populated and highly industrialised regions. As mentioned before, the resulting desire to thoroughly amend the Convention has recently culminated in the adoption of a new instrument that is discussed in chapter V 3.

### III 4 GENEVA

The 1949 Geneva Conventions contain both common and specific provisions and concepts. It may also be recalled that the Conventions are applicable in their totality in international armed conflicts, whereas common Article 3 specifically applies in non-international armed conflicts. The present section is accordingly organised as follows: first, the notion of ‘protected persons’ as defined in Conventions I-III and IV, respectively (chapter III 4.1), and some aspects of the principle of protection underlying the Conventions (chapter III 4.2); then, the substantive parts of each Convention separately (chapter III 4.3 to 4.6); and, finally, common Article 3 (chapter III 4.7).

#### 4.1 Protected persons

The law of Geneva serves to provide protection for all those who, as a consequence of an armed conflict, have fallen into the hands of the adversary. The protection envisaged is, hence, not protection against the violence of war itself, but against the arbitrary power which one party acquires in the course of an armed conflict over persons belonging to the other party. Protection of this type was granted, for the first time in 1864, to ‘the wounded in armies in the field’. Since 1949 it extends to all categories of persons mentioned in the four Geneva Conventions of that year:

- the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (the First or Red Cross Convention);
- the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (the Second or Sea Red Cross Convention);
- the Convention (III) Relative to the Treatment of Prisoners of War (the Third or Prisoners of War Convention); and
- the Convention (IV) Relative to the Protection of Civilian Persons in Time of War (the Fourth or Civilians Convention).

Conventions I-III all relate to combatants who have fallen into enemy hands (and some related groups). Conventions I and II protect in particular those combatants whose need for protection arises from the fact that they are wounded, sick or shipwrecked. Convention III sets out the general rules concerning the status, protection and treatment of prisoners of war, whether healthy or wounded.

For a full enumeration of persons protected under Conventions I-III, the reader is referred to Article 4 of the Third Convention. The following list is drawn from that article:

1. members of the armed forces of a Party to the conflict, even if the government or authority to whom they profess allegiance is not recognised by the adversary;
2. members of other militias or volunteer corps, including those of organised resistance movements, which belong to a party to the conflict and operate in or outside their own territory, even if this is occupied; provided always that the group they belong to fulfils the aforementioned four conditions of Article 1 of the Hague Regulations which are repeated in the relevant articles of the Conventions:
  - (a) to be commanded by a person responsible for his subordinates;
  - (b) to have a fixed distinctive sign recognisable at a distance;
  - (c) to carry arms openly;
  - (d) to conduct their operations in accordance with the laws and customs of war;
3. participants in a *levée en masse*, provided they carry arms openly and respect the laws and customs of war;
4. persons who accompany the armed forces without actually being members thereof, such as duly accredited war correspondents and members of welfare services;
5. crew members of the merchant marine and the crews of civil aircraft of the parties to the conflict.

As may be seen, persons belonging to categories 1-3 are all ‘combatants’ proper; as such, they are entitled to take a direct part in the hostilities and, once captured by the enemy, are normally detained as prisoners of war for the duration of the hostilities. Persons falling under categories 4 and 5, on the other hand, are civilians; yet they are captured in a situation indicating their close (though in principle non-combatant) co-operation with the enemy armed forces or war effort. Although the capturing party may decide to simply let them go, it is entitled, on account of the circumstances of their capture, to detain them for some time, or even for the duration of the armed conflict. If it so decides, the detaining party is obliged to treat these persons as prisoners of war.

The Fourth Convention protects certain categories of civilians (in addition to those mentioned a moment ago). Article 4 defines the protected persons as ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals’. There are some exceptions to this general principle, including, for example, nationals of a neutral State on the territory of a party to the conflict and nationals of a co-belligerent, as long as ‘the State of which they are nationals has normal diplomatic representation in the State in whose hands they are’; and, of course, all those who are protected by Conventions I-III.

A number of points deserve to be highlighted here. The first is the limited scope of the Civilians Convention. In spite of its sweeping title, it is neither intended to protect civilians from the dangers of warfare – such as aerial bombardment – to which they may be exposed in their own territory nor does it offer them

protection against the acts of their own state of nationality. The protection extends essentially to civilians in the power of the adversary. (We shall see hereafter that one Part of the Convention does apply to the whole of the populations of the countries in conflict.)

The second point is that resistance fighters, or, more generally, guerrilla fighters, who fail to meet all four conditions mentioned above cannot claim a right to be treated as prisoners of war; they may, on the other hand, be entitled to the (lesser) protection of the Civilians Convention. It should be added that in recent times a tendency has become apparent to interpret in particular conditions (b) and (c) in a fairly liberal manner; this is in conformity with the practice of the regular armed forces, whose members no longer march into battle dressed in beautiful or at least conspicuous uniforms, any more than they brandish their rifles or hand grenades without need. Yet under the rules of 1899/1949, even a liberal construction of these two conditions leaves quite a few obstacles in the way of recognition of resistance or guerrilla fighters as prisoners of war.

A last point: it is evident from the above that the crucial question, whether a person falls within the scope of Conventions I-III or of Convention IV, is not always readily answered. Who is to provide this answer? And how should the person concerned (say, the resistance fighter in occupied territory) be treated in the meantime? Article 5 of the Prisoners of War Convention answers these questions as follows: 'Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to one of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.' This rule, which has been applied e.g. by the United States in Vietnam and by Israel in the Middle East, removes the risk of arbitrary decision on the part of individual commanders and creates at least the possibility of a duly considered decision.

## 4.2 Principle of protection

The system of protection of the Geneva Conventions rests on the fundamental principle that protected persons must be respected and protected in all circumstances, and must be treated humanely, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria (Article 12 of Conventions I and II, 16 of Convention III and 27 of Convention IV).

'Respect' and 'protection' are complementary notions. 'Respect', a passive element, indicates an obligation not to harm, not to expose to suffering and not to kill a protected person; 'protection', as the active element, signifies a duty to ward off dangers and prevent harm. The third element involved in the principle, that of 'humane' treatment, relates to the attitude which should govern all aspects of the treatment of protected persons; this attitude should aim to ensure to these persons an existence worthy of human beings, in spite of – and with full recognition of – the harsh circumstances of their present situation. The

prohibition of discrimination adds a last essential element that must be taken into account in respect of all three other main elements.

Starting from these fundamental notions the some four hundred, in part highly detailed, articles of the Conventions provide an elaborate system of rules for the protection of the various categories of protected persons. Of this abundant body of law, no more than the main lines are presented here. The common articles relating to implementation and sanctions are dealt with in chapter III 5.

### 4.3 First Convention

Article 12 provides that the wounded and sick shall be treated and cared for ‘by the Party to the conflict in whose power they may be’, adding that ‘only urgent medical reasons will authorise priority in the order of treatment to be administered’. The article prohibits any ‘attempts upon their lives, or violence to their persons’ and, in particular, to murder or exterminate the wounded and sick, to subject them to torture or biological experiments, wilfully to leave them without medical assistance and care, or to create conditions exposing them to contagion or infection.

Parties to the conflict are required to take all possible measures, especially after an engagement, ‘to search for and collect the wounded and sick’ (Article 15). Any particulars which may assist in the identification of each wounded, sick or dead person must be recorded as soon as possible and the information forwarded to the national Information Bureau which each party to the conflict is obliged (by virtue of Article 122 of the Third Convention) to establish at the outset of the hostilities. The national Bureau in turn transmits the information to ‘the Power on which these persons depend’, through the intermediary of a Central Prisoners of War Agency (Article 16). Article 123 of the Third Convention prescribes that the latter Agency shall be ‘created in a neutral country’. In practice, the Central Tracing Agency of the ICRC, located in Geneva, performs this function.

The parties are also required to do their utmost to search for and identify the dead; last wills and other articles ‘of an intrinsic or sentimental value’ must be collected and an honourable interment of the dead ensured, cremation being allowed solely ‘for imperative reasons of hygiene or for motives based on the religion of the deceased’ (Articles 15-17). At the outset of hostilities each party must organise an Official Graves Registration Service (Article 17); the work of this Service, which consists of the registration, maintenance and marking of the graves (or, as the case may be, of the ashes) serves ‘to allow subsequent exhumations and to ensure the identification of bodies, whatever the site of the graves, and the possible transportation to the home country’.

Besides the official authorities, individual persons may also concern themselves in the fate of the wounded and sick and, admitting them into their houses, take up their care. Ever since the Convention of 1864, the principle has been firmly established that none of the parties to the conflict may censure private individuals for such activities: on the contrary, the authorities should



encourage this. Article 18 of the First Convention expressly reaffirms this role of the population. At the same time, it emphasises that the civilian population too must respect the wounded and sick, and must ‘abstain from offering them violence’.

For the rest, care of the wounded and sick is the primary responsibility of the military medical services. Their function actually is a double one: on the one hand, to contribute to the numerical and fighting strength of their own armed forces, and, on the other, to provide medical aid to combatants, whether friend or foe, who are in need of care as a consequence of the armed conflict. As stated before, priority in medical aid may only be determined on the basis of urgent medical reasons and not, therefore, on the grounds that a combatant belongs to one’s own party.

In order to be able to perform their task, military medical services, together with the fixed establishments and mobile units (field and other hospitals and ambulances) at their disposal, themselves benefit from rules on protection. Article 24 provides that the permanent medical and administrative personnel of the military medical services (doctors, nurses, stretcher bearers and so on), as well as chaplains attached to the armed forces ‘shall be respected and protected in all circumstances’. When they fall into enemy hands, they may be retained ‘only in so far as the state of health, the spiritual needs and the number of prisoners of war require’ (and without becoming prisoners of war; Article 28). With respect to auxiliary personnel trained to perform similar functions, such as nurses, Article 25 provides that they ‘shall likewise be respected and protected if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands’. In the latter event they ‘shall be prisoners of war, but shall be employed on their medical duties in so far as the need arises’ (Article 29).

Members of the staff of the national Red Cross or Red Crescent Societies of the parties to the conflict, who are employed on the same duties as the personnel of the military medical services mentioned in Article 24, enjoy the same protection as that personnel, provided they are subject to military laws and regulations (Article 26). A recognised Society of a neutral country that wishes to lend the assistance of its medical personnel and units to a party to the conflict needs the previous consent of its own government, as well as the authorisation of the party concerned. The personnel and units assigned to this task are placed under the control of that party, and the neutral government must notify its consent also to the adverse party (Article 27). If members of this personnel fall into the hands of the latter party, they may not be detained at all and must, in principle, be given permission ‘to return to their country or, if this is not possible, to the territory of the party to the conflict in whose service they were, as soon as a route for their return is open and military considerations permit’ (Article 32).

Fixed establishments and mobile medical units of the military medical services such as (field) hospitals and ambulances may not be attacked (Article 19). But

neither may they be ‘used to commit, outside their humanitarian duties, acts harmful to the enemy’ (Article 21).

Article 23 provides for the establishment of ‘hospital zones and localities’ to protect the wounded and sick and the personnel entrusted with their care from the effects of war. For such a measure to be effective the express recognition by the adverse party of the protected status of the zone or locality is required.

Among the rules in the Convention on the protection of transports of wounded and sick or of medical equipment, those concerning medical aircraft deserve particular attention. The rules in question, laid down in Article 36, are so stringent as to render the effective use of such aircraft virtually impossible: the aircraft must be ‘exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment’; each and every detail about their flight (altitude, time and route) must have been ‘specifically agreed upon between the belligerents concerned’; they may not fly over enemy or enemy-occupied territory, and they must ‘obey every summons to land’. In formulating these restrictive rules the fear of abuse of medical aircraft, for instance for purposes of aerial observation, prevailed over all other considerations.

The above system of protection of personnel and equipment, hospitals and ambulances, and transports, stands or falls with the use of, and respect for, the distinctive emblem, i.e., the red cross or red crescent on a white ground. Articles 38-44 prescribe in detail how the emblem must be displayed. Article 38 also mentions the red lion and sun on a white ground, an emblem used in the past by Iran. Israel employs the red shield of David on a white ground. While this emblem was not internationally recognised in 1949 (and therefore is not mentioned in the Convention), it has been respected in practice.

A last point concerns reprisals: these are prohibited ‘against the wounded, sick, personnel, buildings or equipment protected by the Convention’ (Article 46). This is to say that a party to the conflict cannot claim the right to set aside rules of the Convention in order to induce the adverse party to return to an attitude of respect for the law of armed conflict.

#### 4.4 **Second Convention**

Based on the same principles, the Second Convention provides rules for the treatment of wounded, sick and shipwrecked members of armed forces at sea. Article 12 specifies that ‘the term “shipwreck” means shipwreck from any cause and includes forced landings at sea by or from aircraft’.

Events at sea may result in a greater variety of situations than may occur on land: shipwrecked persons may be picked up by warships, hospital ships, merchant vessels, yachts, or any other craft, sailing under a belligerent or neutral flag, and they may be put ashore in a belligerent or neutral port. Only one of the many resultant special provisions is mentioned here. It is the rule, laid down in Article 14, that a belligerent man-of-war has the right to demand that the wounded, sick or shipwrecked on board military or other hospital ships, merchant vessels,

yachts etc. 'shall be surrendered, whatever their nationality'; this, as far as the wounded and sick are concerned, under the double condition that they 'are in a fit state to be moved and that the warship can provide adequate facilities for necessary medical treatment'. By doing this, the warship may capture enemy combatants who are found on board the other vessel, and make them prisoners of war.

Hospital ships have an important place in the Second Convention. Article 22 defines them as 'ships built or equipped ... specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them'; the ships thus combine the functions of a hospital and medical transport.

The Convention distinguishes between 'military' hospital ships (which are not warships) and hospital ships utilised by Red Cross or Red Crescent Societies or other private institutions or persons. All these ships 'may in no circumstances be attacked or captured, but shall at all times be respected and protected', provided a number of conditions are fulfilled. The most important condition is 'that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed'. The description must include the ship's 'registered gross tonnage, the length from stem to stern and the number of masts and funnels'. An additional requirement for non-military hospital ships is for them to have been granted an official commission by 'the Party to the conflict on which they depend' or, in the case of a hospital ship under a neutral flag, the previous consent of its own government and the authorisation of the party to the conflict under whose control they will exercise their functions (Articles 22-24).

Article 43 provides that hospital ships must be painted white, with the distinctive emblem (red cross or red crescent) painted in dark red, as large as possible and 'so placed as to afford the greatest possible visibility from the sea and from the air'. By day, in good weather conditions and within optical range the ships will thus be sufficiently recognisable as hospital vessels; in less favourable conditions, other means of identification will have to be utilised, though.

As distinct from medical aircraft, hospital ships are free in principle to perform their functions anywhere and at all times; yet, in doing so they 'shall in no wise hamper the movements of the combatants', and any actions they undertake during or shortly after an engagement will be at their own risk (Article 30). The parties to the conflict moreover can drastically restrict the ostensible freedom of action of hospital ships in a number of ways. Article 31 recognises their right to control and search the ships, and to 'refuse assistance from these vessels, order them off, make them take a certain course, control the use of their wireless and other means of communication, and even detain them for a period not exceeding seven days from the time of interception, if the gravity of the circumstances so requires'.

Article 27 provides that under the same conditions as those applicable to hospital vessels, 'small craft employed by the state or by the officially

recognised lifeboat institutions for coastal rescue operations' shall be respected and protected 'so far as operational requirements permit'. Protection is also extended 'so far as possible to fixed coastal installations used exclusively by these craft for their humanitarian missions'.

Like the First Convention, the Second Convention prohibits reprisals against the persons and objects it is designed to protect (Article 47).

#### 4.5 **Third Convention**

Combatants who fall into enemy hands are prisoners of war from the moment of capture. Who is responsible for their treatment? Article 12 of the Third Convention states the principle that: 'Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them.' This means that the Detaining Power is responsible for everything that happens to them; this responsibility of the state does not, however, detract from the responsibility of any individuals that may arise from violations of the Convention.

The opening sentence of Article 13 provides that 'Prisoners of war must at all times be humanely treated'. Obviously, they may not be arbitrarily killed; the article makes the point explicit when it prohibits 'any unlawful act or omission... causing death or seriously endangering the health of a prisoner of war'. Always according to Article 13, prisoners of war must be protected, 'particularly against acts of violence or intimidation and against insults and public curiosity'; and reprisals directed against prisoners of war are prohibited. Additionally, they 'are entitled in all circumstances to respect for their persons and their honour' (Article 14).

To the authorities of the Detaining Power a prisoner of war is mainly of interest as a potential source of information. In order to secure this information they may interrogate him, use kind words and create a congenial atmosphere to make him talk, listen in on his conversations, and so on. They are not allowed, however, to have recourse to 'physical or mental torture' or 'any other form of coercion'. The only information every prisoner of war is obliged to give is 'his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information' (Article 17).

Prisoners of war captured in a combat zone must be evacuated as soon as possible after their capture and if their condition permits, to camps situated outside the danger area, where they may be kept interned at the expense of the Detaining Power (Articles 15, 19, 21). Every such prisoner-of-war camp 'shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power'. This officer, who, under the direction of his government bears responsibility for the application of the Convention in the camp, must not only himself possess a copy of the Convention but also 'ensure that its provisions are known to the camp staff and the guard' (Article 39). The text of the Convention must

moreover 'be posted, in the prisoners' own language, in places where all may read them' (Article 41).

There is nothing in international law which renders it unlawful for a prisoner of war to attempt to escape. The camp authorities may take measures to prevent such attempts, but the means open to them are not unlimited: Article 42 provides that weapons may be used against prisoners of war only as 'an extreme measure, which shall always be preceded by warnings appropriate to the circumstances'. An attempt at escape which remains abortive exposes the prisoner of war to nothing more than disciplinary punishment (Article 92).

The detention of prisoners of war lasts in principle until the 'cessation of active hostilities', after which they 'shall be released and repatriated without delay' (Article 118 – a provision which has given rise to serious difficulties in practice, for instance, after the Korean War when numerous North Korean prisoners in American hands refused to be repatriated).

Detention may come to an earlier conclusion by a number of causes. A first obvious cause is death during capture (Article 120). Second, prisoners who are seriously wounded or seriously sick must be sent back to their own country or accommodated in a neutral country as soon as they are fit to travel (Article 109). In the event of a less serious situation but where the release of prisoners of war 'may contribute to the improvement of their state of health', the Detaining Power may offer to release them partially or wholly 'on parole or promise, in so far as is allowed by the laws of the Power on which they depend' (Article 21).

The complete release on parole or promise, which enables a prisoner of war to return to his own country, need not be confined to the case of probable improvement of his state of health but may be offered on other grounds as well. A condition will normally be that the released prisoner shall no longer take an active part in hostilities for the duration of the armed conflict. Article 21 provides that a prisoner of war who accepts release on parole or promise is bound upon his honour scrupulously to observe the conditions, this both towards the enemy and his own authorities; the latter authorities, for their part, are bound 'neither to require nor to accept' from him 'any service incompatible with the parole or promise given'; always according to Article 21.

As the laws of a number of countries do not allow their military personnel to accept such an offer, or make this permissible only in exceptional situations, the complete release on parole or promise is a rare occurrence. In practice, greater relevance may attach to the other possibility mentioned in Article 21, viz., that of partial release, that is, freedom of movement for a limited period and for a specific purpose. One may think here in particular of a prisoner's state of health, which may profit greatly by a temporary freedom to move outside the premises of the camp.

One obvious method by which the detention of prisoners of war may be terminated is not specifically mentioned in the Convention at all: it is their exchange as a result of an express agreement between parties to the conflict.

Agreements to this effect are often brought about and executed in the course of an armed conflict through the intermediary of the ICRC.

Other matters elaborated in the Third Convention concern the living conditions of the prisoners of war: their quarters, food and clothing; hygiene and medical care; religious, intellectual and physical activities, and so on and so forth. Article 49 permits the Detaining Power to 'utilise the labour of prisoners of war who are physically fit'; while Detaining Powers have often done this simply to benefit from additional work force, the article specifies that a policy of putting prisoners to work should serve in particular to maintain them 'in a good state of physical and mental health'. Officers, however, 'may in no circumstances be compelled to work', whereas non-commissioned officers 'shall only be required to do supervisory work'.

Article 50 specifies the types of work prisoners of war may be compelled to do. In drawing up the list the drafters of the Convention, although well aware that any form of labour of prisoners ultimately may be to the benefit of the Detaining Power, drew the line at activities that contribute all too directly to the war effort. Thus, while compelling prisoners of war to carry out 'public works and building operations which have no military character or purpose' is permitted, compelling them to carry out the same works having a military character or purpose is not.

Article 50 expressly excludes from the classes of permissible labour: work in the metallurgical, machine and chemical industries. This brings to mind the discussion in chapter III 3.4, of the notion of 'military objective' and its extension to certain industrial objects once long-distance aerial bombardment had become a real possibility. It should be pointed out here that the specific reference to these industries in Article 50 cannot lead to the conclusion that each and every metallurgical, machine or chemical plant constitutes a legitimate military objective: as stated above, in order for a given object to qualify as a military objective its elimination must 'in the circumstances contribute to "weakening the military forces of the enemy"' and thus represent a clear military advantage to the attacker'. No matter how vague, this yardstick is decidedly narrower than the one applied in Article 50 preventing prisoners of war from carrying out types of work that would bring them too close to making a direct contribution to the enemy war effort.

Another important point is that only volunteers may be employed on unhealthy or dangerous labour, such as the removal of mines (Article 52).

Prisoners of war are permitted to maintain relations with the exterior. Thus, Article 70 provides that they shall be enabled to inform their relatives of their capture, state of health, transfer to a hospital or to another camp, and so on. An annex to the Convention provides the model of a 'capture card' to be used for this purpose. Besides these capture cards, prisoners of war must also 'be allowed to send and receive letters and cards', although the Detaining Power is empowered to limit the numbers thereof if it finds this necessary (Article 71). Another right of prisoners of war, mentioned in Article 72, is 'to receive by post

or by any other means individual parcels or collective shipments' of all sorts (such as the well-known Red Cross parcels). Again, Article 78 recognises the right of prisoners of war to address requests and complaints regarding their conditions of captivity (e.g. the labour they are compelled to do) to the military authorities of the Detaining Power as well as to the representatives of the supervisory institutions provided in the Convention (see also hereafter, in chapter III 5.2).

According to Article 82 prisoners of war are 'subject to the laws, regulations and orders in force in the armed forces of the Detaining Power'; the provision adds that the latter Power 'shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders'. In doing so, the Detaining Power must respect the specific rules on 'penal and disciplinary sanctions', laid down in the Convention. Articles 82 et seq. provide detailed rules concerning such matters as what a competent authority is (the one who is competent to deal with comparable offences committed by members of the own armed forces), applicable procedures, permissible penalties and the execution of punishments, all of this with an eye to guaranteeing a fair trial and a just punishment.

The text of Article 82 does not preclude the Detaining Power from putting a prisoner of war on trial for an offence committed prior to capture, notably, for an act which may be qualified as a war crime. Indeed, its power in this respect is implicitly recognised in Article 85, which provides that a prisoner, when 'prosecuted under the laws of the Detaining Power' for such an act 'shall retain, even if convicted, the benefits of the present Convention'. The provision aims to prevent a repetition of the practice followed by the Allied Powers after the Second World War with respect to war criminals of the Axis Powers. The Soviet Union and other communist states have made a reservation to Article 85, to the effect that they do not consider themselves bound by the obligation 'to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment'. A number of other states have protested against this reservation, or, as in the case of the United States, rejected it. To this day, the former states have maintained their reservation, though.

#### 4.6 Fourth Convention

Parts II and III of the Fourth or Civilians Convention deal with the following different situations: Part II – General protection of populations against certain consequences of war; Part III (Status and treatment of protected persons), Section I – provisions common to the territories of the parties to the conflict and to occupied territories; Section II – aliens in the territory of a party to the conflict; Section III – occupied territories; Section IV – regulations for the

treatment of internees (which may be aliens in the territory of a party to the conflict or persons in occupied territory); and Section V – Information Bureaux and Central Agency. We subdivide the present section along the same lines.

#### 4.6a *General protection of populations against certain consequences of war*

The provisions of Part II cover ‘the whole of the populations of the countries in conflict’ without discrimination, and ‘are intended to alleviate the sufferings caused by war’ (Article 13). Yet they do not seek to provide general or complete protection. Rather, they offer specific forms of protection or assistance to specified categories of persons.

Provision is made, first, for the establishment of two types of protective zone: ‘hospital and safety zones and localities’ (Article 14) and ‘neutralised zones’ (Article 15). Hospital and safety zones and localities are meant ‘to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven’: categories of persons, in other words, who are not expected to make a material contribution to the war effort. For such ‘zones and localities’ to become effective requires their recognition by the adversary, if possible by the conclusion of an express agreement to that effect between the belligerents (cf. also the hospital zones and localities of the First Convention).

The drafters of Article 14 visualised the hospital and safety zones as fairly large areas, situated at a considerable distance from any battle area. To this day, the concept has remained a mere theoretical possibility: history provides no examples of the establishment of such zones, and the idea appears extremely difficult to realise in any densely populated and highly industrialised region – unfortunately precisely the regions whose populations might need this kind of protection.

The neutralised zones of Article 15, designed to be established in the regions of actual fighting, are ‘intended to shelter from the effects of war the following persons, without distinction: (a) wounded and sick combatants or non-combatants; (b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character’. Here too, an agreement between the belligerents is required and the article specifies that such agreements must be concluded in writing. Both the term ‘neutralised’ and the description of the persons admitted for shelter reflect the essentially undefended character of these zones. (See for subsequent developments, chapter IV 1.5j.)

Several examples of the establishment of such neutralised zones have occurred in practice, usually through the intermediary of the ICRC.

Groups of especially vulnerable people granted some form of protection in the remaining provisions of Part II include the wounded and sick, the infirm, aged persons, children and maternity cases. Duly recognised civilian hospitals with their staff, as well as land, sea or air transports of wounded and sick civilians, the



infirm or maternity cases are entitled to the respect and protection as provided in Conventions I and II to their military counterparts (Articles 18 et seq.). The protection of hospitals obviously cannot amount to absolute immunity even from incidental damage. Article 18, recognising this, provides that ‘In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives’.

The experience of the naval blockades of both World Wars lends great importance to Article 23, obliging each contracting party to ‘allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians’ of another contracting party, ‘even if the latter is its adversary’; and likewise of ‘all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases’. The party allowing free passage may require sufficient guarantees and measures of supervision to ensure that the consignments will go to these categories of civilians. Note that Article 23 does not encompass the whole of the population: the contracting states in 1949 were not prepared to extend the protection against starvation as a result of a blockade beyond the categories of especially vulnerable people enumerated in the article.

Equally important, in view of the experiences of numerous armed conflicts, are the provisions of Part II relating to measures for the protection of children under fifteen ‘who are orphaned or are separated from their families as a result of the war’ (Article 24); the exchange of family news (Article 25), and the restoration of contact between members of dispersed families (Article 26). An important role is attributed in this regard to the Central Information Agency for protected persons, whose creation ‘in a neutral country’ is provided for in Article 140. The article stipulates that the Agency may be the same as the one provided for in the Third Convention. In practice, the Central Tracing Agency operated in Geneva by the ICRC performs its functions for civilians and combatants alike. The national Red Cross and Red Crescent societies likewise contribute greatly to the implementation of these articles.

#### *4.6b Provisions common to the territory of parties to the conflict and to occupied territory*

Part III of the Fourth Convention deals with protected persons in a strict sense: i.e., those civilians who find themselves ‘in the hands of a Party to the conflict or Occupying Power of which they are not nationals’. Thus Article 4, which goes on to exclude from the category of protected persons ‘nationals of a State which is not bound by the Convention’, nationals of a neutral state who find themselves in the territory of a belligerent state and nationals of a co-belligerent state, the latter two as long as their state ‘has normal diplomatic representation in the State in whose hands they are’. (See also the discussion in chapter III 4.1 on the categories of civilians protected by the Fourth Convention.)

The common provisions of Section I deal with respect of fundamental rights of the human person, and of women in particular (specifically prohibiting ‘rape, enforced prostitution, or any form of indecent assault’) (Articles 27), 28); the responsibility of a party to the conflict for the treatment of protected persons in its hands (Article 29); and the right of protected persons to apply to supervisory bodies and relief organisations (Article 30). Prohibited forms of ill-treatment include ‘physical or moral coercion ... in particular to obtain information’ (Article 31), as well as ‘any measure of such a character as to cause the physical suffering or extermination of protected persons’. Measures in the latter category include notably ‘murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person’, and ‘any other measures of brutality whether applied by civilian or military agents’ (Article 32).

According to Article 33 no one ‘may be punished for an offence he or she has not personally committed’. The same article also prohibits collective penalties as well as ‘reprisals against protected persons and their property’ and any other ‘measures of intimidation or terrorism’. Article 34, finally, making short work of the notorious problem of the taking and eventual killing of hostages, simply and radically prohibits any ‘taking of hostages’.

#### 4.6c *Aliens in the territory of a party to the conflict*

Article 35 lays down the right of those aliens who are protected persons (that is, first of all, enemy nationals) ‘to leave the territory ... unless their departure is contrary to the national interests of the State’. If permission is refused they are ‘entitled to have such refusal reconsidered by an appropriate court or administrative board’.

Protected persons who do not leave the territory retain a number of fundamental rights (e.g.: to receive relief and medical attention, to practice their religion, and to move from ‘an area particularly exposed to the dangers of war ... to the same extent as the nationals of the state concerned’; Article 38). They must be granted the opportunity to support themselves; alternatively, the state is obliged to ensure their support and that of their dependants (Article 39). Enemy nationals ‘may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations’ (Article 40; it should be noted that the article does not exclude all work connected with the war effort).

If the security of a party to the conflict makes such a measure absolutely necessary, it may intern protected persons in its territory or place them in assigned residence. On the other hand, a protected person may voluntarily demand internment (for instance, to seek protection from a hostile environment) (Articles 41, 42).

The above system of protection of enemy nationals and other protected persons in the territory of a party to the conflict is significantly weakened by Article 5,

which provides that if the state concerned 'is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State'. One right that immediately comes to mind is that of communication (with one's family, a lawyer, etc.).

The threefold repetition of 'individual' in the quoted text emphasises the point that Article 5 may never be applied as a collective measure. For example, this means that collective internment of persons of a particular nationality is prohibited and instead it must be shown that each person interned is suspected of activities hostile to the security of the state. The article specifies moreover that any person submitted to this special regime must 'nevertheless be treated with humanity'; that in case of trial must be given a 'fair and regular trial' in conformity with the rules laid down in the Convention; and that the special regime must come to an end 'at the earliest date consistent with the security of the State'.

#### 4.6d *Occupied territory*

Apart from Part III, Section III, of the Fourth Convention, rules relating to occupied territory are also found in the Hague Regulations on land warfare. Article 42 of the Regulations states the principle that for a territory to be 'considered occupied' and for the relevant rules therefore to be applicable, the territory must be 'actually placed under the authority of the hostile army'. Clarifying the matter further, paragraph 2 adds that 'The occupation extends only to the territory where such authority has been established and can be exercised'. Article 43 draws from this situation of fact a twofold obligation: on the one hand, the Occupying Power 'shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety'; and on the other, in doing so it must respect, 'unless absolutely prevented, the laws in force in the country'.

Furthermore, the Regulations contain provisions on such diverse matters as the collection of taxes, requisition of property and services, and the fate of movable and immovable property belonging to the state. We pass over these specific provisions in silence. A general remark is that in modern society the degree to which state organs influence, and even participate directly in, economic and social affairs is immeasurably greater than in the days the Regulations were written. An occupying power cannot fail to find itself confronted with the consequences of these deep societal changes and the increased role of the state.

The provisions of the Fourth Convention, laid down at a time when these changes were well on the way, reflect this new trend. Section III opens with an important statement of principle: it is forbidden to deprive protected persons in occupied territory, 'in any case or in any manner whatsoever', of the benefits of the Convention, whether by a change in the institutions of the territory; an agreement between the local authorities and the occupying power; or complete or partial annexation of the territory (Article 47).

Measures specifically prohibited ‘regardless of their motive’ include forcible transfers, whether of individual persons or groups, as well as deportations from the occupied territory to any other country. However, the evacuation of a given area is permissible ‘if the security of the population or imperative military reasons so demand’ (Article 49).

Article 51 provides that protected persons over the age of 18 may be compelled to work but only in the occupied territory where they are located, and ‘only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country’. The construction of fortifications, artillery emplacements etc. does not fall under this permissible labour, as not being ‘necessary for the needs of the army of occupation’ but, rather, as serving for (future) military operations of the Occupying Power.

In principle, the institutions and public officials in the territory continue to function as before. As they owe the Occupying Power no duty of allegiance, each new regulation or instruction issued by the occupying authorities may confront the aforesaid public officials with the question whether they can go on co-operating in the execution of these orders. A question that may become very awkward, for instance, for the police force. Article 54 of the Convention accordingly recognises the right of public officials and judges to ‘abstain from fulfilling their functions for reasons of conscience’. In such an event, the Occupying Power is forbidden from altering their status, or from applying sanctions or taking measures of coercion or discrimination against them: at most, it may remove them from their posts.

The Occupying Power must devote special care to the well-being of children (Article 50). It shall ‘to the fullest extent of the means available to it’ ensure the food and medical supplies of the population (Article 55), as well as public health and hygiene in the territory (Article 56). Article 57 limits the requisitioning of civilian hospitals by the occupant to ‘cases of urgent necessity for the care of military wounded and sick’, and then only temporarily and ‘on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation’. Also, the occupant ‘shall permit ministers of religion to give spiritual assistance to the members of their religious communities’ (Article 58).

Articles 59-61 deal with collective relief actions that may be undertaken by other states or ‘impartial humanitarian organisations such as the International Committee of the Red Cross’ for the benefit of an inadequately supplied population in occupied territory. The Occupying Power is obliged to agree to such schemes and to facilitate them, under the conditions set out in the cited articles. Besides collective relief actions, protected persons in occupied territory are also permitted to receive individual relief consignments: Article 62 makes this right only ‘subject to imperative reasons of security’. In the same vein, the Occupying Power is obliged, subject to ‘temporary and exceptional measures imposed for urgent reasons of security’, to permit national Red Cross or Red Crescent societies ‘to pursue their activities in accordance with Red

Cross principles, as defined by the International Red Cross Conferences'. Other relief societies, as well as existing civil defence organisations, must also be permitted to carry on their work under the same conditions (Article 63).

One important aspect of the obligation of an Occupying Power to 'take all the measures in its power to restore, and ensure, as far as possible, public order and safety' lies in its relation to the penal laws which were in force in the territory prior to the occupation. Article 64 states the principle that these laws 'shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention' (for instance, when a law renders every form of work for the Occupying Power an offence). Similarly, the existing tribunals continue in principle 'to function in respect of all offences covered by the said laws'.

At the same time, Article 64 also recognises the power of the occupant to enact its own regulations. These must be 'essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them'. Any penal provisions so enacted must be properly 'published and brought to the knowledge of the inhabitants in their own language', and cannot have retroactive effect (Article 65). Obviously, acts in contravention of such provisions of laws adopted by the Occupying Power will have to be dealt with by the latter's courts; Article 66 provides that these must be 'properly constituted, non-political military courts'; the courts of first instance must 'sit in the occupied territory', and courts of appeal 'shall preferably sit' in the same territory.

Articles 67 et seq. lay down the standards these courts must meet in their administration of criminal justice. Besides rules of procedure, particular importance attaches to the rules relating to permissible punishments. Article 68 provides that internment or simple imprisonment are the heaviest penalties, and the only ones involving a deprivation of liberty which the courts may impose on a protected person who commits an offence which, while 'solely intended to harm the Occupying Power', is not very grave in that it 'does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them'.

The same article permits the Occupying Power to impose the death penalty solely for particularly grave crimes, viz., espionage, 'serious acts of sabotage against the military installations of the Occupying Power' and 'intentional offences which have caused the death of one or more persons', subject furthermore to the condition 'that such offences were punishable by death under the law of the occupied territory in force before the occupation began'. In order for a death penalty to be actually pronounced, the offender must not have been under the age of 18 at the time of the offence, and 'the attention of the court [must have]

been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance’.

The Section on occupied territory closes with some provisions on the safety measures an Occupying Power may consider necessary, ‘for imperative reasons of security’, with regard to protected persons. Article 78 limits the occupier’s powers in this regard: ‘it may, at the most, subject them to assigned residence or to internment’. Such a decision is moreover subject to appeal and, if upheld, to periodical review.

Here too, the effect of the above rules on permissible forms of punishment and safety measures is affected to no slight degree by Article 5. Paragraph 2 thereof provides that ‘Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power’, he may be denied the ‘rights of communication under the present Convention’ if this is considered necessary on grounds of ‘absolute military security’. Even then, he must be treated with humanity and, if put to trial, must be given a ‘fair and regular trial’ in conformity with the rules laid down in the Convention; and the special regime must come to an end ‘at the earliest date consistent with the security of the State’ (Article 5(3)).

With respect to armed resistance in occupied territory, it was noted earlier that resistance fighters qualify as ‘protected persons’ only when it is obvious, or is found by a competent tribunal, that they do not meet the conditions for prisoner-of-war status spelled out in the Third Convention. Although then entitled to treatment as civilians, they are particularly liable to being subjected to the special security regime of Article 5 and deprived of their rights of communication under the Convention. Moreover, they may be punished for any acts of armed resistance they carried out before capture. At the same time, like any other accused, in any criminal proceedings against them they are entitled to such protection as is provided by the rules guaranteeing a fair trial.

#### 4.6e *Internment*

Section IV contains ‘Regulations for the Treatment of Internees’, whether within the territory of a party to the conflict or in occupied territory (Articles 79 et seq.). It may suffice to note here that the regime laid down in these articles is very similar to the regime for the internment of prisoners of war, laid down in the Third Convention.

#### 4.6f *Information bureaux and Tracing Agency*

Section V of Part III deals with the establishment and functioning of national information bureaux and a Central Information Agency. These institutions were mentioned before. It is worth repeating that the Central Agency, provided for in Article 140, has become the Central Tracing Agency, organised and maintained by the ICRC. The Agency functions both for civilians and prisoners of war, as far as the latter category is concerned in accordance with Article 123 of the Third Convention.

#### 4.7 Common Article 3

Article 3 common to the Conventions of 1949, as the only article especially written for non-international armed conflict, has been described either as a ‘mini-convention’ or as a ‘convention within the conventions’. It provides rules which parties to an internal armed conflict are ‘bound to apply, as a minimum’. Given that in present times the majority of armed conflicts fall within this category, the article has assumed an importance the drafters could hardly have foreseen.

The article presents a peculiar problem in that armed opposition groups are not (and indeed, formally cannot become) parties to the Conventions. They may use this as an argument to deny any obligation to apply the article. A strong argument to encourage armed opposition groups to adopt a more positive attitude is that application of Article 3 is likely to entail an improvement of their ‘image’, in the country and in the eyes of the outside world as well, and thus may work to their advantage.

Another aspect of the same problem is that governments often do not wish to recognise insurgents as an official ‘party to the conflict’, or even as a separate entity. They may therefore wish to avoid any statement officially acknowledging that Article 3 is applicable, for fear that this would be read as a recognition of the insurgents as an adverse party. In an attempt to meet this objection, Article 3(4) stipulates that application of its provisions ‘shall not affect the legal status of the Parties to the conflict’. Evidently, this form of words cannot prevent the potential effect the application of the article may have, or be perceived to have, on the *political* status of the insurgents.

A government faced with this dilemma might realise that even though a refusal on its part to recognise the application of Article 3 may be one possible device for withholding political status from the insurgents, such a refusal in the face of obvious facts may at the same time do serious damage to its own ‘image’, again, both in the eyes of its own population and in those of the outside world. For, as we shall see, the rules contained in Article 3 are minimum standards in the most literal sense of the term; standards, in other words, no respectable government could disregard for any length of time without losing its aura of respectability.

It should be noted that Article 3 is applicable in *all* conflicts not of an international character. These include not only conflicts which see the government opposed to an armed opposition group but also conflicts between two armed opposition groups to which the government is not a party. (For a discussion of the more limited scope of application of the Second Additional Protocol see chapter IV 2.1.)

The article prescribes the humane treatment, without discrimination, of all those who take no active part in the hostilities, including members of armed forces (regular or otherwise) who ‘have laid down their arms’ or are *hors de combat* as a consequence of ‘sickness, wounds, detention, or any other cause’. With respect to all these persons:

the following acts are and shall remain prohibited at any time and in any place whatsoever:

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

Note that the terms ‘respect’ and ‘protection’ do not figure in this text: the provision of humane treatment is the only requirement. Furthermore, there is no reference to prisoner-of-war status, no matter for whom; nor is punishment merely for participation in hostilities excluded, the only conditions being those of a fair trial (which, of course, may be the difference between life and death).

As regards humanitarian assistance, Article 3 requires no more than that ‘the wounded and sick shall be collected and cared for’. Matters such as registration, information, or the status of medical personnel, hospitals and ambulances, are not mentioned at all.

In the penultimate paragraph, the parties to the conflict are encouraged ‘to bring into force, by means of special agreements, all or part of the other provisions’ of the Conventions. The parties may actually be prepared to do this when they have a shared interest, for instance, in organising an exchange of prisoners who are a burden on their hands. The conclusion of such agreements will often come about through the intermediary of the ICRC.

### III 5 IMPLEMENTATION AND ENFORCEMENT

This section discusses the instruments and mechanisms for implementation and enforcement that existed under the pre-1977 rules for the promotion of respect for humanitarian law: instruction and education (chapter III 5.1), the activities of Protecting Powers and humanitarian agencies (chapter III 5.2), and collective and individual responsibility for violations (chapter III 5.3 and 5.4).

#### 5.1 Instruction and education

Of all the methods for improving implementation of humanitarian law, instruction and education are probably the most promising ones. In effect, all other methods, unless combined with instruction and education, are doomed to fail. The law’s actual implementation in the event of armed conflict depends on a multitude of people at all levels of society: how, then, could one ever expect that its rules will be respected and, for instance, a soldier will recognise as unlawful an order wantonly to kill prisoners of war or unarmed civilians, if



adequate information has not been disseminated in advance and on the widest possible scale?

This line of thought was reflected as long ago as 1899 in the Hague Convention on land warfare. Article 1 provides that the contracting states ‘shall issue instructions to their armed land forces’ in conformity with the annexed Regulations. The point is brought out with even greater force in the Geneva Conventions of 1949. Articles 47, 48, 127 and 144 of the four Conventions, respectively, require the contracting states, ‘in time of peace as in time of war’, to disseminate the text of the Conventions ‘as widely as possible in their respective countries’, and ‘in particular, to include the study thereof in their programmes of military and, if possible, civil instruction’, so that the principles of the law embodied in the Conventions may become known to the entire population.

A similar obligation is found in Article 25 of the 1954 Hague Convention on cultural property.

With respect to these explicit obligations, many states parties to the various Conventions fall far short of expectations. While instruction to the armed forces may not always be wholly lacking, education of the civilian population leaves just about everything to be desired. In this deplorable situation, the ICRC, the International Federation of Red Cross and Red Crescent Societies and national societies spend considerable effort to fill the gap. Yet this activity ‘by substitution’ cannot absolve the authorities of their treaty obligations, nor indeed of their responsibility for the consequences of non-performance on this score.

## 5.2 Protecting Powers and other humanitarian agencies

International supervision as a means to improve the implementation of humanitarian law developed in the pre-1949 era mainly within the framework of the law of Geneva. In normal times, states were accustomed to protect the rights of their nationals in foreign countries. When relations between states A and B deteriorated to the point where diplomatic relations were severed, it was customary for state A to ask a third state C to protect its interests and those of its nationals in respect of – and with the agreement of – state B. If an armed conflict then broke out between A and B, it was almost natural for C to continue to protect the interests of A’s nationals – who in their relations to B suddenly found themselves in the position of ‘enemy nationals’, ‘internees’ or ‘prisoners of war’. Over the years this obvious possibility developed into a customary practice. It was subsequently enshrined in the Geneva Conventions, first of 1929 and then of 1949, as the system of Protecting Powers. Although it was last widely applied during the Second World War (with the neutral states Sweden and Switzerland acting as Protecting Powers for numerous parties on both sides of the conflict), we set out its main points here nonetheless (see also chapter IV 3.2 for the attempts in Protocol I to overcome this impasse).

The 1949 Geneva Conventions 'shall be applied with the co-operation and under the scrutiny of the Protecting Power whose duty it is to safeguard the interests of the Parties to the conflict' (Article 8 of Conventions I-III, Article 9 of Convention IV). For this purpose, the Protecting Powers may use their diplomatic or consular staff, or they may appoint special delegates (requiring the approval of the party to the conflict with which the delegates are to carry out their duties). The parties to the conflict must 'facilitate to the greatest extent possible the task' of these representatives or delegates, who are in turn obliged not to exceed their mission and, in particular, always must 'take account of the imperative necessities of security of the state wherein they carry out their duties'.

The 'co-operation and scrutiny' of Protecting Powers in practice assumed the character of management of interests and mediation. When delegates became aware, whether from personal observations or complaints by the victims, that prisoners of war were suffering from bad housing conditions or a lack of food, were compelled to carry out forbidden types of work, were not allowed to send and receive mail, or were maltreated in any other manner, the Protecting Powers sought an improvement of the situation. On the other hand, it was never the function of Protecting Powers to act as a sort of public prosecutors, investigating and exposing violations of the Conventions.

Article 9 of Conventions I-III and Article 10 of Convention IV emphasise that the provisions of the Conventions 'constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organisation may, subject to the consent of the party to the conflict concerned, undertake for the protection of [protected persons] and for their relief'. The express reference to the ICRC amounts to an official recognition of its customary right of initiative in matters of humanitarian protection and assistance.

Article 10 of Conventions I-III and Article 11 of Convention IV address the (now frequent) situation where no Protecting Powers are functioning, for instance, because parties to the conflict do not agree on the appointment of such Powers. Paragraph 1 suggests that contracting parties may 'agree to entrust to an organisation which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers'. This has thus far remained a theoretical possibility.

When paragraph 1 remains without result, paragraph 2 obliges the Detaining Power to 'request a neutral State, or such an organisation, to undertake the functions' of a Protecting Power designated by the parties. While this does not require the agreement of the adverse party, it may not be easy to find a neutral state or impartial organisation prepared to accept, without the consent of the adverse party, the functions of a Protecting Power.

As a last resort, paragraph 3 provides that if none of the above leads to protection being arranged, the Detaining Power 'shall request or shall accept, subject to the provisions of this article, the offer of the services of a humanitarian organisation, such as the International Committee of the Red Cross, to assume the humanitarian

functions assumed by Protecting Powers' under the Conventions. Even this provision does not make the system watertight: the Detaining Power may simply disregard its obligation to request the services of the ICRC or any other humanitarian organisation, and the ICRC can hardly be expected to 'offer its services' without first having ascertained that these are indeed welcome.

The above system of outside supervision applies only to the law of Geneva (with the exception of common Article 3). Delegates performing tasks of supervision must at all times take account of the 'imperative necessities of security of the state wherein they carry out their duties', and they cannot very well expect to receive permission for visits to the fighting forces engaged in actual combat. As regards the law of The Hague, a similar system of supervision did not develop in practice, and the Conventions of The Hague of 1899 and 1907 are silent on the matter. Yet, the 1954 Hague Convention on the protection of cultural property contains a system, comparable to that of the Geneva Conventions, of co-operation and assistance in the application of the Convention and the annexed Regulations. The system includes the (theoretical) co-operation of Protecting Powers and assigns a (practically more important) role to UNESCO.

While all this sounds (and is) very disappointing, it should be noted with gratitude that in practice, the ICRC has ever since its creation in 1863 been performing supervisory functions in innumerable cases, including internal armed conflicts, and to the benefit of millions of prisoners of war, internees and other protected persons, sometimes side by side with the delegates of Protecting Powers and, more often, in their absence. Recognising this practice, Article 126 of the Third Convention and Article 143 of the Fourth Convention accord the delegates of the ICRC the same prerogatives as those accorded delegates of Protecting Powers for the purpose of visiting prisoners of war, civilian detainees and internees. These visits, which represent an important aspect of the protective role of the ICRC, have the purely humanitarian purpose of preserving the physical and moral integrity of detainees, preventing any abuse, and ensuring that detainees enjoy the decent material and psychological conditions of detention to which they are entitled by law.

As regards internal armed conflict in particular, common Article 3 offers some help by providing in paragraph 2 that 'An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict'. Although not formulated as a formal mandate, it serves to preclude any accusation that by offering its services, the ICRC is interfering in the domestic affairs of the state involved. Its functioning as an incontestably impartial and humanitarian organisation finds further support by the incorporation of its mandate in the Statutes of the International Red Cross and Red Crescent Movement, recognised by the states parties to the Conventions.

In the course of its activities the ICRC often comes across instances of serious violations of the Conventions, and exceptionally, when confidential dialogue with the party concerned has not brought about the desired results, the ICRC may have recourse to a public denunciation, in general terms, of the practices involved. The ICRC does not, however, include the tracing and exposure of

those individually responsible for such violations among its tasks, as irreconcilable with its humanitarian mandate of protection and assistance. (The matter of criminal repression of violations of the law of armed conflict is broached in chapter III 5.5, and as far as recent developments are concerned, in chapters IV 3.4 and VI 1).

### 5.3 Collective responsibility

Violations of international humanitarian law can give rise to the most diverse reactions, both against the person or persons who are believed to be individually responsible for the acts, as well as against the collectivity (such as a state or other party to the conflict, or the inhabitants of a village) these persons are assumed to belong to or to represent on other grounds. The reactions may be instant or delayed; they may come from individual persons or from collective entities (such as the adverse party, or an international body like the Security Council); and, most important: they may be lawful or unlawful.

Although it is not the purpose of this book to instruct the reader in unlawful conduct, it has appeared necessary here to include even the unlawful reactions, the better to impress upon the reader the need for humanitarian law not to be violated in the first place.

Among the entities apt to be held collectively responsible for violations of international humanitarian law, the state party to the conflict holds pride of place. Its responsibility 'for all acts committed by persons forming part of its armed forces' was recognised as long ago as 1907, in Article 3 of the Hague Convention on land warfare. This specific responsibility of the state is part of its general responsibility for internationally unlawful acts that for one reason or another can be attributed to it. That violations of humanitarian law committed by its armed forces can be attributed to the state should not surprise. Its responsibility extends beyond that, however, and also encompasses violations of humanitarian law committed by other state agents (the police, the wards of a prisoners-of-war camp) and even by civilians.

Apart from states, other entities have acquired increasing importance as parties to armed conflicts. In the post-World War Two era this was the case with the 'wars of national liberation' of the decolonisation period, with 'peoples' fighting for their right of self-determination. As we shall see in chapter IV 1.2, these wars would in due time be recognised as international armed conflicts, and the legal position of the 'liberation fighters' adjusted accordingly.

It was also the case with the increasing number of internal armed conflicts that came to characterise the current period, with organised but non-state armed groups fighting against other similar groups or against the armed forces of the state. Their position remained governed by common Article 3 of the 1949 Geneva Conventions, which provides that 'each Party to the conflict shall be bound to apply, as a minimum,' the provisions that followed, without enabling the non-state parties to formally become party to the Conventions. This does not however prevent these entities from being of necessity bound by the rules

embodied in these instruments and responsible for the conduct of their members, nor indeed from being held so responsible by opposing parties or by the outside world.

While therefore the responsibility of armed opposition groups for violations of international humanitarian law follows logically from the fact that they must be regarded as bound by the law, the practical implementation of this accountability today is problematic and poses problems of a different order than those connected with the responsibility of the state. This is principally because the existing legal structures for the implementation of such accountability are those of traditional international law and therefore state-centred.

In the opening paragraph of this section, reference was also made to the inhabitants of a village as a collectivity that might be held responsible for violations committed in or close to it. The difference with the earlier types of collective entity is obvious: while those other entities were all parties to the conflict, the village normally speaking is not. We shall outline this difference, and the consequences thereof in law, further down in this section.

### 5.3a *Reciprocity*

The first and most primitive manifestation of the idea of collective responsibility of a state or other party to the conflict arises when the adverse party, confronted with the violation of one or more rules, considers itself no longer bound to respect the rule or rules in question. Such a reaction amounts to a rigorous application of the principle of negative reciprocity. For the 1949 Geneva Conventions the operation of this crude principle is excluded by the provision in common Article 1 that the contracting states are bound to respect the Conventions ‘in all circumstances’.

While it may be questioned whether this provision could be a hundred per cent effective even in the context of the law of Geneva, the situation is clearly different in respect of the pre-1977 law of The Hague. The treaties concerned do not expressly exclude negative reciprocity, and it may be doubted whether an unconditional exclusion would be always appropriate here. Doubt appears particularly justified in a situation where the violation of specific rules may give the guilty party a clear military advantage. One may think here of rules prohibiting or restricting the use of militarily significant weapons. As noted earlier, the ban on use of chemical weapons was long regarded as being subject to reciprocity. This probably was in accordance with their military significance: it seems indeed hard to accept that a belligerent state should simply resign itself to the adverse effects it would be made to suffer from its opponent’s use of chemical weapons when it had the capacity to retaliate in kind and thus to restore the military balance.

Reciprocity may also represent a positive factor, though, when respect of the law by one party entails respect by the other. This positive aspect may also be demonstrated with the example of chemical weapons: while both sides in the

Second World War possessed chemical weapons, neither side actually started using them.

In the Geneva Conventions, a form of positive reciprocity has been given a prominent place in common Article 2(3). This envisions the situation where some parties to the conflict are parties to the Conventions, while another party to the conflict is not. The paragraph provides that 'if the latter accepts and applies the provisions' of the Conventions, the former parties shall be bound to apply the Conventions even in relation to that party.

### 5.3b *Reprisals*

Belligerent reprisals represent a second possible consequence of a party's violation of its obligations under international humanitarian law. Reprisals are acts which intentionally violate one or more rules of the law of armed conflict, resorted to by a party to the conflict in reaction to conduct on the part of the adverse party that appears to constitute a policy of violation of the same or other rules of that body of law, after all other means of making the other side respect the law have failed (requirement of 'subsidiarity'), and aiming to induce the authorities of that party to discontinue the policy. A reprisal must not inflict damage disproportionate to that done by the illegal act that prompted it, and must be terminated as soon as the adverse party discontinues the incriminated policy. Another restriction, advocated by some experts before the Second World War, was that the reprisal must not amount to an inhumane act.

Under the customary law of armed conflict of that period, belligerent reprisals belonged to states' arsenal of permissible measures of law enforcement. They often tended to be applied in such a manner as to have an escalating effect, however, and they could usually be expected to affect persons other than the real culprits of the initial violation. For these reasons, the right of recourse to belligerent reprisals was increasingly restricted. Thus, as mentioned before, reprisals against protected persons and property are expressly prohibited in all four Geneva Conventions of 1949 and in the Hague Convention of 1954 on cultural property.

On the other hand, no such prohibition is found in the Hague Conventions of 1899 and 1907, nor in the 1925 Geneva Gas Protocol. This led to uncertainty, for instance, as to whether aerial bombardment of a civilian population could be justified as a reprisal; what, for instance, of the inhumane character of such a measure? Strangely enough, some experts who defended this element as a requirement for a valid reprisal, nonetheless held that reprisals against a civilian population were admissible.

In the Second World War, both sides on the European theatre carried out large-scale bombardments against a variety of built-up areas in enemy territory, sometimes accidentally or even intentionally selecting areas without any military objectives. They generally attempted to justify the policy as measures of reprisal, without taking too much trouble to claim compliance with the requirements of subsidiarity and proportionality. As a somewhat belated

reaction to this practice, the UN General Assembly in 1970 adopted Resolution 2675 (XXV) ‘affirming’ as one of the ‘basic principles for the protection of civilian populations in armed conflicts’, that ‘Civilian populations, or individual members thereof, should not be the object of reprisals’. Taken by itself, this affirmation was not enough to effectively remove the existing uncertainty as to the law. (See further hereafter, chapter IV 1.5h.)

### 5.3c Compensation

A third aspect of collective responsibility is the risk a party to the conflict runs of having to pay compensation for the damage caused by the conduct for which it is held responsible. In 1907, the duty for states to pay such compensation was expressly included in the Hague Convention on land warfare. According to Article 3 (which, as mentioned in the introduction of this chapter, holds the state responsible for ‘all acts committed by persons forming part of its armed forces’), a belligerent party which is responsible for a violation of the rules laid down in the Regulations ‘shall, if the case demands, be liable to pay compensation’.

In a similar vein, Article 12 of Convention III and Article 29 of Convention IV mention the responsibility of the state for the treatment given persons protected under these Conventions, ‘irrespective of the individual responsibilities that may exist’; they do not however refer to the possible financial implications of this form of state responsibility (but see below in relation to Articles 51, 52, 131 and 148 of Conventions I-IV, respectively).

The idea of a duty of states to pay compensation for violations of the law of armed conflict often leads to mixed results at best. One method for the payment of compensation is the lump-sum agreement, usually as part of a peace treaty, burdening the vanquished state with the obligation to pay the victor state an amount of money, ostensibly by way of reparation for the financial losses suffered on the side of the latter party as a result of the war. The amount is bound to remain far below the actual losses suffered on that side. More important, it is not likely to be determined by, nor even brought in direct ratio to, the damage wrongfully inflicted by violating the law of armed conflict – nor is it likely that any attempt would be made to make the victorious party pay compensation for the damage *it* caused by violations of the law.

Lump-sum agreements usually contain a clause waiving any further claims, whether by the victorious state or its nationals, against the vanquished state for damages arising out of the war. The effect of this is uncertain. Individuals cannot normally bring on the international plane (say, before the International Court of Justice) a claim against a state of which they are not nationals. They may, on the other hand, have access to the domestic courts of the responsible state and attempt to seek compensation for violations that they have suffered. Cases of this sort have been brought before the Japanese courts by persons who as prisoners of war, civilian detainees or inhabitants of occupied territory had suffered damages at the hands of the Japanese armed forces in the course of the Second World War. For a discussion of these cases, see further in chapter VI 3.2.

The aftermath of the Second World War in the Far East has given rise to another peculiar situation, this time concerning damage incurred by nationals of Japan, the vanquished state, through acts of the United States. The peace treaty between these countries contains a clause to the effect that Japan would assume responsibility for any claims by its nationals against the US. The clause led to a remarkable case before the Tokyo District Court, with Japanese claimants arguing that the use by the US of atomic bombs against Hiroshima and Nagasaki had constituted a wrongful act; that by concluding the peace treaty Japan had waived its nationals' right to seek compensation from the US in respect of such wrongful acts, and that, accordingly, the Japanese Government was liable to pay damages (the *Shimoda* case). The court, while holding that the use of the atomic bombs had indeed been unlawful, nevertheless found a way to avoid awarding the claimed damages against the Japanese Government by holding that individuals could only be considered the subjects of rights under international law in situations where rights had been expressly granted to them like, for example, in mixed arbitral tribunals, but that, ordinarily there was no way open to them to seek redress for a violation of international law before a domestic court.

The *Shimoda* case demonstrates the odd consequences that may arise from such a shifting of liability to pay compensation on to the vanquished party. The 1949 Geneva Conventions exclude this possibility, at any rate as far as grave breaches are concerned. The relevant articles provide that 'No High Contracting Power shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [such] breaches' (Articles 51, 52, 131 and 148 of Conventions I-IV, respectively). It may be doubted, though, that these provisions will play any significant role in the solution of the various problems attending implementation of the rules on state responsibility for violations on its obligations under international humanitarian law.

It may be mentioned that on occasions, non-state parties to internal armed conflicts have not only recognised responsibility for particular violations committed by members of their armed group but have paid compensation for the injury and damage resulting from the acts.

### 5.3d *External pressure*

One conclusion from the foregoing is that the main relevance of the consequences of 'collective' responsibility may lie in their deterrent effect. The realisation that any infringement of the law of armed conflict gives rise to the responsibility of the party concerned (and, hence, may give rise to an immediate response based on the principle of negative reciprocity or to belligerent reprisals, or, in the long run, may result in that party having to pay damages after the war) may provide the authorities with an additional incentive to respect, and ensure respect for, this body of law. Furthermore, external pressure may significantly reinforce this effect.



Such external pressure may come from public opinion, inspired by reports and comments of non-governmental organisations such as Human Rights Watch and Amnesty International, and the media. It may also take the form of (discrete or public) representations by third parties: governments, or regional or universal intergovernmental organisations and the ICRC. After all, as members of the international community of states and in many instances as parties to the Convention that is being infringed, it is their shared interest to see the law respected. Article 1 common to the 1949 Geneva Conventions gives expression to this idea when it states that all contracting states ‘undertake to respect and to ensure respect’ for the Conventions ‘in all circumstances’. In the words of the International Court of Justice, ‘such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression’. (Judgment in the *Nicaragua v. United States of America* case of 1986.)

### 5.3e *Collective punishment*

As noted in the introduction to this chapter, the phrase ‘collective responsibility’ is occasionally used in an entirely different meaning as well, reflecting the inclination of parties to hold a community (a village, a town) collectively responsible for acts committed by one or more individuals in their midst. This type of ‘responsibility’ has frequently resulted in vicious acts of retaliation against the inhabitants of such villages or towns, for instance, in reaction to acts of armed resistance against an Occupying Power. In present-day internal armed conflicts, a similar inclination may often be noticed, with local communities being subjected to harsh measures on the suspicion that guerrilla-type activities have been carried out by members of the population.

For international armed conflicts, Article 33 of the Fourth Convention expressly prohibits this form of repression: ‘No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.’ As regards situations of internal armed conflict, the only specifically relevant rule is the provision in common Article 3 which prohibits the taking of hostages (and, *a fortiori*, the wanton execution of such persons). For the rest, the general principle of common Article 3 requiring humane treatment for all persons taking no active part in the hostilities, and the specific prohibitions of ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’ and of ‘outrages upon personal dignity, in particular humiliating and degrading treatment’, provide the remaining solid ground to hold retaliatory acts of the type dealt with here, not only utterly despicable, but unlawful.

### 5.4 *Individual responsibility*

As with collective responsibility for violations of the law of armed conflict, the notion of individual liability for war crimes is of fluctuating import. As far as practical application goes, its major achievement for a long time remained the

massive (though obviously one-sided) post-World War Two prosecution and punishment of the war criminals of the Axis Powers.

The Hague Conventions of 1899 and 1907 on land warfare are silent on the matter of individual criminal liability for violations of the annexed Regulations. This is not to say that such individual liability would have been against the intention of the contracting states: on the contrary, the competence of states to punish their nationals or those of the enemy for the war crimes they might have committed had long since 1907 developed into an accepted part of customary law, so much so that it was not felt to need express confirmation by treaty. Obviously, a *competence* to deal with particular crimes is an entirely different matter than an *obligation* to do so. As regards war crimes, there certainly existed no general obligation of this order at the time of the Hague Peace Conferences, and neither was it created by the Conventions on land warfare of 1899 and 1907.

Yet, the idea was not unknown: a specific duty on states to take legislative measures for the repression of certain infractions was laid down for the first time in the Geneva Wounded and Sick Convention of 1906, and, the next year, at the Second Hague Peace Conference, a similar provision was incorporated in the Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. In 1929, the idea was developed somewhat further in the Geneva Wounded and Sick Convention of that year. On the other hand, the Prisoners of War Convention adopted by the same Conference remained silent on the matter of individual criminal liability.

Finally, in 1949, elaborate provisions on penal sanctions and the prosecution of offenders were introduced in all four Geneva Conventions. The provisions distinguish between two levels of violation: 'grave breaches' and other, presumably less grave violations.

As provided by Articles 49, 50, 129 and 146 of Conventions, respectively, each contracting state must ensure that its legislation provides 'effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches' defined in the Conventions. It is also 'under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches', and it must 'bring such persons, regardless of their nationality, before its own courts', unless it prefers to 'hand [them] over for trial' to another contracting state which has made out a *prima facie* case. The reference in these provisions to 'persons' without further qualification, as to their nationality, or that of the victims of the violations or of the place where the violations were committed, is generally accepted to amount to an application of the principle of universal jurisdiction, meaning that states have jurisdiction over grave breaches irrespective of the place of the act or the nationality of the perpetrator.

The acts that constitute grave breaches are enumerated in each Convention (Articles 50, 51, 130 and 147 of Conventions I-IV, respectively). The definitions comprise acts, 'if committed against persons or property protected by the

Convention', such as wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, unlawful deportation, and the taking of hostages. The specific reference to 'persons or property protected by the Convention' represents a major obstacle, since in each instance it must be shown that the victim was a protected person as defined in the relevant article of the Convention. The problem is greatest in respect of Convention IV, with its complicated definition of 'protected persons' in Article 4 (see above, chapter III 4.1 and 4.6b). It may be noted here that the Yugoslavia Tribunal has held that a difference in ethnic origin could satisfy the requirement of a 'different nationality'.

The other violations are broadly referred to as 'all acts contrary to the provisions of the provisions of the [Conventions] other than the grave breaches' defined in the relevant article. The obligation of contracting states with regard to these other infractions is limited to taking 'measures necessary for [their] suppression'. This may be a disciplinary correction or any other suitable measure including criminal prosecution.

Two points deserve to be made. The first is that neither the grave breaches nor the other violations are characterised as 'war crimes' – indeed, the term was expressly avoided, for political reasons, related to the position of the communist bloc at the time with regard to the treatment of prisoners of war convicted as 'war criminals'. The second point is the total silence on the possibility of international adjudication of violations of the Geneva Conventions, this notwithstanding the experience of the two International Military Tribunals, and in stark contrast with the position adopted by the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article VI of which expressly reserves the possibility of trial by a competent 'international penal tribunal'. Admittedly, that provision may have been accepted with 'tongue in cheek' by states that did not expect to see such a tribunal any time soon. Yet, the existence of such a reference may, in fact, have provided a more solid basis on which to support the establishment of the Rwanda Tribunal (which deals first and foremost with genocide in a situation of internal armed conflict) than could be found in the Geneva Conventions (and the 1977 Protocols additional thereto) for the Yugoslavia Tribunal (which deals with all kinds of serious violation of humanitarian law, in situations both of international and internal armed conflict).

Although currently therefore under renewed attention, the practical effect of the above provisions in the past has long been unsatisfactory. Few states enacted legislation specifically providing penal sanctions for the perpetrators of grave breaches as defined in the Conventions. In the Netherlands, for instance, the legislature confined itself to making any act amounting to a violation of the laws and customs of war (expressly including such acts when committed in an internal armed conflict) punishable as a war crime; and while the law makes the maximum penalty dependent on the gravity of the crime, the various levels of gravity do not in any way reflect the definitions of grave breaches in the Conventions. Furthermore, although a number of states were of the view that

their existing criminal law was entirely adequate to cope with the prosecution of grave breaches, other states did not even take the trouble of answering the requests for information periodically sent to them by the ICRC.

Matters were even worse in respect of the obligations of investigation and prosecution. Since the entry into force of the Conventions, in October 1950, little action of this type was undertaken against suspects other than a state's nationals, and even this rarely.

Since 1997, matters have begun to improve, however. Several states, have adjusted their legislation to the requirements of the Geneva Conventions. A number of alleged perpetrators of atrocities committed in the territory of the former Yugoslavia and in Rwanda have been successfully brought to trial in countries other than the territorial states. These countries include Denmark, Austria, Switzerland, Germany, the Netherlands and France. However, while promising (and obviously connected with the establishment of the Yugoslavia and Rwanda Tribunals), these actions have started only recently and in a limited number of states. It would be extremely desirable if more states took their obligations under the Geneva Conventions more seriously. Constant propaganda and pressure on the authorities will be required to further improve this situation.

The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict contains a much simpler provision on sanctions. Article 28 obliges contracting states to 'take, within the framework of their ordinary criminal legislation, 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'.

## CHAPTER IV

# THE PROTOCOLS OF 1977

As mentioned towards the end of chapter II, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974-1977) adopted on 8 June 1977, the text of two Protocols Additional to the Geneva Conventions of 12 August 1949. One (Protocol I) is applicable in international armed conflicts; the other (Protocol II), in non-international armed conflicts.

The Conference adopted the Protocols ‘by consensus’, that is, without formal vote. This does not mean that every single provision was equally acceptable to all delegations: far from it. Statements made at the end of the Conference left no doubt that a number of delegations still had very serious misgivings about certain provisions of Protocol I, and some delegations even about Protocol II in its entirety. It may be noted with satisfaction, therefore, that an important number of states have subsequently seen fit to ratify or accede to the Protocols.

It is also worthy of note that a good part of the provisions of Protocol I, and perhaps even more of those of Protocol II, are rules of pre-existing customary international law or have subsequently been recognised as such. With respect to these customary provisions, it might be deemed immaterial whether a state ratifies or accedes to the Protocol, or not. In practice, a non-ratifying state like the United States tends to respect those rules of the Protocol it considers to be customary. Yet, ratification or accession remains important, not merely with regard to those provisions which are undoubtedly new, but also in view of the many provisions that introduce a more precise or elaborate formulation of what previously was recognised as a rather vague and unspecified customary rule (such as the precept that civilian populations must be ‘spared as much as possible’).

Only states parties to the Geneva Conventions of 1949 can become parties to the Protocols. As of November 2000, 157 states are parties to Protocol I and 150 to Protocol II. As these data show, some states that consent to be bound by Protocol I in the event of an international armed conflict, do not wish to be bound by the

terms of Protocol II in the event of an internal conflict within their own territory. In contrast, France has chosen to ratify only Protocol II.

In this chapter, attention is first given to Protocol I, as the most elaborate and detailed of the two (chapter IV 1), and then to Protocol II (chapter IV 2). Topics are discussed more or less in the same order as in chapter III, with such deviations from that scheme as result from the ‘confluence of the currents of The Hague, Geneva and New York’ effected in the Protocols.

## IV 1 PROTOCOL I

### 1.1 Character of the law

The Preamble reaffirms that the provisions of the Conventions and the Protocol ‘must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict’. This language is designed to place beyond doubt that all the parties to an international armed conflict are obliged mutually to observe the rules of humanitarian law, irrespective of which party is regarded (or regards itself) as the aggressor or the party acting in self-defence.

The reaffirmation is important because the Charter of the United Nations draws a clear distinction between the two sides in an armed conflict. Under its terms, the inter-state use of force (and, indeed, any ‘threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations’) is prohibited, whereas recourse to individual or collective self-defence against an armed attack remains permissible. While this distinction between the aggressor and the defending side has effects, as it should, in certain areas of international law, it would be unacceptable and entirely against the very purposes of humanitarian law, if the distinction were permitted to result in differences in the obligations of the parties to the conflict under that particular body of law.

Yet, the opposite effect would be equally unacceptable: that is, if the notion of equality of belligerent parties were transplanted to those areas of international law where the distinction between aggressor and defending side has rightly led to a difference in legal position. In order to preclude such an unwarranted effect the Preamble also specifically states that nothing in the Protocol or in the Conventions ‘can be construed as legitimising or authorising any act of aggression or any other use of force inconsistent with the Charter of the United Nations’.

Like the 1949 Conventions, also Protocol I obliges the parties ‘to respect and to ensure respect for [its provisions] in all circumstances’ (Article 1(1)). Here too, it is not open to doubt that the authors in drawing up the various provisions of Protocol I have taken the factor of ‘military necessity’ duly into account. Hence, deviations from the rules cannot be justified with an appeal to military necessity, unless a given rule expressly admits such an appeal.

Article 1(2), repeating in slightly modernised terms the Martens clause of 1899, places beyond doubt that ‘military necessity’ (or unfettered military discretion) does not prevail without restriction even in situations not explicitly governed by any rule in the Protocol or other treaties:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

## 1.2 Scope of application

Protocol I applies in the same situations of international armed conflict and occupation as the 1949 Conventions (Article 1(3)). Paragraph 4 declares that these situations include wars of national liberation. The paragraph defines these as:

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

This formula purports to bring within the notion of international armed conflicts (and, hence, within the scope of application of the Geneva Conventions and Protocol I) those ‘wars of national liberation’ which, as noted before, the General Assembly of the United Nations was already previously treating as such, mainly in the framework of the decolonisation process. The references to ‘colonial domination’, ‘alien occupation’ and ‘racist régimes’, as well as to the ‘right of self-determination’, are designed to limit the scope of the provision: it was not the intention of the drafters that henceforth any conflict designated by a group of self-styled ‘freedom fighters’ as a ‘war of liberation’, would thereby automatically fall into the category of international armed conflicts.

Even so, the wording of the paragraph is rather elastic. Several states, both in Western Europe and elsewhere, accordingly feared from the outset that Article 1(4) might offer an opening to separatist movements, or movements violently opposing the existing social order, to label their actions as a ‘war of national liberation’ and in that manner at least score some political advantage.

Article 1(4) also presents the difficulty that peoples fighting ‘in the exercise of their right of self-determination’ cannot become parties to the Conventions or the Protocol. In an attempt to remove this obstacle, Article 96(3) of the Protocol provides that the authority representing such a people may address a unilateral declaration to the depositary (the Swiss Government) stating that it undertakes to apply the Conventions and the Protocol. The paragraph requires that the war be ‘against a High Contracting Party’; a declaration under Article 96(3) can therefore only have effect if the state against which the war is waged is itself a

party to the Protocol (and, hence, to the Conventions). The effect of such a declaration is to make the Conventions and the Protocol applicable in that armed conflict, and be equally binding upon all parties to the conflict.

It should be emphasised that Article 1(4) can only have its intended effect if both conditions are met: the state concerned must be a party to the Protocol, and the authority representing the people undertakes to apply the Conventions and the Protocol by means of a declaration addressed to the depositary. Also worthy of note is the provision in Article 4 that ‘application of the Conventions and of this Protocol ... shall not affect the legal status of the Parties to the conflict’.

In practice, no case has occurred since the entry into force of the Protocol, of an armed conflict that met the conditions of Article 1(4) with the state involved being a party to the Protocol and the authorities representing the people making the declaration of Article 96(3). On the other hand, leaders of rebellious movements have occasionally claimed that they were fighting a war of national liberation. Such statements did not have the effect of making the Conventions and Protocol I applicable to the situation.

A general comment may be repeated here that was already made in chapter III 2, namely, that international judicial bodies have their own power to determine whether the Conventions and Protocol I are, or were, applicable to a given situation of international violence.

### 1.3 **Combatant and prisoner-of-war status**

How to recognise a combatant? In the past, there was no great difficulty as far as the regular armies were concerned: they marched proudly in their magnificent uniforms, with swords and shields – and somewhat later, the long rifle – on prominent display. Even now, on ceremonial occasions, one may witness such a splendid show of colours. Both in the past and in more recent times, however, there were also other situations where groups of people took part in the fighting without distinguishing themselves quite so clearly from the rest of the population: resistance fighters in occupied territory, and in our days, ‘liberation fighters’ taking part in the decolonisation wars and similar irregular fighters. Should they nonetheless be recognised as combatants and, upon capture, as prisoners of war? The attempt to find a solution had failed completely in 1899; and in 1949, a sort of solution was accepted which was satisfactory only to the regular armies, leaving the irregulars mostly out in the cold.

The negotiators of Protocol I tried their hand at the conundrum again, and the result of their endeavours, as embodied in Section II of Part III of the Protocol, is summarised in the next paragraphs. Their main concern can be best shown, however, by quoting part of Article 48 that opens the next Part of the Protocol (Civilian Population):

In order to ensure respect for and protection of the civilian population ... the Parties to the conflict shall at all times distinguish between the civilian population and combatants...



Indeed, in the whole of Protocol I, and no matter how important many other provisions, this may be its most cardinal provision. It was the most difficult to elaborate, and continues to be the most difficult to apply and interpret.

### 1.3a Qualification as ‘armed force’ and ‘combatant’: general rules

As a first step towards solving the problem, Article 43 gives an entirely novel definition of ‘armed forces’ and ‘combatants’. According to paragraph 1:

The armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognised by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

This definition does not make any distinction between the (regular) armed forces of the state and the (irregular) armed forces of a resistance or liberation movement, or other similar guerrilla forces. For the ‘regular’ armed forces – i.e. not ‘militia or volunteer corps’ – the implication is that they are for the first time submitted to express requirements.

For all ‘armed forces’, these requirements can be summed up as: a measure of organisation, a responsible command, and an internal disciplinary system designed notably to ensure compliance with the written and unwritten rules of armed conflict. Compared with the traditional requirements of the Hague Regulations, the most striking difference is that qualification as an armed force is no longer made dependent on its members having a uniform or carrying arms openly at all times, as means to distinguish the members of the armed force from the civilian population.

This brings us to the second, and a good bit more complicated, part of the solution sought in 1977 to the age-old problem of protection of the civilian population in a situation of irregular warfare. The solution was sought in the context, not of the notion of ‘armed force’ but, rather, in terms of the rights and obligations of its individual members. Setting out their rights first, Article 43(2) specifies that they all ‘are combatants, that is to say, they have the right to participate directly in hostilities’. (Excepted are only ‘medical personnel and chaplains covered by Article 33 of the Third Convention’, as non-combatant members of the armed forces.)

This status and this right are directly linked with combatants’ right to ‘be a prisoner of war’ when they fall into the power of an adverse party (Article 44(1)). As a matter of course, an individual combatant is ‘obliged to comply with the rules of international law applicable in armed conflict’ and bears individual responsibility for any violations he might commit. Article 44(2) emphasises that, one exception apart, such violations by individuals ‘shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse party, of his right to be a prisoner of war’: those rights are inherent in his

membership of the armed force. The exception is announced in the closing phrase of the quoted sentence: ‘except as provided in paragraph 3 and 4’.

### 1.3b *The individual obligation of the combatant to distinguish himself from civilians*

Article 44(3) begins by laying upon individual combatants the obligation to distinguish themselves from civilians:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population when they are engaged in an attack or in a military operation preparatory to an attack.

This provision closely resembles the text, quoted above, of Article 48: there, the obligation is addressed to the parties to the conflict; here, it is translated into one for individual combatants. Another important feature is that the combatant needs not so distinguish himself at all times: it suffices for him to do this whenever he is engaged in ‘an attack or in a military operation preparatory to an attack’. This may still cover a considerable length of time, beginning quite a while before the assault is finally launched.

But even the preparation of typical guerrilla activities such as an ambush or a hit-and-run action may begin days, if not weeks, before the final operation. Can persons engaged in armed resistance in occupied territory, or in a war of national liberation or other type of guerrilla warfare, be expected to survive if they are to distinguish themselves from civilians throughout that period? Can, conversely, civilians hope to survive if the guerrilla fighters in their area never distinguish themselves as such?

### 1.3c *Exception to the general rule of distinction*

In a valiant attempt to solve this last bit of the problem, the second sentence of Article 44(3), ‘recognising that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself’, declares that ‘he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly’:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

If, on the contrary, our man falls into the power of the adversary ‘while failing to meet the requirements set forth in the second sentence of paragraph 3’, he ‘shall forfeit his right to be a prisoner of war’ (Article 44(4)). Yet, this severe consequence is mitigated by the provision in the same paragraph that ‘he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol’. These ‘equivalent’ protections apply even ‘in the case where such a person is tried and punished for any offences

he has committed’ – such as the offence of taking part in an attack or ambush while posturing as a civilian, which may be punishable as an act of perfidy (see hereafter, chapter IV 1.4). Even apart from these ‘equivalent protections’, there is also, by virtue of Article 45(3), entitlement to ‘the protection of Article 75 of this Protocol’ which provides fundamental guarantees for persons in the power of a party to the conflict not benefiting from a more favourable protection under the Conventions or the Protocol. (See further, in chapter IV 1.8.)

Of interest to the resistance fighter in occupied territory is the rule in Article 45(3) providing that unless held as a spy, such a person ‘shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention’. This at least prevents the Occupying Power from keeping him totally incommunicado.

Finally, in the event that a combatant ‘falls into the power of an adverse party while not engaged in an attack or in a military operation preparatory to an attack’, Article 44(5) specifies that he retains his ‘rights to be a combatant and a prisoner of war’ irrespective of his prior activities (for which he may or may not be punishable, perhaps, again, as an act of perfidy).

This set of rules and exceptions obviously reflects a compromise between those who demanded that irregular fighters be accorded the status of combatants without being obliged to distinguish themselves from civilians, and those others who strongly opposed any exceptions in favour of irregular fighters in difficult situations. The compromise goes a long way towards meeting the interests of both parties: those of the irregulars, because they are recognised as combatants in principle and lose this status only in exceptional cases; and those of the other party because it is given the possibility, precisely in such exceptional cases, to try and punish the prisoners caught ‘red-handed’ as persons without status and, hence, without evoking the protests and retaliatory actions the wartime trial of prisoners of war has sometimes occasioned.

It must be emphasised that the new rules are not intended in any way to detract from the rule of distinction between combatants and the civilian population. Article 44(7) specifies that the article ‘is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict’.

### 1.3d *Espionage*

Part III, Section II, of Protocol I contains rules addressing two special situations. One concerns the ‘member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage’. Article 46(1) states the general rule: such a person ‘shall not have the right to the status of prisoner of war and may be treated as a spy’. Paragraphs 2-4 provide refinements to this general rule. Paragraph 3 is of particular relevance to the resistance fighter in occupied territory:

A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.

To give an example, the resistance fighter in occupied territory who, dressed as a civilian but without having recourse to false pretences or a clandestine manner, attempts to gather information of military value, does not forfeit his status as a combatant. If he does make use of such forbidden methods (for instance, by wearing a uniform of the occupying forces) and is caught in the course of his attempt to gather the 'information of military value' he is after, he forfeits his right to the status as a prisoner of war. In that case, however, Article 45(3) will apply: this person will enjoy the minimum protection of Article 75. Yet, in this case the Occupying Power will be entitled, by virtue of Article 5 of Convention IV, to deny him (just like any other spy) his rights of communication under that Convention.

If our resistance fighter is caught while transmitting information of military value, he must be treated as a prisoner of war; it is then immaterial whether he gathered the information with the aid of false pretences or a clandestine manner, or otherwise.

It should be noted that the provision is equally applicable and offers the same protection to members of the regular armed forces engaged in espionage.

### 1.3e *Mercenaries*

The other special situation is that of the mercenary. Article 47(1) provides that such a person 'shall not have the right to be a combatant or a prisoner of war'. It was notably the group of African states who fought for acceptance of this exception, which in Western eyes goes against the basic idea that the right to be a prisoner of war ought not to be dependent on the motives, no matter how objectionable, which prompt someone to take part in hostilities. Yet, the potentially disastrous effects of paragraph 1 are largely neutralised by paragraph 2, which makes a person's qualification as a mercenary dependent on his fulfilling a cumulative list of conditions; one of these conditions is that he 'is not a member of the armed forces of a Party to the conflict'.

The effect of the definition is that the exception of Article 47 applies only to the members of a totally independent mercenary army which is not (in terms of Article 43(1)) 'under a command responsible to [a party to a conflict] for the conduct of its subordinates'. Viewed thus, Article 47 does not even amount to a genuine exception, since under the terms of Article 43 such an army is not counted among the 'armed forces of a Party to a conflict'.

### 1.3f *Treatment in case of doubt about status*

In sum, the new rules on ‘armed forces’, ‘combatants’ and ‘prisoners of war’ constitute an important improvement over the old rules of the Hague Regulations on Land Warfare of 1899 and the Third Convention of 1949. The new rules may, however, easily lead to a situation where the status of a ‘person who takes part in hostilities and falls into the power of an adverse Party’ is not immediately evident upon capture. There may be doubt whether he is a member of an ‘organised armed force, group or unit’, or whether the group he belongs to meets the requirements of Article 43. Does the prisoner wear a uniform or is there anything else identifying him as a member of an armed force? Is he a fighter to whom the exception of Article 44(3) and (4) applies? Or that of Article 46 on spies? Must he be regarded as a mercenary?

With respect to all such questions, Article 45(1) begins by creating a presumption of prisoner-of-war status in favour of any ‘person who takes part in hostilities and falls into the power of an adverse Party ... if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the Detaining Power or to the Protecting Power’. The second sentence, reaffirming the rule on ‘doubt’ set out in Article 5(2) of the Third Convention, provides that:

Should any doubt arise as to whether any such person is entitled to the status as prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

Article 45(2) makes provision for the event that a person who has fallen into the hands of an adverse party but is *not* held as a prisoner of war, claims that status the very moment he is put on trial for ‘an offence arising out of the hostilities’. Even in that case ‘he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated’, whenever procedurally possible, ‘before the trial for the offence’. Representatives of the Protecting Power ‘shall be entitled to attend the proceedings ... unless, exceptionally, the proceedings are held *in camera* in the interest of State security’ – a circumstance of which the Detaining Power must notify the Protecting Power. In practice, the ICRC often attends such proceedings.

## 1.4 **Methods and means of warfare**

### 1.4a *Basic rules*

Part III, Section I, of Protocol I gathers under this single heading, several topics which in chapter III were dealt with under the separate headings of ‘means of warfare’ and ‘methods’. The merging is apparent in Article 35 (‘Basic rules’), which repeats two existing principles of the law of The Hague and adds one new principle, each time adding the term ‘methods’ to the classical limitations on ‘means’ of warfare:

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Apart from this addition of the concept of 'methods', the reaffirmation of the first two principles adds nothing new, and their elaboration into internationally accepted prohibitions or restrictions on use of specific conventional weapons (such as incendiary weapons, mines and booby-traps), although under discussion at the Diplomatic Conference of 1974-1977, had to wait for another occasion (see hereafter, chapter VI). As regards the newly added third principle (inspired mainly by the large-scale measures of deforestation carried out by the Americans in the course of the war in Vietnam), its terms and, in particular, the words qualifying the concept of 'damage to the natural environment', are too vague and restrictive for much to be expected of a concrete application of this 'basic rule'. Indeed, at the time of the Diplomatic Conference, the term 'long-term' was interpreted as meaning several decades; and for a method or means of warfare to fall under the prohibition it is necessary for its use to be accompanied by an intention or expectation to cause the required damage. Here too, an express prohibition on use of defoliants and herbicides (or general recognition that the prohibition in the Geneva Protocol of 1925 covers the use of such chemical agents) would obviously have been more effective. But again, that was not on the agenda of the Diplomatic Conference.

The Conference could, and did, tackle the issue from another angle. As noted in chapter III 3.2, once integrated into arsenals, a weapon is not lightly discarded on the mere assertion that it causes unnecessary suffering. It is therefore important to forestall the introduction of means or methods of warfare which might have that effect. Addressing this issue, Article 36 provides that 'In the study, development, acquisition or adoption of a new weapon, means or method of warfare' each state party to the Protocol is required 'to determine whether its employment would, in some or all circumstances, be prohibited' by any applicable rule of international law.

Several states have introduced procedures for such a unilateral evaluation. There remains the difficulty that the effects of new means or methods of warfare in actual battle conditions often are insufficiently known (and for obvious reasons cannot be experimentally tested). Yet the obligation in Article 36 makes a useful contribution to the goal of prohibiting excessively injurious means and methods of warfare.

A final comment on the 'basic rules' is that their inclusion Article 35 does not imply any intention of the part of the drafters to pass judgment on the legality or illegality of the employment of nuclear weapons. The consensus at the Diplomatic Conference was that it had not been convoked to bring the problems connected with the existence and possible use of nuclear weapons to a solution,

and more specifically, that any *new* rules it adopted (such as the principle of environmental protection in Article 35(3)) were not laid down with a view to the use of nuclear weapons. This question is discussed further in chapter IV 1.5h.

### 1.4b *Perfidy and ruses of war*

Article 37(1) provides an improved version of the prohibition in Article 23(b) of the Hague Regulations, to ‘kill or wound treacherously individuals belonging to the hostile nation or army’. Its first sentence prohibits ‘to kill, injure or capture an adversary by resort to perfidy’. (It will be noted that capture has been added to the list.) While the Hague Regulations left the notion of ‘treachery’ undefined, the second sentence of Article 37(1) seeks to define ‘perfidy’ in terms so concrete and precise as to permit of its application in a legal setting (for instance, by a court) without too great difficulty, as follows:

Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.

Two points are worthy of note here. One is the construction of the paragraph. Although the ‘acts inviting confidence with intent to betray it’ are stated to ‘constitute perfidy’, carrying out such acts is not enough to constitute a crime. Instead, the acts are a qualifying element which, together with the material element: the actual killing, injuring or capturing of the adversary, constitutes the crime of ‘perfidious killing’ (etc.).

The other point is that the definition of ‘perfidy’ does not simply refer to ‘confidence’ in a general sense: the confidence of the adversary must specifically relate to a belief that he is entitled to ‘protection under the rules of international law applicable in armed conflict’. A betrayal of confidence not related to this form of legal protection does not amount to perfidy in the sense of Article 37. In particular, this second, limiting element in the definition of perfidy tends to convert the abstract term into a sufficiently concrete concept. Filling in the picture with further detail, the article provides the following four examples of perfidy (paragraph 1):

- (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) the feigning of an incapacitation by wounds or sickness;
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

Example (c) brings to mind the obligation of combatants to distinguish themselves from the civilian population. As noted in that context, Article 44(3) makes an exception for ‘situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself’. In order to exclude

all possible misunderstandings, the last sentence of that paragraph specifies that ‘Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c)’.

The opposite of the prohibited act of perfidy was in 1899, as it is today, the permissible ruse of war. Article 37(2) reaffirms in its first sentence the rule of Article 24 of the Hague Regulations: ‘Ruses of war are not prohibited.’ As explained in the second sentence, ruses, like acts of perfidy, ‘are intended to mislead an adversary or to induce him to act recklessly’. Yet, unlike such perfidious acts, they ‘infringe no rule of international law applicable in armed conflict’ and neither do they ‘invite the confidence of an adversary with respect to protection under the law’. Here again, some examples of ruses complete the provision: ‘the use of camouflage, decoys, mock operations and misinformation’.

A concrete example may shed some further light on the distinction between acts of perfidy and ruses of war. A combatant on the battlefield may feign death to avoid capture and, either, rejoin his own forces or get behind the enemy lines. This is misleading rather than perfidious conduct. It is a ruse of war. But if the combatant feigns death with intent to kill or injure an adversary, who then approaches him on the assumption that he is wounded and in need of help, this brings the case within the notion of perfidy in Article 37(1)(b). Even then, the combatant feigning death with intent to kill or injure becomes guilty of a violation of Article 37(1) only if he actually kills or injures the adversary. For, it is worth repeating, the article does not prohibit perfidy per se but, rather, ‘to kill, injure or capture an adversary by resort to perfidy’.

#### 1.4c *Emblems, flags and uniforms*

Article 38 prohibits *inter alia* the improper use of the red cross or red crescent, of the flag of truce (being a white flag, indicating a readiness to negotiate) and of the emblem of the United Nations. Then, while Article 39(1) prohibits ‘to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict’, Article 39(2) does not prohibit the use of the enemy uniform outright but spells out in which situations the use is prohibited:

It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.

The first two paragraphs of Article 39 do not address the special situation of the spy, who obviously cherishes the use of a neutral or enemy uniform as one of his favoured methods for acquiring the information he is after. While the spy, if caught red-handed, is liable to be punished for his act of espionage, it is generally recognised that his use of such uniforms does not of itself constitute an encroachment of any rule of international law. Article 39(3) expressly confirms this fact.

The same paragraph also provides that ‘Nothing in this article or in Article 37, paragraph 1 (d), shall affect the existing generally recognised rules of international



law applicable to ... the use of flags in the conduct of armed conflict at sea'. This language refers to the ancient practice of approaching the adversary under cover of a false flag, warships only being obliged to display their true flag immediately before opening fire (the 'oath to the flag'). It is doubted even in naval circles whether this practice should be maintained as a legitimate method of waging naval warfare today. However, like other questions specifically belonging to the realm of warfare at sea, this question was not on the agenda of the Diplomatic Conference, a fact duly reflected by the quoted clause.

#### 1.4d Quarter

Articles 40-42 elaborate in greater detail the two prohibitions contained in Article 23(c) and (d) of the Hague Regulations, to 'kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion', and to 'declare that no quarter will be given'. Article 40 clarifies and adds greater precision to the rule on quarter:

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

Article 41 substitutes the surrender at discretion of the Hague Regulations, with protection of an enemy *hors de combat*. The basic rule is formulated in paragraph 1:

A person who is recognised or who, in the circumstances, should be recognised to be *hors de combat* shall not be made the object of attack.

It should be noted that in this formula, 'should be recognised' is mentioned next to, and on the same footing as, 'is recognised'. For a soldier to avoid liability for a violation of Article 41 it is not sufficient to say: 'I did not see it': it must also be shown that an average, normally attentive soldier would also not have noticed that this adversary was *hors the combat*.

Article 41(2) indicates that a person is *hors de combat* if:

- (a) he is in the power of an adverse Party;
- (b) he clearly expresses an intention to surrender; or
- (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

The case under (a) may seem to be a matter of course: from the moment a combatant falls into enemy hands he is, and enjoys the protection of, a prisoner of war (Third Convention, Articles 4 and 13). Yet, the express reference to this case is important for two reasons. One lies in the concluding phrase of the paragraph: a captured combatant who attempts to use violence against his captors or to escape, effectively discontinues his status of being *hors de combat* and therefore, in the words of the first paragraph, may once again 'be made the object of attack'.

The second reason is connected with the converse situation: not the captured combatant who attempts to use violence against his captors but, instead, the patrol who took him prisoner and who, rather than evacuating him to the rear area (which it regards as too burdensome in the circumstances), would prefer to kill him, so as to be relieved of the burden of his presence. Article 41(1) and (2)(a) implicitly exclude this solution of the problem. For good measure, paragraph 3 indicates the behaviour to be followed when ‘persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation’: ‘they shall be released and all feasible precautions shall be taken to ensure their safety.’ It may be commented that while this may be the ideal solution, it may not in all cases be a realistic one.

As regards the cases mentioned under (b) and (c), we may point to their relationship with perfidy: whenever a person by merely feigning to be in one of these situations invites the confidence of an adversary to lead him to believe that the latter is obliged to accord him protection, and then, betraying that confidence, attempts to ‘kill, injure or capture’ that adversary, he not only loses his privileged status as a person *hors de combat* but also is guilty of perfidy.

#### 1.4e *Occupants of an aircraft in distress*

Article 42, finally, deals with a situation close to that of being *hors de combat*: that of occupants of an aircraft in distress. Paragraph 1 provides that no person parachuting from such an aircraft ‘shall be made the object of attack during his descent’. It is immaterial whether the person in question may be expected to land in territory controlled by his party or by an adverse party; in the former case, his helplessness during the descent is taken to prevail over the argument that he may soon be taking an active part in hostilities again.

In the event of his ‘reaching the ground in territory controlled by an adverse Party’, Article 42(2) stipulates that he ‘shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act’.

Paragraph 3 specifically provides that ‘Airborne troops are not protected by this Article’. Such troops may, in other words, be made the object of attack even while they are descending by parachute from an aircraft in distress. Once they have reached the ground in territory controlled by the adverse party, the normal rules apply: being combatants, they may be attacked and defend themselves against the attack; they may also themselves attack the enemy; finally, in terms of Article 41(2)(a), they may ‘clearly express their intention to surrender’ and thus bring themselves under the protection of that article.

#### 1.5 **Protection of the civilian population**

As summarily and randomly as the Hague Regulations on Land Warfare had dealt with the subject of protection of the civilian population, so detailed and thoroughly thought out are the rules on this subject in Protocol I. Section (I) of

Part IV (Civilian Population) devoted to its ‘General Protection against Effects of Hostilities’ contains 20 elaborate articles. The cardinal importance of this issue was indeed apparent earlier in the present chapter as well, when both the continued entitlement to combatant and prisoner-of-war status and, in one case, the notion of perfidy were found to be dependent on compliance with combatants’ obligation to distinguish themselves from civilians (chapter IV 1.3 and 1.4).

It may be noted that Part IV of the Protocol comprises two more Sections: II, on ‘Relief in Favour of the Civilian Population’, and III, on ‘Treatment of Persons in the Power of a Party to the Conflict’.

### 1.5a *Basic rule and field of application*

Article 48, opening Section I (General Protection against Effects of Hostilities), sets forth the ‘basic rule of distinction’. Its crucial importance has already been emphasised, and its text quoted in part, in the opening paragraphs of chapter IV 1.3 on ‘combatant and prisoner-of-war status’. Yet, as the keystone of the whole set of interconnected provisions on protection of the civilian population, it deserves to be quoted again, this time in full:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Apart from the distinction of combatants from civilians, military objectives must also be distinguished from civilian objects. Parties to the conflict have to make these distinctions in their ‘operations against military objectives’: this again is a form of words that needs further clarification. The necessary clarifications are supplied in Articles 50 to 52. Before that, Article 49 defines the term ‘attacks’, as an important notion in the subsequent provisions elaborating the protection of civilians. The article also sets forth the territorial scope of these provisions as well as their relation to other existing rules on protection of civilians and civilian objects.

Article 49(1) defines ‘attacks’ as ‘acts of violence against the adversary, whether in offence or in defence’. It should be explained that ‘acts of violence’ mean acts of warfare involving the use of violent means: the term covers the rifle shot and the exploding bomb, not the act of taking someone prisoner (even though the latter act may also involve the use of force). The concluding words, ‘whether in offence or in defence’, put beyond doubt that the party to the conflict who, either in the conflict as a whole or in respect of a given military operation, finds itself on the defending side, is nonetheless obliged to carry out its ‘acts of violence against the adversary’ in conformity with the rules for the protection of the civilian population.

Emphasising this point, Article 49(2) specifies that the provisions relating to attacks ‘apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party’. By virtue of this provision, if the territory of a state is being invaded and its armed forces carry out attacks against the invading forces, whether in defence of the remainder of the territory or in an attempt to push the enemy back, they must do this with full respect of the rules in question. This applies with equal force to armed resistance units that carry out attacks on the occupying forces. In other words, in such circumstances the obligation of ‘respect and protection’ covers not only the enemy civilian population but a state’s own population as well.

While this may extend the scope of application of the protective rules compared to the Geneva Conventions which did not afford protection to a state’s own population, Article 49(3) in turn restricts the scope of the rules, notably to the civilian population on land. The first sentence provides that ‘The provisions of this Section apply to any land, sea or air warfare which may affect the civilian population, individual civilians or civilian objects on land’. With respect to attacks from the sea or the air in particular, the second sentence states that the provisions in question ‘apply to all attacks from the sea or from the air against objectives on land’ (but ‘do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air’ – thus showing once again that the Diplomatic Conference studiously avoided the matter of naval warfare proper).

Finally, reminding us that rules on the protection of the civilian population may be found elsewhere as well, Article 49(4) states that the provisions of Part IV, Section I, ‘are additional to ... other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities’.

### 1.5b *Civilians and combatants*

According to Article 50(1) ‘a civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol’. In brief, a civilian is any person who does not belong to the category of combatants. The latter category is defined with all possible precision in the quoted articles. Yet, in the course of a military operation, doubt may arise as to whether a given person is a combatant or a civilian.

The second sentence of Article 50(1) prescribes how to act in a situation where the status of a person is uncertain: ‘In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.’ In practical terms, this means that a combatant may only open fire on persons of uncertain status or who find themselves in a location which puts their status into doubt (say, in a terrain where civilians are not expected) if he is convinced that they are enemy combatants, or, taking into account the loss of protection a civilian suffers when

he takes a direct part in hostilities, persons who are doing that. This rule applies in all circumstances, whether in daylight or in the dark of the night, and for the helicopter crew as much as for the foot soldier.

From the definition of ‘civilians’ follows that of the ‘civilian population’: this ‘comprises all persons who are civilians’ (Article 50(2)).

In practice, of course, civilians and combatants are not always strictly separated. One need only think of common situations such as the town also harbouring, besides the civilian inhabitants, units of armed forces, or the stream of civilian refugees intermingled with an army retreating in disorder. Tackling this problem from the point of view of definition of the civilian population, Article 50(3) provides that ‘The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character’. The question remains, of course, what effect a very significant presence of such ‘non-civilians’ will have on the protection of the civilian population.

This brings us back to the very reasons underlying the distinction: while combatants have the right to participate directly in hostilities and may therefore be the object of attempts on the part of the enemy to disable them, civilians lack the right of direct participation but, on the other hand, in the words of Article 51(1), ‘enjoy general protection against dangers arising from military operations’. It stands to reason that this idea of ‘general protection’ is the more difficult to realise as there is less distance separating civilians from combatants.

Under Article 51(3) civilians lose their entitlement to protection ‘for such time as they take a direct part in hostilities’. This implies that for the time of their direct participation such civilians may be made the object of attack. In this context, ‘to take a direct part in hostilities’ must be interpreted to mean that the persons in question perform hostile acts, which, by their nature or purpose, are designed to strike enemy combatants or *matériel*; acts, in other words, such as firing at enemy soldiers, throwing a Molotov-cocktail at an enemy tank, blowing up a bridge carrying enemy war *matériel*, and so on. If persons who have carried out such acts fall into enemy hands, they may be tried and punished for their activities without being entitled to protection as prisoners of war, or even to ‘equivalent protection’. (Yet, they are not devoid of all rights: by virtue of Article 45(3) they retain the right to protection in accordance with Article 75 of this Protocol; see further chapter IV 1.8.)

What is the ‘time of direct participation’? Although certainty is lacking on this point, military logic suggests that the period indicated by these words encompasses both the time during which the civilian is obviously approaching the chosen target with a view to carrying out his hostile act (although one should be aware here of the rule on cases of doubt in Article 50(1)) and the time he needs to withdraw from the scene after the act.

Whether this interpretation is accepted or not, it is beyond doubt that the notion of ‘direct participation in hostilities’ is far narrower than that of making a

contribution to the war effort. Especially in the Second World War, the thesis was repeatedly heard that the mere fact of making a contribution to the war effort was sufficient ground for a civilian to lose his right to protection against the effects of military operations. 'Contributing to the war effort' is an extremely elastic notion, which even under the narrowest conceivable construction covers such activities as the production and transport of arms and munitions of war, or the construction of military fortifications. It is equally certain, however, that such activities do not amount to a direct participation in hostilities. It deserves some emphasis that with the adoption of Article 51(3) the arguments made in the Second World War have therefore lost any basis which they might have had in the past.

### 1.5c *Civilian objects and military objectives*

The twin reasons underlying the distinction between civilian objects and military objectives are quite similar to those underlying the distinction between civilians and combatants: military objectives effectively contribute to military action and may therefore be attacked, whereas civilian objects do not make such a contribution and hence may not be attacked. Article 52(1) lays down the prohibition of attacks on civilian objects and then defines these objects, like in the case of the civilians, in negative terms: 'Civilian objects are all objects which are not military objectives as defined in paragraph 2.' Paragraph 2, second sentence, defines military objectives:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

Civilian objects, in other words, are objects that do not 'by their nature, location, purpose or use make an effective contribution to military action, and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time', does not offer 'a definite military advantage'.

Typically, military objects such as a tank or armoured vehicle, an artillery emplacement, an arms depot, or a military airfield may be presumed to be military objectives. On the other hand, objects such as 'a place of worship, a house or other dwelling or a school', are 'normally dedicated to civilian purposes'. Article 52(3), singling out this category of objects, states that in case of doubt as to whether such an object 'is being used to make an effective contribution to military action, it shall be presumed not to be so used'. Note that the list is not exclusive: the criterion is whether an object may be regarded as 'normally dedicated to civilian purposes'. Note also that such an object too, may actually be used in such a way (for instance, as military quarters or a command post or munitions depot) that it contributes effectively to military action. It may then be regarded as a military objective, provided always that the condition requiring that its destruction offer a 'definite military advantage in the

circumstances ruling at the time' is also met. The presumption, obviously, applies only in case of doubt.

There remain all sorts of objects which fall under neither presumption. Objects such as a road, bridge or railway-line, (parts of) a sea port, a power-generating facility, or any industrial plant, may or may not come within the terms of a military objective. They will do so when they meet the dual criterion that they not only (normally by their location or use) make 'an effective contribution to military action' but that their 'total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage'.

The above definition of military objectives purports to curb the tendency, apparent in the past, to regard virtually every object as a military objective. Instead of an abstract definition one might perhaps (like the ICRC in the 1950s, see chapter III 3.4) prefer a list specifying the objects a belligerent party may regard as military objectives. However, the examples given above may suffice to demonstrate the impracticability of such a solution. The question of whether an object such as a bridge or a school represents a military objective depends entirely on their actual circumstances. A list of objects qualifying as military objectives that does not mention such objects is unacceptable from a military point of view; to include them in the list without any restrictions is equally unacceptable in view of the humanitarian requirement of protection of the civilian population. In practice, the general definition couched in abstract terms is the only realistically available solution to a vexed problem.

This leads to a last comment. Civilians who are employed, say, in the arms industry do not thereby lose their protection 'as civilians'. But obviously, this does not imply that by virtue of their presence, the factory where they are working through their presence acquires protection as a 'civilian object'. Decisive is whether an object 'makes an effective contribution to military action', and the key words 'military action', even though less vague and narrower than 'the war effort', doubtless encompass more than the hostilities proper. Staying with the examples given a moment ago, the arms industry, or the transport of weapons and munition, obviously make a contribution to military action which is not merely 'effective' but, indeed, indispensable.

It bears repeating that for an object to represent a military objective also requires, as stated in Article 52(2), that its 'total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage'. When the object in question is an arms factory, this requirement is easily fulfilled. The question is therefore once again: what protection, if any, can a 'protected' civilian expect when he finds himself in the vicinity of, or even within, a non-protected object?

To find an answer to this question we next examine the rules elaborating the notion of 'general protection of the civilian population against dangers arising from military operations'.

### 1.5d *Two main lines of protection*

As mentioned in chapter II 4 ('Confluence'), Resolution XXVIII of the International Conference of the Red Cross and Crescent (Vienna, 1965) stated four basic principles of the law of armed conflict. In 1968 the UN General Assembly endorsed three of these principles with the adoption of Resolution 2444 (XXIII). Two of these principles are of immediate concern to the question of protection of the civilian population and are therefore quoted here once again:

That it is prohibited to launch attacks against the civilian population as such; That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.

Protocol I seeks to protect the civilian population along the two lines set out in this text. The first line is reflected both in Article 51(2) ('The civilian population as such, as well as individual civilians, shall not be the object of attack.') and in Article 52(1) ('Civilian objects shall not be the object of attack'). The second is reaffirmed in Article 57(1): 'In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.' It bears repeating, moreover, that Article 48 already lays an obligation on the parties to the conflict to 'direct their operations only against military objectives'.

### 1.5e *Prohibition of attacks against the civilian population and civilian objects*

Article 51 elaborates the prohibition to make the civilian population, or individual civilians, the object of attack.

Paragraph 2, second sentence, specifies that 'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'. This addition to the basic rule confirms once and for all the illegality of the so-called terror bombardment, as of any spreading of terror among the civilian population and even the threat thereof. The importance of this confirmation is evident in view of the long series of terror bombardments, carried out against population centres in the Second World War, and the innumerable attacks aimed at terrorising the civilian population carried out in more recent armed conflicts.

In defence of this type of action a frequent argument is that the actions are aimed at breaking the morale of the civilian population and, with that, the will of the authorities to continue the war. In rare cases, this may actually have happened; in all others, the method was ineffective. Apart from that, it is completely at odds with the principle, expressed already in 1868 in the Declaration of St. Petersburg, that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the *military forces* of the enemy'. Put differently, the method amounts to a flat denial of the distinction between civilians and combatants, and has the effect of drawing the entire population into the armed conflict.



Another matter altogether is the attack on an area of civilian habitation, carried out because it is believed to contain military objectives. Assuming this to be the case, the justification of the attack depends entirely on the method and means by which it is carried out. There is an obvious difference between so-called ‘carpet bombing’ or area bombardment, and precision attacks.

Taking up one aspect of the matter, Article 51(4) outlaws blind or ‘indiscriminate’ attacks, and defines these as follows:

Indiscriminate attacks are:

- (a) those which are not directed against a specific military objective;
  - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
  - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
- and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Article 51(5) provides definitions of two types of attack which, ‘among others’, must be ‘considered as indiscriminate’. The first type, the area bombardment, is defined under (a):

an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.

The reference in this definition to other areas ‘containing a similar concentration of civilians or civilian objects’ is designed to cover such objects as a refugee-camp, a column of refugees on a road, and so on.

The other type of attack which is ‘considered as indiscriminate’ is one which may be expected to cause excessive damage among the civilian population. It is defined in Article 51(5)(b):

an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

This type of attack represents a border-line case in more than one respect. First, because a line is drawn between attacks causing excessive damage and other attacks causing damage to civilians and civilian objects that is not considered excessive. Secondly, because the definition also covers attacks which do not necessarily fall under the definition in Article 51(4) of indiscriminate attacks: an attack may meet the description in paragraph 5(b) even though it is in effect ‘directed at a specific military objective’ and the method and means of combat employed are capable in principle of being so directed and of being ‘limited as required by this Protocol’: the precision bombardment but carried out, perhaps, with insufficient precision.

Viewed thus, the situation addressed by Article 51(5)(b) may be said to belong under the heading of ‘carrying out one’s attacks on military objectives in such a manner as to spare the civilian population as much as possible’, rather than under the present heading of ‘refraining from attacks against the civilian population’. This case is accordingly dealt with in chapter IV 1.5g on ‘Precautionary measures’. To avoid any misunderstanding, though, one point should be placed beyond doubt straightaway. The mere fact that an attack does not cause excessive damage to the civilian population and, hence, is not an attack ‘to be considered as indiscriminate’ in the sense of Article 51(5)(b), is not enough to justify the conclusion that the attack meets all the requirements laid down in the Protocol for the protection of the civilian population.

Article 51(6) prohibits ‘attacks against the civilian population or civilians by way of reprisals’. We shall deal with it, together with comparable prohibitions in Articles 52-56, in chapter IV 3.3b.

Article 51(7) prohibits parties to a conflict from utilising the ‘presence or movements of the civilian population or individual civilians’ to ‘render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations’. Parties must also not ‘direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations’. Like the rule in Article 51(5)(b), these prohibitions are narrowly connected with the obligations of the parties to take precautionary measures for the protection of the civilian population, and will accordingly be discussed under that heading.

The connection is explicitly made in Article 51(8), providing that any violation of the prohibitions set out in the preceding paragraph ‘shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57’.

After the discussion in chapter IV 1.5b, of the notion of ‘civilian object’ and how to distinguish it from military objectives, followed by the discussion in the present section of the ‘protection of the civilian population’ (which more than once included references to civilian objects as well), the only point that remains to be made on the ‘general protection of civilian objects’ is the statement in the first sentence of Article 52(1) that ‘Civilian objects shall not be the object of attack or of reprisals.’ Once again, the difficulty here resides not so much in the prohibition itself but in the determination that a given object does not, in the circumstances at the time, meet the criteria for a military objective.

As noted, reprisals are discussed in chapter IV 3.3b.

### 1.5f *Prohibition to attack specified objects*

Article 53, the first of the provisions in Protocol I designed to protect specified objects, deals with cultural objects and places of worship. Without detracting in

the least from the more detailed and precise obligations of states parties to the Hague Convention of 1954 (for this, see chapters III 3.6 and V 3), it prohibits:

- (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (b) to use such objects in support of the military effort;
- (c) to make such objects the object of reprisals.

It is evident that these few broad strokes cannot equal the Hague Convention as an instrument for the protection of cultural property. Therefore, although a significant number of states have ratified or acceded to the Hague Convention, those states that have not done so might wish to reconsider their position in this respect. They also, as noted before, now have the option to become party to the 1999 Second Protocol to that Convention.

Article 54 prohibits the use of methods of warfare designed to endanger the survival of the civilian population. Paragraph 1 states the principle that 'Starvation of civilians as a method of warfare is prohibited.'

Paragraphs 2-4 provide detailed prescriptions serving to ensure that a long series of 'objects indispensable to the survival of the civilian population' shall not be 'attacked, destroyed, removed or rendered useless' for the 'specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party', provided the adverse party does not use the objects concerned 'as sustenance solely for the members of its armed forces' or otherwise 'in direct support of military action'. Paragraph 2 lists the following examples of objects indispensable to the survival of the civilian population: 'foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works'. The terms 'specific', 'solely' and 'direct' in these provisions are obviously problematic, with opposed parties tending to read situations differently.

Article 54(5) adds to this complicated set of rules for the prohibition of a 'scorched earth' policy the following exception:

In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict ... within such territory under its own control where required by imperative military necessity.

The above exception is explicitly available solely to the state defending its own territory. When an occupation army is forced to retreat, it cannot invoke the exception in justification of a 'scorched earth' policy.

In this connection, we note the practice often followed by the Netherlands in the past, of inundating significant parts of its territory in order to halt, or at all events to impede, the progress of an invading army. A law of 1896, which has not been revoked, identifies the authorities empowered to order an inundation and makes provision for the payment of damages. Quite apart from the dubious

utility of establishing such ‘water-lines’ today, it is clear that recourse to the method would not run counter to Article 54: although depriving the invading forces of ‘agricultural areas for the production of foodstuffs’, this would not be done ‘for their sustenance value ... to the adverse Party’.

The principle underlying the prohibition in Article 35(3) on use of methods and means of warfare ‘which are intended, or may be expected, to cause such damage to the natural environment’ is stated in positive terms in the first sentence of Article 55(1) (‘Protection of the natural environment’): ‘Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage.’ The second sentence repeats the prohibition, adding a clause which brings the provision among the rules ensuring the protection of the civilian population: ‘and thereby to prejudice the health or survival of the population’.

Article 56, on ‘Protection of works and installations containing dangerous forces’, is as complex and detailed as Article 55 is general and broadly phrased. The works and installations in question are exhaustively listed in Article 56(1) as ‘dams, dykes and nuclear electrical generating stations’. While under the terms of Article 52(2) such objects may or may not be military objectives, Article 56(1) provides that in either case, they ‘shall not be made the object of attack ... if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population’. The Article also prohibits attacks on ‘other military objectives located at or in the vicinity of these works or installations’ if those attacks give rise to the same risks.

The special protection of these objects ceases whenever the conditions set forth in Article 56(2) obtain. General conditions, applicable to all three classes of objects, are that the object in question must be used ‘in regular, significant and direct support of military operations’, and the attack must be ‘the only feasible way to terminate such support’. With respect to dams and dykes in particular, Article 56(2)(a) adds the further condition that the object ‘is used for other than its normal function’.

The report on the negotiations which resulted in the adoption of the latter phrase places on record that the term ‘normal function’ means ‘the function of holding back, or being ready to hold back, water’. As long as an outer or inner dyke serves no other purpose, it will not lose its protection. Even if, say, an inner dyke carries a main road and thus has an important traffic function which may at first sight even seem to preponderate over its ‘normal’ function of ‘being ready to hold back water’, this does not result in a loss of protection, not even if the traffic includes occasional military transport. The special protection of the dyke ceases only if the traffic it carries is ‘in regular, significant and direct support of military operations’, and ‘attack is the only feasible way to terminate such support’.

All things considered, it may be concluded that although the above solution of a delicate problem provides no watertight guarantee, say, for the many Dutch or Vietnamese dykes, it does provide them with a high level of protection.

Whenever one of the objects mentioned in Article 56 loses its special protection and hence may be made the object of attack, the rules on general protection of the civilian population continue to apply. Article 56(3) specifies that these rules include ‘the precautionary measures provided for in Article 57’, and it adds that in such a case ‘all practical precautions shall be taken to avoid the release of the dangerous forces’. This latter obligation appears to rest on both parties, obviously, to the extent that either party is in a position to take such precautions.

Article 56(5) broaches a topic that is bound to arise in any discussion of special protection of given objects or persons: viz., the question of whether measures taken for the defence of such objects or persons affect their protected position. As this is really a question of precautionary measures, it shall be discussed under that heading.

Article 56(6) urges interested parties ‘to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces’.

One method by which additional protection may be achieved is by marking the protected objects, thereby facilitating their identification. Article 56(7) makes provision for this option: ‘Parties to the conflict may mark [the objects] with a special sign consisting of a group of three bright orange circles placed on the same axis.’ An annex to Protocol I provides a picture of the sign and specific indications about the right way to use it. The sign appears more suitable for the identification of nuclear power stations and dams than for a system of dykes spreading, as in the case of the Netherlands, widely over the country. Be this as it may, its use is not obligatory, and Article 56(7)7 specifies that ‘The absence of such marking in no way relieves any Party to the conflict of its obligations under this Article’.

### 1.5g *Precautionary measures*

Chapter IV (‘Precautionary Measures’) of the first Section of Part IV comprises two articles. One, Article 57, deals with precautions ‘in attack’, that is, precautions to be taken by the attacker. The other, Article 58, deals with precautions ‘against the effects of attack’, that is, precautions parties should take against the possible effects of attacks on military objectives under their control.

As mentioned before, Article 57(1) lays down the principle that ‘In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects’. This should be taken literally: total avoidance of damage to the civilian population is the ideal standard that combatants should seek to attain in all cases.

Article 57(2)(a) is addressed to ‘those who plan or decide upon an attack’. In the event of a major military operation this will be the commanding general with his staff; in case of a minor action, say, of a few men on patrol or a small group of guerrilla fighters it will be the leader (or the collective leadership) of the unit. These persons have a threefold obligation:

- (i) they must ‘do everything feasible to verify’ that the chosen target is a military objective and may be attacked as such;
- (ii) they must ‘take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects’;
- (iii) they must ‘refrain from deciding to launch’ a planned attack whenever it ‘may be expected to cause’ such loss, injury or damage in a measure ‘which would be excessive in relation to the concrete and direct military advantage anticipated’.

Article 57(2)(b) deals with the next phase: the decision to attack has been taken but the attack has not yet been carried out. In this interval between decision and execution it may become apparent that the chosen target is not a military objective or may not be attacked (because it is under special protection), or that the attack, if carried out, would cause excessive damage. In either such case, the attack ‘shall be cancelled or suspended’.

The above, slightly abbreviated complex of provisions gives rise to several difficult problems of appreciation. First, whether the chosen target actually is a military objective (the school with some armoured vehicles in the court-yard) and, if so, whether it nonetheless is protected from attack (the machine-gun nest at the foot of the dyke). Those involved in the attack must be aware of these questions for the entire duration of the military operation, that is, both at the planning and decision-making stages and in the phase of execution. For, it may easily happen that the person or unit charged with carrying out the attack, on the basis of his own observations, arrives at the conclusion that the target does not, or no longer, represent a military objective that may be attacked (the armoured vehicles have left the court-yard).

Article 57(2)(a)(ii) poses a very practical problem: the attacker does not always have a ‘choice of means and methods of attack’ at his disposal. If a choice is actually available, he must choose the munition capable of neutralising the machine-gun nest without doing damage to the dyke, rather than a heavy bomb which destroys both.

It should be noted that the primary obligation in this sub-paragraph is to ‘avoid’ damage to the civilian population; the goal of ‘minimising’ such damage will come into play only when total avoidance is not feasible.

Even minimised damage may be considerable, yes, excessive. This brings us back, first, to Article 51(5)(b) providing, as we saw earlier, that an attack which may be expected to cause excessive damage in relation to the concrete and direct military advantage anticipated is ‘to be considered as indiscriminate’. Article 57(2)(a)(ii) and 2(b), in terms identical to those of Article 51(5)(b), draws the line that an attacker must never overstep: he must discriminate and therefore must refrain from deciding or carrying out an attack which may be expected to cause such excessive damage in relation to the concrete and direct military advantage anticipated.

These paragraphs unmistakably may confront the persons concerned with extremely difficult problems. What exactly is the ‘concrete and direct military advantage anticipated’, what the ‘incidental loss of civilian life, injury to civilians or damage to civilian objects’ that may in effect be expected, and, most difficult of all, what is the ratio between these two? Obviously, an all too subtle weighing process cannot be expected here: the attacker is obliged to refrain from the attack only if the disproportion between the two sides in the equation ‘becomes apparent’. Yet the decision is not entirely left to the subjective judgment of the attacker: decisive is whether a normally alert attacker who is reasonably well-informed and who, moreover, makes reasonable use of the available information could have expected the excessive damage among the civilian population.

The above provisions are so intricate, both in language and in train of thought, that full implementation may probably be expected only at higher levels of command. In the event of a small unit on patrol, or a guerrilla unit, only respect of the principles underlying the detailed provisions may (and must) be expected: that civilians and civilian objects are not made the object of attack; that needlessly heavy weapons are not used against military objectives; that an attack is not carried out when no reasonable person could doubt the strictly limited military significance of the chosen target as compared with the severe damage the attack may clearly be expected to cause among the civilian population. It should also be taken into consideration that the small unit usually does not have a wide choice of methods and means of combat at its disposal and may, moreover, be limited in more than one way (lack of time, lack of sophisticated information-gathering equipment) in its capacity to evaluate all relevant aspects of the situation. In the end, therefore, what it boils down to is that even such a small unit must be thoroughly aware, in carrying out its task, of its basic obligation to spare the civilian population as much as possible.

At higher levels of command, where a choice between various operations and modes of execution is often possible and where a constant stream of information is supposed to guarantee at all times a reliable picture of the situation, the above prescriptions apply without reserve. Decisive here is not so much a particular level of command as, rather, the combination, within a given time frame, of freedom of choice of ways and means and availability of information.

The next provision, Article 57(2)(c), repeating in somewhat modernised terms a rule which was already found in Article 26 of the Hague Regulations, requires that ‘effective warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit’.

Article 57(3) indicates yet another way of minimising the risks for the civilian population: not, this time, by selecting a particular method or means of attack, but by selecting among several military objectives offering a similar military advantage the objective ‘the attack on which may be expected to cause the least danger to civilian lives and to civilian objects’. The rule seems impeccable from a theoretical point of view; in practice, however, too much should probably not be expected from it, as the situation where a variety of military objectives may be attacked with similar military advantage is not particularly common.

Article 57(4) provides a rare occasion where the Protocol deals in so many words with the ‘conduct of military operations at sea or in the air’. In such events, each party to the conflict ‘shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects’. The statement is redundant and does not noticeably contribute to the ‘reaffirmation and development’ of the law of war at sea or in the air. (The ‘reaffirmation and development of international humanitarian law applicable in armed conflicts’ being the stated aim of the Diplomatic Conference.)

Several of the above provisions of Article 57 are subtly phrased and could, by their subtlety, give rise to the misunderstanding that an attack which does not cause excessive damage to the civilian population is really quite permissible. To avoid such misunderstandings, Article 57(5) expressly states that ‘No provision of this Article may be construed as authorising any attacks against the civilian population, civilians or civilian objects’.

Article 58, on the precautions parties to the conflict should take against the effects of attacks on military objectives located within their territory or territory under their control, is far less elaborate. These parties ‘shall, to the maximum extent feasible’:

- (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- (b) avoid locating military objectives within or near densely populated areas;
- (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

Article 49 of the Fourth Geneva Convention of 1949 prohibits ‘individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not’. Yet Article 49 permits the Occupying Power, by way of exception, to ‘undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand’.

For the rest, it is a truism that effective separation of civilians and civilian objects from combatants and military objectives provides the best possible protection of the civilian population. It is equally obvious that in practice, this may be very difficult, if not impossible, to realise. This much is certain, however, that parties must, ‘to the maximum extent feasible’, endeavour to bring about and maintain the above separation – and that they are precluded from doing the opposite: a prohibition we already came across in the express terms of Article 51(7).

As mentioned before, Article 56(5) also contains a provision on precautions against the effects of attacks on military objectives. In language closely resembling that of Article 58(b), it prescribes that ‘The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the



works or installations mentioned in paragraph 1' (that is, the specially protected dams, dykes and nuclear electrical generating stations). This obligation is immediately followed, however, by a long sentence aiming to meet the evident desire to provide in the defence of these 'works and installations', just in case they might be attacked in violation of the prohibition in Article 56(1). The sentence begins by providing that 'installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack'; it then adds the condition that the defence installations 'are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations'.

If one attempts to visualise how all this could work in practice, the difficulties appear to be immense. By what means may a dam, an important dyke, or a nuclear power station be defended? Would, for instance, an anti-aircraft battery be such a permissible means? After all, as became apparent in the past, an attack from the air on targets such as dams, dykes and power stations is at least as probable as any other type of attack. Does, however, an anti-aircraft battery erected in defence of such a protected object meet the requirement that 'its armament is limited to weapons capable only of repelling hostile action against the protected work or installation'? Normally speaking, an anti-aircraft battery is equally capable of being used against aircraft in overflight as against attacking aircraft. Then again, not much else helps against attacking aircraft except the projectile of an anti-aircraft battery.

The solution may lie in restraint on both sides, with the battery crew avoiding all possible misunderstanding as to the purpose of the defence installation by not targeting aircraft in overflight, and the crew of those aircraft tolerating the presence of the battery as being of no harm 'in the circumstances ruling at the time'.

### 1.5h *Protection of the civilian population and nuclear weapons*

As noted in chapter IV 1.4b, the drafting history of Protocol I makes clear that any new principles and rules it contains, were not designed to take into account the use of nuclear weapons. Without going into the difficulties of determining what constitutes a 'new' rule, one clear example of such a new rule is the principle of protection of the natural environment, laid down in Article 35(3), complemented in Article 55 with the element of 'prejudice to the health or survival of the population'.

New are also the prohibitions on attacks by way of reprisal against the civilian population, civilians and civilian objects (on this, see chapter IV 3.3b). In theory (and as far as this part of international law is concerned) a nuclear Power whose cities are under nuclear attack could therefore still feel entitled to carry out a counter-attack by similar means on the grounds of reprisal – provided always that the counter-attack constitutes an ultimate means, is preceded by a due

warning, does no more damage to enemy cities than is proportionate to the damage inflicted on its own cities, and is terminated as soon as the enemy discontinues his unlawful attacks. The question remains, of course, what good this type of legal reasoning could do in the face of what is sometimes euphemistically referred to as a ‘nuclear exchange’.

There remain the principles and rules embodied in the Protocol on ‘general protection’ of the civilian population, as the most likely candidates to have an impact on the use of nuclear weapons. It may be safe to say that these reflect pre-existing principles of customary or treaty law. Yet, their actual formulation and elaboration into minute detail at times amount to a complete renovation. Articles 57 and 58 on precautions in attack and against the effects of attacks provide striking instances of this type of development.

In this respect, it may be noted that any conceivable process of rational decision-making relative to the eventual use of nuclear weapons may be expected to take place at a level of command where the factors set out in Article 57 will be taken into account as a matter of course, without the decision-makers asking themselves whether they are applying norms they are not legally bound to respect. (They will, in effect, consider many other factors as well.) Yet, this cannot alter the conclusion that, as a matter of law, the adoption and entry into force of Protocol I has not modified the legal position, as depicted in chapter III 3.5, with respect to the use of nuclear weapons. Specifically, the new rules as well as novel formulations of existing law found in the Protocol, cannot be deemed to bind decision-makers considering the possible use of nuclear weapons.

Here again, one may wonder what value such legal reasoning has in the face of the rather formidable characteristics of nuclear weapons. There are many more sides to the actual use, and even to the threat of use, of these weapons, and these necessitate a broader assessment of the admissibility of such use or threat. This was actually the task facing the International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, given in 1996 in reply to a request of the UN General Assembly. Since in the whole of the Court’s argument, specific rules of humanitarian law, and of Protocol I in particular – as opposed to fundamental principles such as ‘elementary considerations of humanity’ – play a decidedly secondary role, discussion of the Opinion is postponed to chapter V 2.1.

### 1.5i *Localities and zones under special protection*

Article 59(1) repeats the rule of Article 25 of the Hague Regulations: ‘It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.’ In the past, this ostensibly simple rule had often led to much uncertainty: when could a locality be deemed to be non-defended, and who was empowered to determine this? Paragraphs 2-9 of Article 59 provide detailed answers to these questions.

According to Article 59(2), the ‘appropriate authorities’ of a party to the conflict may unilaterally ‘declare as a non-defended locality any inhabited place near or

in a zone where armed forces are in contact which is open for occupation by an adverse Party'. Such a locality must meet the following four stringent conditions:

- (a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
- (b) no hostile use shall be made of fixed military installations or establishments;
- (c) no acts of hostility shall be committed by the authorities or by the population; and
- (d) no activities in support of military operations shall be undertaken.

Condition (d) prohibits activities like the transport from the locality of munitions and similar supplies to an armed force engaged in a military operation, or the transmission to that armed force of information on movements of opposing forces, et cetera.

To avoid the unilateral declaration remaining an empty gesture, the authorities must address it to the adverse party. Article 59(4) orders the latter party to 'acknowledge its receipt'. This party is then also obliged to 'treat the locality as a non-defended locality unless the conditions laid down in paragraph 2 are not in fact fulfilled, in which event it shall immediately so inform the Party making the declaration'. Even then, the locality continues to 'enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict'. This much is clear, though, that a unilateral declaration will not be sufficient in all cases to bind the hands of the adverse party, especially in the not unlikely event of a difference of opinion regarding the fulfilment or interpretation of the above four conditions.

Such difficulties can be avoided when the parties to the conflict agree on the establishment of a particular non-defended locality. Paragraphs 5 and 6 deal with this possibility, especially with respect to localities which 'do not fulfil the conditions laid down in paragraph 2'.

Article 59(7) makes provision for the event that a locality ceases to fulfil the conditions (either those of paragraph 2 or those agreed between the parties) underlying its status as a non-defended locality. Not surprisingly, the paragraph provides that the locality then loses its status; yet, as in paragraph 4, here too, the protection under the other applicable rules continues unabated.

As is apparent from the above definition of a non-defended locality, while it may not be attacked, it is 'open for occupation' by the adverse party. If the parties to the conflict wish to exclude also this latter eventuality, they must expressly agree on this. It is then no longer a question of a non-defended locality, though, but of a 'demilitarised zone' in the sense of Article 60. This article provides that the status of 'demilitarised zone' can only be conferred by agreement. Paragraph 2 specifies that this 'shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organisation, and may consist of reciprocal and concordant declarations'. Such agreements can be concluded in peacetime or, perhaps somewhat more likely in practice, after the outbreak of hostilities, when the need has made itself felt.

The protection a demilitarised zone is designed to provide follows from paragraphs 1 and 6. According to paragraph 1, 'It is prohibited for the Parties to the conflict to extend their military operations' to such a zone, 'if such extension is contrary to the terms of [the] agreement'. Paragraph 6 specifies that 'If the fighting draws near to a demilitarised zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status'.

While it is open to the parties to agree on the conditions for the demilitarisation of a particular zone, Article 60(3) assists them by providing a sort of model set of conditions. The list closely resembles the list of conditions laid down in Article 59(2) for a non-defended locality, with one marked difference: while the latter paragraph under (d) prohibits 'activities in support of military operations', Article 60(3)(d) requires that 'any activity linked to the military effort must have ceased'. The term 'military effort' is perhaps somewhat narrower than the all-encompassing 'war effort' we came across in chapter IV 1.5c, but it must have been meant as something wider than 'military operations'. Thus, activities like agriculture or the import or export of raw materials or general industrial products may not fall under it, but the production of military goods like munitions, tanks or military aircraft probably does. Since the term may therefore give rise to divergent interpretations, especially in a situation of armed conflict where the immediate interests of the parties may inspire quite extreme positions, the concluding sentence of Article 60(3) admonishes the parties to the conflict to 'agree upon the interpretation to be given to the condition laid down in sub-paragraph (d)'.

Article 60 provides further details about the marking of a demilitarised zone; the presence in the zone of police forces, and similar matters. We pass them over in silence, except for the point that a 'material breach' by one party to the conflict of the provisions of paragraphs 3 or 6 releases the other party from its obligations under the agreement establishing the demilitarised zone. The zone thereby loses its protected status. Once again, however, the normal rules for the protection of the civilian population and civilian objects continue to apply.

It should be noted that the 'localities and zones under special protection' of Articles 59 and 60 have nothing to do with the type of 'safe haven' like those established in the 1990s by the United Nations in Gorazde, Srebrenica and other places in the territory of the former Yugoslavia and which were set up as militarily defended areas.

### 1.5j *Civil defence*

Organised protection of the civilian population against the dangers of hostilities, or 'civil defence', proved its importance in the course of the Second World War, in the context of the massive bombardments of cities and similar places of civilian habitation. Yet, the subject was not taken up in Part II ('General Protection of Populations against Certain Consequences of War') of the Fourth Convention of 1949, despite its obvious relationship to matters such as the position of civilian hospitals and medical convoys, which did find a place

in that Part. It hence remained for the Diplomatic Conference of 1974-1977 to lay down, for the first time, rules on this subject. These rules, contained in chapter VI of Part IV, Section I, of Protocol I, clearly show their relationship to the matters just indicated.

The chapter opens with a definition of what ‘civil defence’ means ‘for the purposes of this Protocol’. Article 61(a) defines this function as follows:

the performance of some or all of the undermentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help to recover it from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival.

It then provides a detailed list of what these tasks are:

- (i) warning;
- (ii) evacuation;
- (iii) management of shelters;
- (iv) management of blackout measures;
- (v) rescue;
- (vi) medical services, including first aid, and religious assistance;
- (vii) fire-fighting;
- (viii) detection and marking of danger areas;
- (ix) decontamination and similar protective measures;
- (x) provision of emergency accommodation and supplies;
- (xi) emergency assistance in the restoration and maintenance of order in distressed areas;
- (xii) emergency repair of indispensable public utilities;
- (xiii) emergency disposal of the dead;
- (xiv) assistance in the preservation of objects essential for survival;
- (xv) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organisation’.

The enumeration is meant to be exhaustive. Yet the ‘task’ defined under (xv) provides an opening to bring activities not mentioned in the list under the scope of the chapter, provided the activities are ‘necessary to carry out any of the tasks mentioned’ under (i)-(xiv).

The above definition in Article 61 (a) of the *function* of ‘civil defence’ is followed by sub-paragraphs (b)-(d) defining ‘civil defence organisations’, the ‘personnel’ and the ‘*matériel*’ of such organisations, respectively. The decisive factors are that the organisations ‘are organised or authorised by the competent authorities of a Party to the conflict to perform any of the tasks mentioned under sub-paragraph (a)’ and that they ‘are assigned and devoted exclusively to such tasks’.

Article 62 addresses the protection of civilian civil defence organisations. These have to perform their tasks under a variety of circumstances: in the event of attacks against targets in the hinterland, in zones of combat, or in occupied territory. Paragraph 1 lays down that they ‘shall be respected and protected’ in

all circumstances, and that they ‘shall be entitled to perform their civil defence tasks except in case of imperative military necessity’. Article 63 adds to this general principle a series of provisions specifically for the purpose of enabling the organisations to continue to perform their tasks even in the event of occupation.

An obvious question is what protection may realistically be expected for the personnel, buildings and *matériel* of civilian civil defence organisations. The problem will be greatest in the event of attacks from the air: supposing that the chosen target is a military objective located within a built-up area and the attacks result in fires spreading beyond the target, the deployment of civil defence units to combat the fires will not prevent the enemy from continuing the attacks. Or consider the effects of exploding delayed-action bombs dropped outside the target area. In any such event, the members of the civil defence unit clearly run far greater risks than the rest of the civilian population. Yet they may not expect, for themselves and their equipment, anything better than the general protection afforded the entire civilian population. Article 62(3) expressly states so with respect to the ‘buildings and matériel used for civil defence purposes’: these objects ‘are covered by Article 52’. The same applies to ‘shelters provided for the civilian population’.

In other situations, for instance, when a town is conquered street by street, the above risks may be diminished by clearly marking the personnel, buildings and *matériel* of the civil defence organisation, as well as the shelters provided for the civilian population. On this matter of identification Article 66 contains a number of provisions relating, among other things, to the use of an ‘international distinctive sign of civil defence’. This is described in paragraph 4 as ‘an equilateral blue triangle on an orange ground’. To the extent that ‘medical and religious personnel, medical units and medical transports’, which are normally identified by a red cross or red crescent, are used for civil defence purposes, paragraph 9 permits the continued use of the latter signs (see also hereafter, in chapter IV 1.6).

The distinctive sign of civil defence may be used already in time of peace, with the consent of the competent authorities, to identify civil defence personnel, buildings and *matériel* as well as civilian shelters (Article 66(7)). Article 66(8) requires the contracting parties and, as the case may be, the parties to the conflict to ‘take the measures necessary to supervise the display’ of the sign and ‘to prevent and repress any misuse thereof’.

Article 67 makes provision for the event that individual members of the armed forces or entire military units are ‘assigned to civil defence organisations’. Such members or units ‘shall be respected and protected’, provided that they fulfil a long list of conditions, the essence of which is that they are ‘permanently assigned and exclusively devoted to the performance of any of the tasks mentioned in Article 61’ and ‘are clearly distinguishable from the other members of the armed forces by prominently displaying the international distinctive sign of civil defence’.

## 1.6 Wounded, sick and shipwrecked

### 1.6a General remarks

Like Part IV on the 'Civilian Population', also Part II of Protocol I, on the 'Wounded, Sick and Shipwrecked', contains many important improvements over the pre-existing law. This is so despite the fact that comparatively little time had passed since its codification in the relevant parts of the Geneva Conventions of 1949.

A first point of interest concerns the title of Part II. While in 1949 the subject-matter was still divided across several instruments, with the wounded, sick and shipwrecked of the armed forces coming under Conventions I and II, and wounded and sick civilians under Convention IV, Part II of Protocol I brings them all together under the general heading of 'wounded, sick and shipwrecked'. The unification is apparent from Article 8, defining, 'for the purposes of this Protocol', the 'wounded and sick' and 'shipwrecked', respectively, as follows:

- (a) 'wounded' and 'sick' mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility;
- (b) 'shipwrecked' means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol.

The above definitions present some interesting features. First, the notion of sickness has been defined in very wide terms, the key element being 'need of medical assistance or care'. It is beyond question that not only physical trauma but also mental illness brings a person under the category of the 'sick' in the sense of the Protocol.

Then, the text emphasises repeatedly that a person who is 'wounded', 'sick' or 'shipwrecked' will enjoy protection as such only so long as he refrains from 'any act of hostility'. This condition brings to mind two rules dealt with before. One is the rule in Article 42(2)(c) that attacks are prohibited against a person who is *hors de combat* because he 'has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself, provided that ... he abstains from any hostile act and does not attempt to escape'. The other is the rule in Article 51(3) that civilians enjoy general protection as such, 'unless and for such time as they take a direct part in hostilities'.

The category of 'shipwrecked' comprises, besides the classical 'shipwrecked at sea', also persons who are in peril in 'other waters', such as rivers or lakes. The

definition makes clear that being ‘shipwrecked’ represents a transitory stage; it comes to an end as soon as the person in question is put ashore and, with that, acquires a different status, for instance, that of prisoner of war, of a ‘wounded’ person, or of a civilian, whether in occupied or non-occupied territory.

Article 10 lays down the principles of protection and care of the wounded, sick and shipwrecked. Paragraph 1 emphasises that ‘All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected’. Paragraph 2, first sentence, requires that ‘In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition’. Elaborating this point, the second sentence specifies that medical grounds are the only ones which can justify any distinction in their treatment. It should be noted in this respect that Article 9(1) excludes in the most general terms ‘any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria’ in the application of the present Part of the Protocol.

A first striking aspect of Article 11 is that it is not confined to the wounded, sick and shipwrecked but concerns, quite generally, all those persons, whether healthy or sick, ‘who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty’ as a result of a situation amounting to an international armed conflict. Paragraph 1 prohibits to endanger their ‘physical or mental health’ by ‘any unjustified act or omission’, such as ‘any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty’.

Article 11(2) prohibits in particular ‘to carry out on such persons, even with their consent’, procedures amounting to ‘physical mutilations’, ‘medical or scientific experiments’ or ‘removal of tissue or organs for transplantation’, which cannot be justified on medical grounds. Article 11(3) permits exceptions to the last-mentioned prohibition only in the case of entirely voluntary ‘donations of blood for transfusion or of skin for grafting’; the donations must moreover be made ‘for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient’.

Article 11(4), on the criminal character of certain violations of the above rules, is referred to in chapter IV 3.4 on individual responsibility.

Article 11(5) lays down the right of the persons described in paragraph 1 ‘to refuse any surgical operation’. In case of such a refusal, the medical personnel concerned shall endeavour to document it by means of ‘a written statement to that effect, signed or acknowledged by the patient’.

Article 11(6) provides guidelines for the registration of medical procedures undertaken with respect to the persons identified in paragraph 1.



### 1.6b *Medical units, medical personnel, religious personnel*

Articles 12-15 supplement the existing rules on the protection of medical units and civilian medical and religious personnel. In this respect, the first point of interest is how these categories are defined in the Protocol. Article 8 (e) defines medical units as:

establishments and other units, whether military or civilian, organised for medical purposes, namely the search for, collection, transportation, diagnosis or treatment – including first-aid treatment – of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medical centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary.

It should be noted that this definition, rather than confining itself to giving an enumeration of activities relating to the treatment of wounded, sick and shipwrecked, also mentions the prevention of disease. This extension is directly related to the wide scope of Article 11, discussed above. (We shall encounter this point once again in the discussion of Article 16, in chapter IV 1.6e).

Medical personnel, as defined in Article 8 (c), are ‘those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under sub-paragraph (e) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary’. Article 8 (c) lists three categories of persons who are included under the term in any event:

- (i) medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organisations;
- (ii) medical personnel of national Red Cross, Red Crescent and Red Lion and Sun Societies and other national voluntary aid societies duly recognised and authorised by a party to the conflict;
- (iii) medical personnel of medical units or medical transports described in Article 9, paragraph 2.

The units or transports indicated under (iii) are those units or transports which have been ‘made available to a Party to the conflict for humanitarian purposes’ by a neutral state or aid society of such a state or by an impartial international humanitarian organisation. (The reference in Article 9, as elsewhere in the Protocol, is to ‘a neutral or other State which is not a Party to that conflict’; the addition of the ‘other’ state serves to place beyond question that the provision also covers those states which have not formally declared their neutrality and, perhaps, do not in all respects abide by the strict rules of traditional neutrality law; we shall hereinafter simply refer to all non-participating states collectively by the term ‘neutral state’, which in our view adequately describes the ‘other’ situation as well.)

The above definition is once again wide in scope, not only on account of its reference to sub-paragraph (e), but also because it includes administrative and technical personnel. It is not, on the other hand, a virtually open-ended definition. The limitation lies in the requirement that the personnel in question must have been expressly assigned by a party to the conflict. In the eyes of the authors of the text, only somewhat sizeable organisations would normally qualify for such an assignment: the hospital with its personnel would qualify, but not the individual medical practitioner or pharmacy.

‘Religious personnel’, as defined in Article 8 (d), means:

military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:

- (i) to the armed forces of a party to the conflict;
- (ii) to medical units or medical transports of a party to the conflict;
- (iii) to medical units or medical transports described in Article 9, paragraph 2; or
- (iv) to civil defence organisations of a party to the conflict.

Here again, the attachment may be either permanent or temporary. While the Conventions of 1949 simply refer to ‘chaplains’, the present text refers to them merely as one example of persons constituting ‘religious personnel’. This leaves room for a somewhat more flexible interpretation than would previously have been possible, perhaps even to the inclusion of personnel providing spiritual assistance not, strictly speaking, of a ‘religious’ character in the narrow sense of: being devoted to the service of, and seeking reliance in, a specific god, or gods.

Article 12, on the protection of medical units, states in its first paragraph the general principle that these ‘shall be respected and protected at all times and shall not be the object of attack’. In order to make this principle effective, the parties concerned may resort to a variety of measures. As far as fixed medical units are concerned, they may notify the adverse party of their location. Paragraph 3 invites them to do this, adding that the ‘absence of such notification shall not exempt any of the Parties from the obligation’ to abide by the principle set forth in paragraph 1. Another obvious measure for ensuring protection is found in paragraph 4, which obliges the parties, whenever possible, to ensure that medical units, whether fixed or mobile, ‘are so sited that attacks against military objectives do not imperil their safety’.

Over and above these and similar measures, a point of major importance is the possibility to mark a given object as a medical unit. As the need of identification applies to medical personnel and medical transports as well, it is discussed separately in chapter IV 1.6d.

For a *civilian* medical unit, such as a civilian hospital or blood transfusion centre, to qualify for the protection of Article 12(2), either it must belong to a party to the conflict, or it must be ‘recognised and authorised by the competent authorities’ of such a party, or it must have been made available by a neutral state or organisation as mentioned above.

When civilian medical units ‘are used to commit, outside their humanitarian function, acts harmful to the enemy’ they lose their protection but only, as specified in Article 13, after a due ‘warning has remained unheeded’. The article provides a list of situations that are not ‘considered as acts harmful to the enemy’, such as the carrying of ‘light individual weapons’ for the defence of the personnel or the wounded and sick, and the presence of combatants in the unit ‘for medical reasons’.

Article 14 reaffirms the obligation laid down in Article 55 of the Fourth Convention, for an Occupying Power ‘to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied’. Elaborating this principle, paragraph 2 puts specific limits to the power of the party concerned to ‘requisition civilian medical units, their equipment, their *matériel* or the services of their personnel’.

Article 15 states and elaborates the principle that civilian medical and religious personnel ‘shall be respected and protected’.

Addressing the situation ‘in an area where civilian medical services are disrupted by reason of combat activity’, paragraph 2 requires that the personnel shall be afforded ‘all available help’. Although the paragraph does not specify who is to afford this help, it may be safe to say that the obligation rests on every party to the conflict in a position to do so.

Article 15(3), dealing with a situation of occupation, reaffirms and reinforces the obligations of an Occupying Power under Article 56 et seq. of the Fourth Convention and requires this Power to ‘afford civilian medical personnel in occupied territories every assistance to enable them to perform, to the best of their ability, their humanitarian functions’. It is obvious that the said Power may not, conversely, compel them to act in a manner which is ‘not compatible with their humanitarian mission’.

Article 15(4) provides in general terms, and without reference to any particular situation of danger, disruption of services or occupation, that the personnel ‘shall have access to any place where their services are essential’; both in their own interest and in that of the relevant party to the conflict, this right of access is ‘subject to such supervisory and safety measures’ as this party ‘may deem necessary’.

Article 15(5) makes both the general rule of respect and protection and the relevant specific ‘provisions concerning the protection and identification of medical personnel’ applicable to civilian religious personnel as well.

### 1.6c *Medical transportation*

Leaving aside for the moment Articles 16-20, we now broach first the provisions relating to medical transportation in Section II of Part II. The definitions of the various key concepts concerned are once again found in Article 8.

Article 8(f) defines the function of ‘medical transportation’ as ‘the conveyance by land, water or air of the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol’.

‘Medical transports’, as the means for carrying out this function, are defined in Article 8(g) as ‘any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a Party to the conflict’. ‘Control of a competent authority’ is decidedly more exacting than mere prior ‘recognition’ or ‘authorisation’, and it must persist as long as the object in question is ‘assigned exclusively to medical transportation’.

Sub-paragraphs (h)-(j) distinguish as separate categories of medical transports: ‘medical vehicles’, ‘medical ships and craft’, and ‘medical aircraft’, for transport by land, by water, and by air, respectively.

The protection of medical vehicles (such as ambulances) requires no more than a single provision of Section II: Article 21 lays down that they ‘shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol’.

The remainder of the Section provides supplementary rules on the use and protection of hospital ships and coastal rescue craft (Article 22) and other medical ships and craft (Article 23), and it deals at length with the position of medical aircraft (Articles 24-31).

As noted in chapter III 4.3, fear of possible abuse of medical aircraft had led in 1949 to the adoption of rules severely curtailing their use, to the point that this had become virtually impossible. This situation needed to be redressed. An important factor in the deliberations was the necessity, inherent in modern aerial warfare, of rapid decisions concerning the classification of moving objects in the air and the measures, if any, to be taken against them. Taking this and other relevant factors into account, Articles 24-31 were drafted with a view to providing medical aircraft with the maximum protection that may realistically be expected in each distinct situation.

Article 24 states the principle that ‘Medical aircraft shall be respected and protected, subject to the provisions of this Part’.

The use of medical aircraft is subject to certain general restrictions. Article 28(1) provides that they shall not be used ‘to attempt to acquire any military advantage over an adverse Party’ or ‘in an attempt to render military objectives immune from attack’, and paragraph 2 prohibits their use ‘to collect or transmit intelligence data’ or for the transport of any persons or cargo not included within the above definition of the function of ‘medical transportation’. A further obvious restriction is that medical aircraft are in principle precluded from carrying any weapons; exception is made in paragraph 3 only for ‘small arms and ammunition taken from the wounded, sick and shipwrecked on board and not yet handed to the proper service, and such light individual weapons as may

be necessary to enable the medical personnel on board to defend themselves and the wounded, sick and shipwrecked in their charge’.

Articles 25-27 identify three specific situations: medical aircraft may be in ‘areas not controlled by an adverse Party’; in ‘contact or similar zones’; or in ‘areas controlled by an adverse Party’. The first situation gives rise to the least problems: Article 25 confirms that in and over such areas ‘the respect and protection of medical aircraft of a party to the conflict is not dependent on any agreement with an adverse Party’. Yet, for greater safety, and ‘in particular when such aircraft are making flights bringing them within range of surface-to-air weapons systems of the adverse Party’, notification of the latter party may be advisable. The areas are defined in the article as ‘areas physically controlled by friendly forces, or sea areas not physically controlled by an adverse Party’.

Greater difficulties arise when medical aircraft are in or over ‘contact or similar zones’. A ‘contact zone’, as defined in Article 26(2), is ‘any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground’. Paragraph 1 deals with the situation of medical aircraft ‘in and over those parts of the contact zone which are physically controlled by friendly forces’ as well as ‘in and over those areas the physical control of which is not clearly established’. For a ‘fully effective’ protection of medical aircraft in and over such areas ‘prior agreement between the competent military authorities of the Parties to the conflict’ is required. In the absence of such agreement, medical aircraft ‘operate at their own risk’. Even then, though, they must be respected ‘after they have been recognised as such’.

Most problematic is the situation of medical aircraft of a party to the conflict ‘flying over land or sea areas physically controlled by an adverse Party’. Article 27(1) provides that medical aircraft shall be protected even in this situation, ‘provided that prior agreement to such flights has been obtained from the competent authority of that adverse Party’. In the event of a medical aircraft flying over such an area ‘without, or in deviation from the terms of, an agreement provided for in paragraph 1, either through navigational error or because of an emergency affecting the safety of the flight’, it is obviously at risk of being attacked; in order to minimise this risk, Article 27(2) requires it to ‘make every effort to identify itself and to inform the adverse Party of the circumstances’. As soon as that party has recognised the medical aircraft for what it is, it ‘shall make all reasonable efforts to give the order to land or to alight on water ... or to take other measures to safeguard its own interests’; only if all these measures have remained without effect may it attack the aircraft.

Medical aircraft flying over contact or similar zones (Article 26) or over areas controlled by an adverse party (Article 27) ‘shall not, except by prior agreement with the adverse Party, be used to search for the wounded, sick and shipwrecked’; thus Article 28(4). Strictly speaking, this rule does not amount to a restriction on the operations of medical aircraft, as ‘search for the wounded, sick and shipwrecked’ is not covered by the function of ‘medical transportation’ as defined

in Article 8(f). Yet, in practical terms, Article 28(4) significantly restricts the use of medical aircraft. Helicopters are often used without prior notification to search for, and collect the wounded, sick or shipwrecked in contested areas or areas under enemy control. As a consequence of the rule in Article 27(4), a helicopter operating in this fashion will do so entirely at its own risk. As a further consequence, this task is likely to be assigned to fully armed battle helicopters rather than to aircraft fulfilling the conditions for a medical aircraft.

The remaining articles of this Section deal with the procedures to be followed with respect to notifications and requests for prior agreements (Article 29), landing and inspection of medical aircraft (Article 30), and flying over or landing in the territory of neutral states (Article 31).

### 1.6d *Identification*

Effective respect for and protection of medical units, medical and religious personnel and medical transports depends to a very great extent on recognising them as such. Traditionally, the red cross or red crescent, applied so as to ensure maximum visibility, have served this purpose. Visibility, though, depends in turn on factors such as the dimensions of the distinctive emblem, the distance between emblem and observer and the time available for its recognition, not to mention circumstances affecting visibility such as rain, fog, or darkness.

Article 18, on identification, prescribes in paragraph 1 that ‘Each Party to the conflict shall endeavour to ensure that medical and religious personnel and medical units and transports are identifiable’. In somewhat more concrete terms, paragraph 2 requires each such party to ‘endeavour to adopt and to implement methods and procedures which will make it possible to recognise medical units and transports which use the distinctive emblem and distinctive signals’. The use of distinctive *signals* constitutes a novelty. Paragraph 5 makes their use dependent on authorisation by the party concerned, and detailed provisions on the use of distinctive signals are contained in chapter III of Annex I to the Protocol, as amended in 1993. Provision is made for the use of a light signal (a flashing blue light), a radio signal (the urgency signal and distinctive signal described in specified regulations of the International Telecommunication Union), and means of electronic identification using the Secondary Surveillance Radar (SSR) system. Further improvements and developments in this field are continually sought. As noted before, the characteristics of modern aerial warfare make the timely identification of medical units and transports extremely important.

With respect to the identification of civilian medical and religious personnel, Article 18(3) prescribes that in ‘occupied territory and in areas where fighting is taking place or is likely to take place’ they ‘should be recognisable by the distinctive emblem and an identity card certifying their status’. Chapter I of Annex I provides indications concerning the design and format of the identity card.

### 1.6e *General protection of medical duties*

Article 16, on the ‘general protection of medical duties’, breaks new ground. It deals with the problems that may arise in connection with ‘medical activities’ relating to the treatment of wounded and sick, with ‘medical ethics’ serving as the yardstick by which these activities are to be measured. The article does not give any definition of ‘medical activities’, and neither does it indicate who are thought to be carrying out these activities. Yet the link with ‘medical ethics’ makes clear that its drafters had in mind those who practise the medical profession, and the professional activities of these persons: indeed, of *all* such persons, irrespective of whether they belong to the category of ‘medical personnel’ or not.

Article 16 lays down three basic rules. The first, in paragraph 1, prohibits punishing any person ‘for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom’.

The second rule, in paragraph 2, prohibits to compel ‘persons engaged in medical activities’ to perform acts ‘contrary to the rules of medical ethics’ or other relevant rules or, to refrain from performing acts that are ‘required by those rules and provisions’.

The third rule, in paragraph 3, prohibits to compel any person engaged in medical activities to give ‘any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or their families’. The sole exception to this last prohibition concerns information the person is required to give to his own party in accordance with the law of that party. He is, moreover, bound to respect existing regulations for the compulsory notification of communicable diseases.

It may be clear from this brief outline that Article 16 deals with a topical yet delicate issue: the tendency is strong to regard the provision of medical aid to wounded adversaries and not informing one’s authorities accordingly, as a betrayal of one’s own cause.

### 1.6f *Role of the civilian population and of aid societies*

Article 17 deals with the role of the civilian population and of aid societies from various angles. Paragraph 1, first sentence, addresses the not-so-humanitarian tendencies of the civilian population:

The civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them.

The remainder of Article 17(1) deals with the positive role the population can equally well play. Both the civilian population in general and aid societies (such as national Red Cross or Red Crescent Societies) in particular, ‘shall be permitted, even on their own initiative, to collect and care for the wounded,

sick and shipwrecked, even in invaded or occupied areas'. No one, the paragraph concludes significantly, 'shall be harmed, prosecuted, convicted or punished for such humanitarian acts'.

While the initiative in Article 17(1) lies with the civilian population, paragraph 2 deals with the converse situation, where the authorities ('the Parties to the conflict') appeal to the civilian population and aid societies 'to collect and care for the wounded, sick and shipwrecked, and to search for the dead and report their location'. The parties are then obliged to 'grant both protection and the necessary facilities to those who respond to this appeal'. The paragraph even lays down that if the adverse party gains control of the area, it shall 'afford the same protection and facilities for so long as they are needed'.

### 1.6g *Other matters*

Part II, Section I, contains two more articles on matters of a general nature. Article 19 lays down an obligation for neutral states to 'apply the relevant provisions of this Protocol to persons protected by this Part who may be received or interned within their territory, and to any dead of the Parties to that conflict whom they may find'.

Article 20, continuing the line set out in the Conventions of 1949, prohibits reprisals 'against the persons and objects protected by this Part'. On this, see chapter IV 3.3b.

Section III of Part II is devoted to 'missing and dead persons'. Obviously, any armed conflict of some duration and covering a somewhat extended area entails uncertainty about the fate of vast numbers of individuals, combatants and civilians alike. Accordingly, the Conventions of 1949 already contain provisions designed to facilitate the tracing of missing and dead persons. The rules in Section III supplement these provisions. Article 32 expresses the ratio behind the rules: the primary concern lies with 'the right of families to know the fate of their relatives'.

Article 33 deals with missing persons, that is, 'persons who have been reported missing by an adverse Party'. The party to the conflict which has received such reports has the duty, 'as soon as circumstances permit, and at the latest from the end of active hostilities', to search for the persons in question, *inter alia*, on the basis of relevant information transmitted by the adverse party (paragraph 1). In order to facilitate this gathering of information, paragraph 2 requires the parties concerned to record, in the course of the armed conflict, specified data relating to persons who have been detained for some time or who died 'as a result of hostilities or occupation'. Paragraph 3 prescribes that information as well as requests for information shall be transmitted either directly or through the Protecting Power, the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross or Red Crescent Societies; the parties must ensure that the information, no matter how transmitted, is always also supplied to the Central Tracing Agency.



Article 33(4) urges the parties to the conflict to ‘endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas’. An obvious form of such an arrangement is the local cease-fire. The search party may be composed of personnel of one or, as appropriate, both parties to the conflict. The paragraph specifies that ‘Personnel of such teams shall be respected and protected while exclusively carrying out these duties’.

Article 34 provides rules on the treatment of the remains of persons who have died as a result of hostilities or occupation, and on the maintenance of and access to their gravesites.

## 1.7 Relief in favour of the civilian population

While we encountered the civilian population in Article 17 of the Protocol as a potentially active party in collecting and caring for the wounded, sick and shipwrecked, it figures as a group itself in need of relief in Section II (‘Relief in favour of the civilian population’) of Part IV (‘Civilian Population’).

As far as occupied territory is concerned, Convention IV already regulates the subject in a fairly satisfactory manner (see chapter III 4.6d). Accordingly, Article 69 of the Protocol merely adds to the ‘food and medical supplies of the population’ (which Article 55 of the Convention obliges the Occupying Power to ensure) a catalogue of other ‘basic needs’ which it must also meet: ‘clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship’. The inclusion of ‘other supplies essential to survival’ removes the danger, inherent in any such detailed specification, that the omission of a particular item is used as an argument that it is not covered by the obligation.

In contrast with the rules for occupied territory, the provisions in Convention IV relating to relief for the civilian population in non-occupied territory were totally inadequate. Article 70 of the Protocol is designed to fill this gap, to the extent that this proved acceptable to the contracting states. The main obstacle was the inclination of states to regard the well-being of their own population as a domestic affair and, accordingly, to reserve to themselves the right to decide whether, and by whom, relief shall be provided. A compromise between this aspect of state sovereignty on the one hand, and the fundamental idea of aid according to need on the other, was the best that could be achieved.

The compromise is evident in Article 70(1). It opens with the ostensibly firm statement that ‘If the civilian population [in non-occupied territory] is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken’, adding immediately, however, that such actions shall be ‘subject to the agreement of the Parties concerned in such relief actions’. In an attempt to forestall possible objections of the recipient state, Article 70(1) goes on to state that offers of relief ‘shall not be regarded as interference in the armed conflict or as unfriendly acts’. In a closing sentence it

lays down that in the distribution of relief consignments, priority shall be given to specially protected persons ‘such as children, expectant mothers, maternity cases and nursing mothers’.

Strikingly, while the need of the civilian population has been phrased in objective terms (*is not adequately provided*), the text specifies neither who should undertake the relief actions, nor who are the ‘Parties concerned’ in the relief actions. As regards the first question, it appears that the ‘actor’ may be any individual or organisation, whether governmental or non-governmental, the sole condition being that the action is ‘humanitarian and impartial in character and conducted without any adverse distinction’.

Among the ‘Parties concerned’, two appear to be of crucial interest: the receiving party, and an adverse party in a position to prevent the passage of relief consignments, for instance, because it has established a blockade. The article provides no further details concerning the position of the receiving party, in particular, whether it is obliged to permit necessary relief actions. Yet, one feels inclined to conclude to the existence of such an obligation in a situation where all conditions are fulfilled, notably the condition that in any reasonable assessment the civilian population is threatened in its survival.

As regards other parties concerned, and especially the adverse party, Article 70(2) provides that they ‘shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party’. This language effectively precludes the practice, applied sometimes in blockades, of cutting off literally all supplies with enemy destination. In fact, this provision requires all states parties to allow and facilitate rapid and unimpeded access of all relief consignments, equipment and personnel.

The remaining paragraphs of Article 70 deal with practical aspects of relief actions, including international co-ordination. Finally, Article 71 lays down some rules relating to the position of the personnel involved in relief actions, both in occupied and non-occupied territory. In particular, it provides that such personnel shall be respected, protected and assisted in carrying out its relief mission.

## 1.8 Treatment of persons in the power of a party to the conflict

The above phrase is the title of the third and last Section of Part IV (Protection of the Civilian Population). Opening chapter I (Field of Application and Protection of Persons and Objects), Article 72 defines the field of application. It states that the provisions of the Section are additional, not only to ‘the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention’, but equally to ‘other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict’. These other rules include human rights provisions found in various treaties.

Article 73, on ‘Refugees and stateless persons’, provides that ‘Persons who, before the beginning of hostilities, were considered as stateless persons or refugees’ under relevant rules of international or domestic law ‘shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction’. The purpose of this provision is to ensure that, if the territory where these persons are living is occupied by the party to the conflict from whose territory they fled or whose nationality they were deprived of before the outbreak of hostilities, that party will grant them the guarantees and protection to which they are entitled as ‘protected persons’, regardless of the fact that the individuals in question had previously fled from that party’s territory.

While Article 73 is not concerned with people who flee their homes after the beginning of hostilities, Article 74 addresses at least part of that problem, and one that often tends to assume staggering proportions, viz., the break-up of families ‘as a result of armed conflicts’. The article provides that all parties (that is, all states parties to the Protocol, and first and foremost the parties to the conflict) ‘shall facilitate in every possible way the reunion’ of such families. The parties are moreover put under an obligation to ‘encourage in particular the work of the humanitarian organisations engaged in this task in accordance with the provisions of the Conventions and of this Protocol and’ – unavoidable safety clause – ‘in conformity with their respective security regulations’.

The clearest example of a human rights-type provision in Section III of Part IV is Article 75. It provides an extensive catalogue of fundamental, human rights-type guarantees for the protection of persons in the power of a party to the conflict, such as their right to life and personal integrity (paragraph 2) and minimum standards to be observed in the arrest and criminal procedures against them (paragraphs 3-7). Special reference should be made to paragraph 7, which places beyond doubt that the principles of fair trial apply equally to ‘persons accused of war crimes or crimes against humanity’. Paragraph 8, finally, expressly excludes a reading of the article that would deprive a person from the protection of ‘any other more favourable provision granting greater protection’.

It may be noted in passing that Article 75 thus reaffirms a number of the basic principles which were embodied earlier in common Article 3 of the 1949 Conventions, applicable in *non*-international armed conflicts.

Who are the ‘persons in the power of a Party to the conflict’ who qualify for the protection of Article 75? First, those persons who have fallen into the hands of an adverse party and who do not benefit from more favourable treatment under the Conventions or under the Protocol. An example is the guerrilla fighter who, in an unusual combat situation as defined in Article 44, has failed to meet the minimum requirement of carrying his arms openly ‘during each military engagement, and during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate’, and who thus has forfeited his right to be a prisoner of war. Another example is the mercenary of Article 47, who ‘shall not have the right to be a combatant or a prisoner of war’.

An open question is whether the protection of Article 75 also extends to those persons, nationals of a party to the conflict, whom that party, for reasons related to the armed conflict, deprives of their liberty or subjects to criminal procedures. The Article provides no answer to this question, leaving the possibility of divergent views.

Chapter II of Section III contains ‘measures in favour of women and children’. Article 76, on ‘protection of women’, provides in paragraph 1, first, that women must be ‘the object of special respect’, and then, reflecting many tragic experiences, specifies that they ‘shall be protected in particular against rape, forced prostitution and any other form of indecent assault’.

Article 76(2) and (3) deal with pregnant women and mothers having dependent infants. When ‘arrested, detained or interned for reasons related to the armed conflict’, their cases must be ‘considered with the utmost priority’ (paragraph 2). In respect of the death penalty, paragraph 3 requires the parties to the conflict to ‘endeavour to avoid the pronouncement’ of this punishment on these women ‘for an offence related to the armed conflict’, and it provides that this penalty for such offences shall ‘not be executed on such women’.

Article 77 deals with various aspects of the ‘protection of children’. We mention, first, the restrictions paragraphs 2 and 3 place on the direct participation of children in hostilities. Children ‘who have not attained the age of fifteen years’ ought not to take a direct part in hostilities; this is the idea underlying the text of paragraph 2. It should be immediately added that this opinion, with its specific age limit of 15 years, represents a more or less arbitrary compromise between those who would have preferred a far lower limit, or even no specific limit at all, and those who favoured a distinctly higher limit, say, of 18 or 21 years.

As it stands, Article 77(2) obliges the parties to the conflict to ‘take all feasible measures’ to ensure that children below 15 are kept from taking a direct part in hostilities; ‘in particular, they shall refrain from recruiting them into their armed forces’. For the event that, despite this express rule, children below the set age limit ‘take a direct part in hostilities and fall into the power of an adverse Party’, Article 77(3) provides that ‘they shall continue to benefit from the special protection accorded by this article, whether or not they are prisoners of war’. Elements of this special protection are: special respect, protection against indecent assault, and ‘the care and aid they require’ (paragraph 1), and quarters in principle ‘separate from the quarters of adults’ (paragraph 4).

An aspect that deserves to be highlighted concerns the death penalty. Article 77(5) prohibits the execution of this penalty for an offence related to the armed conflict ‘on persons who had not attained the age of eighteen years at the time the offence was committed’. It is emphasised that, in so far as execution of the death penalty is concerned, the only decisive factor is the age of the offender at the time he *committed* the offence: irrespective of the age at which he is tried, and even if he is then *condemned* to death, that penalty shall not be *executed* on him if he was below 18 at the time he perpetrated the crime.

Article 78 is designed to prevent the arbitrary evacuation of children to a foreign country. Their evacuation is prohibited in principle; exception may only be made in their own interest: viz., ‘where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require’. For these exceptional cases, the article provides several precise rules to be observed in preparing and carrying out their evacuation.

Chapter III of Section III consists of one single article: Article 79, on ‘measures of protection for journalists’. The persons envisaged here are those journalists who, without being accredited to the armed forces as war correspondents, are ‘engaged in dangerous professional missions in areas of armed conflict’ – a type of activity whose dangerous character has clearly come to light in a number of, sometimes fatal, incidents. The question is what can be done to protect journalists engaged in such missions without at the same time depriving them of their freedom of movement and of collecting and imparting information.

In this respect, two situations need to be distinguished. A journalist whose ‘dangerous professional mission’ has brought him into an area where combat is actually being waged, may, either, be able to move around freely in the area, or may find himself apprehended and detained by one of the parties to the conflict. Article 79, which does not explicitly identify these situations, must be regarded as applicable to both situations.

With regard to the first situation, the law evidently cannot do overly much to protect our journalist against the immediate effects of combat – the bullets, the bombs, the mines. Article 79(1) confines itself to a statement of the obvious: he and his colleagues ‘shall be considered as civilians within the meaning of Article 50, paragraph 1’. Article 79(2) adds that ‘They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians’. The point is, of course, that they *are* civilians, but civilians with the peculiar propensity to seek out situations of acute danger in which the rules on protection of civilians are bound to be of limited effect.

As for the journalist who finds himself in the hands of a party to the conflict, his two main concerns will probably be to keep his materials intact and to regain as rapidly as possible his liberty and freedom of movement. Article 79 does not squarely address either of these issues; rather, paragraphs 1 and 2 apply in this situation too: the journalist ‘shall be considered as a civilian’ and ‘shall be protected as such’. One question is whether he will be believed in his assertion that he actually is a journalist. In this respect, paragraph 3 provides that a journalist setting out on a dangerous mission ‘may obtain an identity card ... issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located’. Such an official identity card may contribute to convincing the detaining party that the person in question is not a spy or a saboteur but, rather, a respectable person doing a respectable job.

There is another side to the picture: to obtain the card from the government concerned may imply the acceptance of a measure of official supervision

which the journalist considers irreconcilable with the requirements of his profession. In view of this dilemma, paragraph 3, rather than firmly prescribing the possession of an identity card attesting to the status of its bearer as a journalist, leaves the journalist entirely free to acquire such a document, or not.

## IV 2 PROTOCOL II

After the above, lengthy discussion of Protocol I, much less need be said about Protocol II, dealing with internal armed conflict. For one thing, it counts only 28 articles (as opposed to the 102 articles of Protocol I). For another, several of its provisions are copies of provisions in Protocol I.

As indicated by Article 1, Protocol II ‘develops and supplements Article 3 common to the Conventions of 1949’. The preamble similarly recalls ‘that the humanitarian principles enshrined in Article 3 ... constitute the foundation of respect for the human person in cases of armed conflict not of an international character’, adding immediately that ‘international instruments relating to human rights offer a basic protection to the human person’.

The preamble defines what may be regarded as the basic purpose of Protocol II, as ‘the need to ensure a better protection for the victims’ of internal armed conflicts. These ‘victims’ are, in large measure, the civilians not participating in the hostilities. A particularly important ‘supplement’ to common Article 3 are therefore the rules of the Protocol specifically designed for their protection.

Since a complete or perfect regulation of this and other topics could not be reached at the Diplomatic Conference, the preamble concludes with a simplified version of the Martens clause, stating that ‘in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience’.

### 2.1 Scope of application

To what situations does Protocol II apply? Obviously not to those situations which fall under the scope of Protocol I: international armed conflicts, including, as appropriate, wars of national liberation. Nor does it apply to situations which are too low on the ladder of violence, defined in Article 1(2) as ‘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’. The internal armed conflict, both of common Article 3 and of Protocol II, is situated between these two extremes.

As opposed to common Article 3, Protocol II is not applicable to each and every ‘internal armed conflict’. Article 1(1) defines the ‘material field of application’ of the Protocol as all internal armed conflicts taking place in the territory of a state party:

between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control

over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

A first point to note is that this language excludes the case of, even major, fighting in a country between various armed groups but with no involvement of the governmental armed forces. As recent history shows, this is not an imaginary case. (For a discussion of the scope of application of common Article 3 of the Geneva Conventions see chapter III 4.7)

Regrettable though this exclusion may be, even greater importance attaches to the catalogue of conditions the ‘adverse party’ is required to meet and which tend to exclude any argument that the Protocol should be deemed to apply to an internal armed conflict simply because it causes a large number of victims. Similarly, the Protocol does not appear designed to apply to a situation where the ‘adverse party’ is an underground guerrilla movement which can only incidentally, now here then there, carry out actions of the hit-and-run type.

There is, moreover, the fact that thus far, the qualification of a situation as an armed conflict under the Protocol (or common Article 3, for that matter) has largely been left to the discretion and the good faith of the state concerned. Much will therefore depend on the good will of the authorities in the state concerned and, as the case may be, on such pressure as the outside world may be able to exert.

It bears repeating that, as noted earlier in chapters III 2 and IV 1.2, international judicial bodies are empowered to make their own determination about the application of Protocol II, as of common Article 3, to a given situation of internal violence.

As expressly stated in paragraph 1, Article 1 does not purport to modify the ‘existing conditions of application’ of Article 3 common to the Conventions. It remains therefore entirely possible to invoke the latter article with respect to those situations of internal armed conflict which are not considered to meet the requirements of Article 1(1) of the Protocol.

An armed conflict presupposes the existence of parties to the conflict. It is, therefore, a striking fact that although Article 1 speaks of armed forces, it does not refer to ‘parties to the conflict’. The same goes for the other provisions of the Protocol: one may read about a situation of ‘armed conflict’, with ‘hostilities’ and ‘military operations’ – but there is not a single reference to the ‘parties to the conflict’. This utter silence reflects the fear of many governments that the mere reference to an adverse party might in concrete instances be interpreted as a form of recognition.

The same fear resulted in the adoption of Article 3 on ‘Non-intervention’. Paragraph 1 provides that ‘Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State’. Paragraph 2 adds, for good measure, that nothing in the Protocol ‘shall be

invoked as a justification for intervening ... in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs’.

The complete silence on the existence of an ‘adverse party’ might give rise to the question of whether the Protocol is binding on non-state parties to a conflict. While possible hesitations on this score might be strengthened by the absence of any procedure, comparable to that of Article 96(3) of Protocol I, by which the leadership of ‘other organised armed groups’ might express the will to respect its obligations under the Protocol, its negotiating history leaves no doubt that both sides to a conflict which falls within the scope of the Protocol are intended to implement its provisions.

## 2.2 Protected persons

In terms similar to those usually found in human rights conventions, Article 2(1) defines the ‘personal field of application’ of Protocol II as: ‘all persons affected by an armed conflict as defined in Article 1’. For good measure, it adds that the Protocol ‘shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria’. It may be evident that this prohibition of discrimination on any ground is in complete opposition to the practice of parties in many internal armed conflicts.

Attention should be drawn to an important restriction on the scope of Protocol II, as compared to Protocol I: while the latter instrument recognises certain categories of persons as ‘combatants’ and makes provision for their protection against the employment of certain methods and means of warfare, the notion of ‘combatant’ does not figure in Protocol II (and neither does that of ‘prisoner of war’).

The one and only provision which, in deviation from the above, affords protection precisely to those who take part in hostilities, is found in the closing sentence of Article 4(1): ‘It is prohibited to order that there shall be no survivors.’ For the rest, all the provisions of Protocol II are without exception designed to protect, in the words of the first sentence of the quoted paragraph, those persons ‘who do not take a direct part in hostilities or who have ceased to take part in hostilities’.

## 2.3 Humane treatment

Under the above title, Part II opens the series of substantive provisions of Protocol II. It starts out with the statement of principle, in Article 4(1), that all persons who do not or who have ceased to take a part in hostilities, ‘whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices’. They shall moreover ‘in all circumstances be treated humanely’, once again, ‘without any adverse distinction’.

Article 4(2) elaborates this general principle into a long list of ‘acts against the persons referred to in paragraph 1’ which ‘are and shall remain prohibited at



any time and in any place whatsoever'. The list repeats a number of acts prohibited already by virtue of Article 3 common to the Conventions, and adds such diverse acts as (in the order in which they figure in the text) 'corporal punishment', 'acts of terrorism', 'outrages upon personal dignity' including 'rape, enforced prostitution and any form of indecent assault', 'slavery and the slave trade in all their forms', and 'pillage'. The list ends with 'threats to commit any of the foregoing acts'.

Article 4(3) concerns the specific problem of the protection of children. Here too, the paragraph opens with a general principle: 'Children shall be provided with the care and aid they require'. This is followed by a set of specific provisions, which in effect represent a simplified version of the comparable list in Articles 77 and 78 of Protocol I. Attention is drawn in particular to the provision that 'children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities'.

Article 5, on 'persons whose liberty has been restricted', provides striking evidence of the wide gulf separating the treaty rules of humanitarian law applicable in international and internal armed conflicts, respectively. A separate, elaborate and greatly detailed treaty, the Third Convention of 1949, governs the treatment of prisoners of war in an international armed conflict; and the set of rules in the Fourth Convention on the treatment of civilian internees is hardly less impressive. As compared to this, Article 5 does little more than indicate some main lines concerning the treatment of all persons deprived of, or restricted in, their liberty for reasons related to the armed conflict. Yet, as compared to common Article 3, Article 5 of the Protocol represents a significant development.

The article does not make any distinction according to the reasons why a person's liberty is restricted other than that it must be for 'reasons related to the conflict'. The fact should be underscored once again that there is no special prisoners of war regime in Protocol II: it is immaterial whether a person is taken prisoner, say, as a 'participant in hostilities' or on the suspicion that he has 'incited to armed rebellion against the legitimate government', was engaged in espionage for one or the other side, or provided medical aid to a wounded victim of the conflict.

Article 5(1) and (2) deal in particular with persons who are interned or detained. Paragraph 1 lays down some rules which 'shall be respected as a minimum', regarding such matters as: appropriate medical treatment, individual or collective relief, practising one's religion, and spiritual assistance. The persons in question shall also, 'to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict'.

Article 5(2) adds a series of provisions which 'those who are responsible for the internment or detention' of the persons concerned are also bound to respect, although this time only 'within the limits of their capabilities'. Allowing the internees or detainees to send and receive letters and cards falls in this category, as

well as, somewhat surprisingly, the prohibition to endanger their ‘physical or mental health and integrity’ by ‘any unjustified act or omission’; the paragraph specifies that it is accordingly ‘prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances’. One would rather have expected to find this prohibition in paragraph 1, among the rules that have to be ‘respected as a minimum’.

Article 5(3) provides that persons who are not interned or detained but ‘whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely’. This humane treatment must be in accordance, in particular, with certain named provisions of Articles 4 and 5, relating, among other things, to individual or collective relief, religion and spiritual assistance, and correspondence.

Article 5(4), finally, makes provision for the event that ‘it is decided to release persons deprived of their liberty’: in that case, ‘necessary measures to ensure their safety shall be taken by those so deciding’.

The ‘prosecution and punishment of criminal offences related to the armed conflict’ is the subject of Article 6. The standards of ‘due process’, laid down in the article, have been based on existing human rights conventions. Thus, any sentence and the execution of any penalty require ‘a conviction pronounced by a court offering the essential guarantees of independence and impartiality’; an accused must be afforded ‘all necessary rights and means of defence’; and the act or omission must have constituted ‘a criminal offence, under the law, at the time when it was committed’.

Article 6(4) prohibits to pronounce the death penalty on ‘persons who were under the age of eighteen years at the time of the offence’, and to execute it on ‘pregnant women or mothers of young children’.

Whereas the formulation of the rules in Article 6 might again permit their application by an adverse, non-governmental party, in the perception of governmental authorities the matter of ‘prosecution and punishment of criminal offences’ is something exclusively reserved to the judicial apparatus of the state. To meet the conditions set forth in the article for fair trial and execution of punishments may moreover usually, even in a long-lasting internal armed conflict, be beyond the capacities of the adverse party.

Article 6(5), on amnesty at the end of hostilities, is discussed in chapter IV 3.4.

## 2.4 Wounded, sick and shipwrecked

It may be recalled that on the subject of this section, Article 3 common to the Conventions of 1949 merely provides that ‘The wounded and sick shall be collected and cared for’, and that they, like all other persons not taking or no longer taking active part in hostilities, must be treated humanely and without discrimination. Part III of Protocol II reaffirms and develops these basic rules:

with respect to ‘protection and care’ in Article 7, and with respect to ‘search’, including for the dead, in Article 8.

According to Article 7(1), ‘all the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict’ are entitled to protection and care. Paragraph 2 establishes the principle of medical care without discrimination:

In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

In addition to this, Article 9(1) provides that ‘Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties’, and it prohibits to compel such personnel ‘to carry out tasks which are not compatible with their humanitarian mission’. Paragraph 2 specifically prohibits requiring that medical personnel, in the performance of their duties, ‘give priority to any person except on medical grounds’.

The picture is completed by Article 10 which, under the heading of ‘general protection of medical duties’, lays down a number of rules similar to those found in Article 16 of Protocol I: prohibition to punish any person ‘for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom’ (Article 10(1)); prohibition to compel persons engaged in such activities ‘to perform acts or to carry out work contrary to ... the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol’, or, conversely, to compel them to refrain from acts required by such rules (Article 10(2)); and protection of professional obligations, including patient confidentiality, (Article 10(3) and (4)). Needless to say, these rules are even harder to maintain in internal armed conflict than they are in an international one.

Then, Article 11 provides basic protection for medical units and transports: unless ‘used to commit hostile acts, outside their humanitarian function’, these objects ‘shall be respected and protected at all times and shall not be the object of attack’. Article 12 deals in equally brief terms with the ‘distinctive emblem’: the red cross or red crescent, when displayed, under the ‘direction of the competent authority concerned’, ‘by medical and religious personnel and medical units’ or ‘on medical transports’, ‘shall be respected in all circumstances’; on the other hand, it ‘shall not be used improperly’.

## 2.5 Civilian population

As mentioned before, Protocol II has very little to say about methods and means of warfare. Yet, this virtually complete silence could not in common decency be maintained with regard to an aspect of internal armed conflict that attracts so much attention in recent times, to wit, the often miserable fate of the civilian population in a country torn by civil strife. At the same time, as the Protocol recognises neither the existence of ‘combatants’ nor (with one curious

exception) of ‘military objectives’, it was impossible to define the civilian population and civilian objects with reference to those concepts. The effect of this absence of a definition is that the provisions on the protection of the civilian population, which constitute Part IV of Protocol II, hang somewhat in the air. They are, moreover, considerably shorter than the comparable provisions in Protocol I. In practice, fortunately, parties are inclined to seek guidance in Protocol I for their interpretation of the relevant provisions in Protocol II.

Article 13(1) lays down the principle that ‘The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations’. It is accordingly prohibited to make them the object of attack, and so are ‘Acts or threats of violence the primary purpose of which is to spread terror among the civilian population’ (paragraph 2). As mentioned before, civilians enjoy this protection ‘unless and for such time as they take a direct part in hostilities’ (paragraph 3).

Articles 14 to 16 prohibit acts of war directed against specified objects, namely: ‘objects indispensable to the survival of the civilian population’ (on the basis of the principle that ‘Starvation of civilians as a method of combat is prohibited’; Article 14); ‘works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations’ (even, remarkably, if they are ‘military objectives’: this being the single reference to that concept in the Protocol; Article 15); and the ‘historic monuments, works of art or places or worship which constitute the cultural or spiritual heritage of peoples’, Article 16).

Article 17(1) prohibits ordering the displacement of the civilian population for reasons related to the conflict ‘unless the security of the civilians involved or imperative military reasons so demand’; and paragraph 2 forbids under any circumstances to compel civilians ‘to leave their own territory’ for reasons related to the conflict.

Article 18 contains the few provisions, applicable in internal armed conflicts, on ‘relief societies and relief actions’. Paragraph 1 provides, first, that relief societies ‘located in the territory’ of the state afflicted by the conflict, such as Red Cross or Red Crescent organisations, ‘may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict’. It should be noted that, in contrast with Article 81 of Protocol I, this paragraph does not expressly refer to the ICRC and the International Federation of Red Cross and Red Crescent Societies. It does, on the other hand, provide a role for the civilian population; as stated in the second sentence, the population ‘may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked’.

Article 18(2) broaches the question of relief to the civilian population. If it ‘is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies’, relief actions ‘shall be undertaken’; the paragraph stops at that: it does not specify who is to carry out this obligation. It does specify, on the other hand, that the actions must be ‘of an exclusively humanitarian and impartial nature’ and be ‘conducted without any adverse distinction’. The actions require, moreover, ‘the consent of the High Contracting

Party concerned', that is, of the recognised government of the state, whether the relief has to be brought to the civilian population in territory under its control or under the effective control of the (formally un-recognised) adverse party.

### IV 3 IMPLEMENTATION AND ENFORCEMENT

Article 1(1) of Protocol I states, in terms identical to Article 1 of the Geneva Conventions of 1949, that the contracting states 'undertake to respect and to ensure respect for this Protocol in all circumstances'. The scope of this formula, originally conceived in the context of the law of Geneva, is herewith explicitly expanded to the law of The Hague as codified and developed in the Protocol.

A similar formula is absent from Protocol II. It should not be deduced from this silence that a state by becoming party to that Protocol does *not* undertake 'to respect and to ensure respect' for it. It is simply that in their general tendency to reduce the expression of their obligations under Protocol II to the barest minimum, states preferred to leave out this formula here.

Indeed, Protocol II is remarkably silent on all aspects of 'implementation and enforcement'. The single provision on this subject is Article 19, which reads in full: 'This Protocol shall be disseminated as widely as possible.' Especially in light of the total absence of provisions on other aspects of implementation and enforcement, this one, passively formulated provision gains overwhelming importance in the attempts to bring the message of Protocol II home.

The situation under Protocol I is very different. Both Parts I ('General Provisions') and V ('Execution of the Conventions and of this Protocol') provide a series of measures designed to improve the implementation and enforcement of humanitarian law.

#### 3.1 Instruction and education

Opening Part V, Article 80 emphasises the duty of all contracting states, and of states parties to an international armed conflict in particular, to take 'without delay ... all necessary measures for the execution of their obligations under the Conventions and this Protocol'; to issue 'orders and instructions to ensure observance' of these instruments; and to 'supervise their execution'.

Article 83 reinforces the duty of states parties to provide for the necessary dissemination of knowledge of humanitarian law. As provided in paragraph 1, states parties undertake, 'in time of peace as in time of armed conflict, ... to include the study [of the Conventions and the Protocol] in their programmes of military instruction and to encourage the study thereof by the civilian population', with the aim that 'those instruments may become known to the armed forces and to the civilian population'.

Paragraph 2 specifies that 'Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof'.

Article 82 adds an interesting instrument for improved dissemination and compliance in the armed forces. It obliges, once again, both the contracting states at all times and parties to the conflict in time of armed conflict, to ensure the availability of legal advisers 'to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject'. This provision has already proved its usefulness in numerous situations, where commanders were more adequately informed about applicable rules and troops were better acquainted with their basic obligations under humanitarian law.

The overriding importance of dissemination of humanitarian law, first but not exclusively among the armed forces, can hardly be exaggerated. The better the rules of humanitarian law are known, the greater the chance that they will be respected in practice. Regrettably, quite a few states continue to lag behind in this respect. In this unfortunate situation, Red Cross and Red Crescent societies, under the guidance of the ICRC and the International Federation of Red Cross and Red Crescent Societies, are running programmes of dissemination, both among their members and beyond that circle, and, occasionally, even for the armed forces. Needless to say, these activities of the Red Cross and Red Crescent Movement cannot in any way absolve the authorities from their responsibilities. It may be repeated that at least the dissemination of the applicable law is a 'must' under Protocol II as well (Article 19).

### 3.2 **Protecting Powers and other humanitarian agencies**

As mentioned in chapter III 5.2, the Geneva Conventions of 1949 assign a function of supervision to Protecting Powers or, in their absence, to an impartial humanitarian organisation such as the ICRC. Since 1949 the system of Protecting Powers has hardly worked, however, if only because armed conflicts rarely were of the type where, as in the past, diplomatic relations were severed and (one or more) third states took over the protection of the conflicting states' interests, who could upon the outbreak of hostilities almost automatically assume the duties of a Protecting Power. With this automatism failing, it was found that once an armed conflict had broken out, the appointment of Protecting Powers was almost impossible to achieve. Moreover, although under Article 10 of Conventions I-III and Article 11 of Convention IV, states are obliged to accept offers of service by the ICRC or other humanitarian organisations, should it prove impossible to arrange protection by means of Protecting Parties, the functioning of such substitutes in practice remained dependent on the consent of the party or parties concerned.

Articles 5 and 6 of Protocol I are designed to improve this situation. They are preceded by a definition of 'Protecting Power', in Article 2(c) as:

a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol.

The definition makes clear that the appointment of a Protecting Power involves a triangular arrangement. For a given state to act as Protecting Power on behalf of one party to the conflict in the territory of the adverse party, needs the consent of all three states.

Article 5(1) states the principle that ‘It is the duty of the Parties to a conflict from the beginning of that conflict to ensure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers’; that system includes, *inter alia*, ‘the designation and acceptance of those Powers, in accordance with the following paragraphs’.

The paragraph adds that ‘Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict’. This language closely resembles the formula found in the Geneva Conventions. Yet, there it simply referred to a factual situation (‘the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict’), indicating the past practice of states almost automatically slipping into the role of Protecting Powers as a natural consequence of their earlier acceptance of the function of diplomatic representation on behalf of one of the parties to a dispute that subsequently evolved into an armed conflict. In Article 5(1), on the other hand, it assumes the character of an obligation, laid upon a state which in the course of an armed conflict is designated and accepted, and itself accepts, to act as a Protecting Power. In the context of the Protocol, this obligation cannot be understood as a reference to a general duty of diplomatic representation: rather, the ‘interests’ the Protecting Power is asked to safeguard must specifically be the interests of a party to the conflict to see its nationals in enemy hands treated in accordance with applicable standards of international humanitarian law, and probably also, to a certain extent, with their own customs and culture.

Paragraphs 2 and 3 of Article 5 lay down detailed procedures designed to facilitate the ‘designation and acceptance’ of Protecting Powers. If all this remains without result, it is the turn of a ‘substitute’. As defined in Article 2(d), this ‘means an organisation acting in place of a Protecting Power in accordance with Article 5’. Article 5(4) indicates how this can be brought about: the ICRC or ‘any other organisation which offers all guarantees of impartiality and efficacy’ *may*, ‘after due consultations with [the parties to the conflict] and taking into account the result of these consultations’, offer to the said parties to act as a substitute; if, after such thorough preparation, the organisation makes an offer, ‘the Parties to the conflict shall accept [it] without delay’.

One difference between a Protecting Power and a substitute such as the ICRC is that, while the former is obliged to safeguard the interests of the party to the conflict it represents, the emphasis in respect of the substitute is on its impartiality. For an organisation like the ICRC, it is evident that it will focus first and foremost on the interests of the victims of the conflict.

A practical problem attending the possible activities of Protecting Powers is that, in order to carry out their supervisory functions, they need to have at their disposal sufficient qualified personnel. Article 6 aims to ensure that the parties

to the Protocol will already in peacetime do whatever is necessary to train such personnel.

The above attempt to revive the institution of Protecting Powers with the aid of a series of new provisions has remained without success. However, the system is available and may be resorted to in a future armed conflict. What then may be expected of the supervision by Protecting Powers or their substitute? On the one hand, they may be expected to effectively supervise conditions in places where wounded and sick, prisoners of war or civilian internees are kept or put to work, or the health situation and provision with essential foodstuffs of a civilian population in occupied territory. On the other hand, any supervisory activities with respect to combat activities proper and the rules applying in that respect between combatants will, it is feared, be accidental and indirect at best. The functions of Protecting Powers do not normally include investigation into whether attacks were carried out according to the rules. An exception to this general statement should perhaps be made in respect of the use of chemical weapons; as past experience shows, the traces of such use may sometimes be found in the target area, and this investigation can be carried out equally well by delegates of a Protecting Power or a substitute as by anyone else.

Another conclusion is that Protocol II makes no mention of anything similar to the Protecting Powers system. An interesting question is whether such a mechanism or something comparable to it could be suitable to be applied in an internal armed conflict. It should be noted that the ICRC also conducts visits to persons deprived of their liberty in connection with internal armed conflicts falling within the scope of Protocol II.

### 3.3 **Collective responsibility**

As mentioned in chapter III 5.3, the state party to the conflict is the first entity to come to mind to be held responsible for violations of international humanitarian law, whether in an international or internal armed conflict to which it is a party.

In this respect, mention should be made of the combined effect of Articles 1(4) and 96(3) of Protocol I. As noted in chapter IV 1.2, Article 1(4) recognises certain 'wars of national liberation' as international armed conflicts, and Article 96(3) creates the possibility for the authority representing the people fighting such a war to address to the depositary a declaration holding the undertaking to apply the Conventions and the Protocol. This brings the Conventions and the Protocol into force for that party to the conflict 'with immediate effect', and renders these instruments 'equally binding upon all Parties to the conflict'. In consequence, from the moment this situation would be effectuated (which, as noted earlier, has not happened in practice) the leadership of the people fighting a liberation war would become fully accountable for any violations of the body of international humanitarian law.

Unfortunately, a similar possibility has not been provided in Protocol II. Although, as argued in chapter III 5.3, armed opposition groups involved in an



internal armed conflict must of necessity be held responsible for violations committed by their members – a responsibility that in an armed conflict of the Protocol II type encompasses all the provisions of the Protocol – a provision along the lines of Article 96(3) of Protocol I would have been helpful.

### 3.3a *Reciprocity*

As noted in chapter III 5.3a, a state party to the 1949 Conventions cannot invoke reciprocity in its negative aspect ('I am no longer bound to respect the law because you have not respected it') as a ground to withdraw from its obligations under the Conventions. The matter was not so entirely clear with respect to the law of The Hague, though. The question arises how matters stand in this respect with Protocol I, which, as we have seen, combines elements of Geneva and Hague law.

Article 1(1) expresses the undertaking of the states parties 'to respect and to ensure respect for this Protocol in all circumstances'. This clause is identical in wording to the text of Article 1 common to the Geneva Conventions. The conclusion lies ready at hand that negative reciprocity has been excluded for the entire terrain covered by the Protocol, including the rules originally belonging to the law of The Hague which relate to methods and means of warfare and the protection of the civilian population against the effects of hostilities.

Positive reciprocity ('I am bound to respect the law because you undertake to do so too') has equally found a place in Protocol I, notably in relation to the wars of national liberation of Article 1(4). As mentioned a moment ago, a declaration made pursuant to Article 96(3) would not only have the effect of bringing the Conventions and this Protocol into force for the people fighting the war 'with immediate effect', but would render these instruments 'equally binding upon all Parties to the conflict'.

Protocol II contains no provisions similar to those in Protocol I on 'negative' or 'positive' reciprocity. Yet its very application depends on the condition being fulfilled that not only the armed forces of the state but the 'other organised armed groups ... exercise such control over a part of its territory as to enable them ... to implement this Protocol'. Once this condition is satisfied and the Protocol therefore in force in the conflict, a strong case can be made that its rules for the protection of victims of the conflict are so essentially humanitarian that they cannot be set aside by the argument that the other side is violating them.

As for positive reciprocity, too much should perhaps not be expected of the simple good example. Respect by one side may on the other hand be used as an argument in the hands of third parties trying to promote respect of international humanitarian law by all sides.

### 3.3b *Reprisals*

Rules prohibiting recourse to reprisals are found in Protocol I both in Part II (Wounded, sick and shipwrecked) and Part IV (Civilian Population).

Article 20, supplementing the prohibitions already embedded in the Conventions of 1949, prohibits reprisals against all persons and objects protected by Part II on wounded, sick and shipwrecked. This prohibition was adopted without any difficulty.

Part III, on 'Methods and means of warfare, combatant and prisoner-of-war status', does not contain a prohibition on reprisals. Yet reprisals in respect of some provisions of this Part are excluded because they are prohibited elsewhere. Thus, the rule forbidding 'to make improper use of the distinctive emblem of the red cross [or] red crescent' (Article 38) is 'reprisal-proof' by virtue of the prohibition in Article 20. Failing such a specific prohibition elsewhere the question remains whether other rules of Part III can still be set aside by way of reprisals.

In this regard, it seems an entirely defensible position that reprisals are no longer justifiable in derogation of rules unmistakably designed to protect named categories of persons, such as the prohibition of perfidy in Article 37, or the rules on quarter and protection of an enemy *hors de combat* in Articles 40 and 41. On the other hand, restrictions on the use of weapons or enemy uniforms (Articles 35, 39) arguably remain subject to reprisals.

As mentioned in chapter III 5.3b, in 1970 the UN General Assembly adopted Resolution 2675 (XXV) which, among other things, states that 'civilian populations, or individual members thereof, should not be the object of reprisals'. At the Diplomatic Conference, this extension of the prohibition of reprisals turned out to be a hard nut to crack. In contrast with the self-evident reaffirmation of the ban on reprisals in the framework of the protection of the wounded, sick and shipwrecked, the debate on reprisals in the context of the protection of the civilian population was long and difficult.

Two main currents opposed each other: those who advocated a categorical ban in this area too, and those who wished to maintain a possibility of recourse to reprisals against the civilian population.

Both sides advanced strong arguments. Representatives of the former group argued that just like reprisals against prisoners of war, measures of reprisal against the civilian population are bound to hit innocent people. Moreover, their chance of success (that is to say, the chance that a particular measure of reprisal would result in the adverse party giving up its unlawful behaviour) was deemed to be slight at best.

Members of the latter group argued, in contrast, that civilian populations cannot always be regarded as so entirely innocent of what the political and military leadership is doing; that it is unproven that reprisals against the civilian population will be ineffective in all cases, and, last but not least, that parties to the conflict simply have no other means at their disposal to bring about a change in the attitude of a non-complying adversary. Representatives of the latter group also felt that, if the prohibition of attacks in reprisal against the

civilian *population* could not be avoided, then at least the possibility of reprisals against civilian *objects* needed to be maintained.

Proponents of the latter position also introduced proposals for a strict regulation of permissible recourse to reprisals. These proposals contained elements such as: express warning in advance; no execution of the reprisal unless it is apparent that the warning has gone unheeded; infliction of no greater amount of suffering to the enemy civilian population than the adversary had caused to one's own population; and termination of the reprisal measure as soon as the adverse party has discontinued its unlawful attacks.

After prolonged debate and negotiations the 'ban' current obtained a total victory, resulting in the adoption of prohibitions on attacks by way of reprisal against the civilian population or individual civilians (Article 51(6)), civilian objects (Article 52(1)), cultural objects and places of worship (Article 53(c)), objects indispensable for the survival of the civilian population (Article 54(4)), the natural environment (Article 55(2)), and works and installations containing dangerous forces (Article 56(4)).

These categorical prohibitions doubtless form part of the law. Equally doubtless, in practice they are typically vulnerable to considerations of 'negative reciprocity'. It should be kept in mind, moreover, that a number of the provisions relating to the protection of the civilian population are complicated and phrased in terms which in practice may easily give rise to differences of opinion as to whether they are being respected or violated. To the extent that this may be a matter of fact-finding, mention may be made here of the possibility, created in Article 90 of the Protocol, for parties to a conflict to utilise for this purpose the International Fact-Finding Commission. Early recourse to this Commission in appropriate cases may be expected to contribute to curbing the tendency to take recourse to reprisals. (See further hereafter, chapter IV 3.5).

In 1986, in ratifying Protocol I, Italy declared that it 'will react to serious and systematic violations by an enemy of the obligations imposed by ... Articles 51 and 52 with all means admissible under international law in order to prevent any further violation'. While this text does not specify what 'means' Italy regards as 'admissible under international law', the phrase in all likelihood was meant to reflect the traditional requirements for a lawful reprisal.

The declaration made by the United Kingdom upon ratification, in 1998, is explicit on this point. It reads, in relevant part:

If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those articles, the UK will regard itself as entitled to take measures otherwise prohibited by the articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those articles, but only after formal warning to the adverse party requiring cessation of the

violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the UK will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The UK will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.

This is an accurate formulation of the requirements international law traditionally sets for recourse to belligerent reprisals. The declaration (which has not been the subject of complaint by other contracting states) may be understood to imply that the United Kingdom, while accepting the prohibition of 'reprisals' in the sense of plain retaliation, retains the right of recourse to duly considered, open, official, formal and strictly circumscribed acts of reprisal. The effect is, of course, that potential adversaries of the United Kingdom will have the same right, again under the same strict conditions.

It may be noted that the United Kingdom (like Italy before it) has also recognised the competence of the International Fact-Finding Commission. One would hope that in actual practice, recourse to that Commission would precede – and thus probably remove the need of – recourse to reprisals.

A last point to note is that there appear to have been no instances, since the adoption of the Protocol, of attacks on an enemy civilian population or civilian objects announced as reprisals and meeting the conditions therefor. On the other hand, there have been numerous occasions where parties to armed conflicts have viciously retaliated against enemy civilian populations. The international community, far from condoning these practices, has more than once strongly reacted to such behaviour. Even so, it remains doubtful, also in light of the Italian and UK declarations, whether the prohibitions of reprisals against the civilian population in Articles 51 *et seq.* can now be regarded as rules of customary law.

None of the above is reflected in Protocol II. Discussion at the Diplomatic Conference of the issue of reprisals in internal armed conflict led to the negative conclusion that nothing would be said about it in the Protocol. One argument was that reprisals do not have a place in the law relating to internal armed conflict. In a strict sense, the argument is correct: the rules on justifiable belligerent reprisals developed in international practice (warning, ultimate means, proportionality, limitation in time) have no counterpart in the history of internal armed conflicts. From another point of view, the argument is a bit of a nonsense; the prohibitions of reprisals in the Conventions and Protocol I serve first and foremost to outlaw the almost blind gut reaction to intolerable violations: 'he killed my people, now I'll kill his'. This type of reaction is probably even more common in situations of internal armed conflict than in the international variety. The real point at the Conference was that states, although not perhaps in favour of such acts of blind retaliation, did not wish to bind their hands by including a ban on reprisals in Protocol II.

### 3.3c Compensation

State responsibility in the classical sense, finally, is expressly dealt with in Article 91 of Protocol I:

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

The article amounts to an adaptation of Article 3 of the 1907 Hague Convention on Land Warfare (where liability was strictly speaking confined to violations of the Regulations) to the new situation of ‘confluence’, or intermingling of Hague and Geneva law in the Protocol. The implication is that the rule on responsibility, including the liability to pay compensation, has acquired a much broader scope. Although formally written for the Conventions and the Protocol as treaties, it is not too daring to regard it as applicable to the whole of international humanitarian law, whether written or customary.

Another consequence of the language adopted in 1977 flows from the reference to ‘a Party to the conflict’ and ‘its armed forces’. A state party’s responsibility covers, by virtue of Article 43(1), ‘all organised armed forces, groups and units which are under a command responsible to [it] for the conduct of its subordinates’. If a ‘people’ fights a war of national liberation under the terms of Article 1(4) juncto Article 96(3), that ‘party to the conflict’ will be equally responsible for all that is done by its ‘armed forces’ as defined in Article 43(1).

For a discussion of the possibilities and difficulties in attempts to apply the rule of Article 3 of 1907, see chapter III 5.3c. The same considerations apply to application of Article 91 of the Protocol.

The second sentence of Article 91 may be read in an entirely different sense as well, as an indication that a party to the conflict may be held responsible, not only by the party suffering the damage, but by all other parties to the Protocol, or by public opinion. This aspect of the matter is discussed further in chapter IV 3.5 and, for recent developments, including those relating to internal armed conflict, in chapter VI.

### 3.4 Individual responsibility

Article 85(1) ensures the application of the system for the repression of ‘grave breaches’ and other violations of the Conventions to similar encroachments of Protocol I as well. At the same time, the Protocol significantly adds to and improves the system.

The system was easy to apply to those provisions of the Protocol designed, just like the Conventions, to protect clearly specified categories of persons and objects which are either in the power of the adverse party, or can be recognised as being under special protection by virtue of a distinctive sign (such as a red cross). Thus, Article 85(2) counts among the provisions the violation of which represents a

‘grave breach’, those that relate to persons who take part in hostilities and fall into enemy hands without being entitled to prisoner-of-war status. Similarly, in Part II (Wounded, Sick and Shipwrecked) Article 11(4) turns into a grave breach any ‘wilful act or omission’ that ‘seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends’ and violates one of the rules laid down in the article.

More circumspection was needed when it came to applying the system to Parts III and IV of the Protocol, which deal with hostilities proper and protection of the civilian population against the effects thereof. For one thing, these Parts are not, generally speaking, designed to protect well-defined, sufficiently restricted categories of ‘protected persons’. Then, it is often very difficult to establish the true facts about the ‘hostilities proper’ and their effects. Parties to an armed conflict are generally – and all the more so in the heat of combat – inclined to give a propagandistically coloured version of the facts. How then could they be expected to give a fair trial to an adversary accused, say, of having bombed a residential district?

These considerations are reflected in Article 85(3). Take, by way of example, a violation of the prohibition on indiscriminate attacks (Article 51(4)): for such an attack to amount to a grave breach it must not only be ‘committed *wilfully*, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health’, but also be launched ‘in the *knowledge* that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii)’. The italicised requirements of intent and knowledge serve to prevent overly hasty, primarily propagandistic criminal charges.

The attack on an adversary *hors de combat* provides another example. Article 41(1) prohibits an attack on an adversary ‘who is recognised, or who, in the circumstances, *should be recognised to be hors de combat*’. However, for such an attack to constitute a grave breach, Article 85(3) requires specifically that the act was done in the *knowledge* that the victim was *hors de combat*. Again, Article 11(4) requires that the act or omission was *wilful*.

Not all the provisions of Parts III and IV have been brought under the operation of the system of grave breaches. Left out were, for instance: the basic rules prohibiting the use of weapons of a nature to cause superfluous injury or unnecessary suffering, and of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the environment (Article 35(2) and (3)); use of enemy uniforms (Article 39(2)); and attacks against objects indispensable to the survival of the civilian population, such as foodstuffs, crops and livestock (Article 54).

Article 85(4) introduces another, entirely novel set of grave breaches, including ‘unjustifiable delay in the repatriation of prisoners of war or civilians’ and ‘practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination’, in either case ‘when committed *wilfully* and in violation of the Conventions or the Protocol’.

These 'grave breaches' reflect specific concerns of the 1970s (Pakistan vs. India, South Africa). Here too, the text has been drafted with an eye to preventing all too facile application.

Article 85(5), finally, states that grave breaches of the Conventions and of the Protocol 'shall be regarded as war crimes'. This statement, ostensibly of the obvious, is mostly of historical interest in that certain states, for reasons connected with the war crimes trials conducted after the Second World War, had so far consistently refused to recognise that grave breaches of the Conventions fell under the general notion of war crimes.

The Geneva Conventions of 1949 do not state in so many words that 'a failure to act when under a duty to do so' may itself constitute a breach. Article 86(1) mends this defect. The second paragraph adds to this ostensibly simple rule, a provision concerning the most important problem arising in connection with 'failure to act': that is, the responsibility of superiors for the behaviour of their subordinates. It reads as follows:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Clearly, a superior cannot be held responsible for just any form of criminal behaviour exhibited by his subordinates: he must have had prior knowledge or, at the very least, the necessary information, and have failed to do what could in effect be expected of him to prevent or repress the crime. Elaborating the point, Article 87 specifies that the states parties and the parties to the conflict shall place military commanders under a duty, 'with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol'.

In this respect, it is of major importance for military commanders to be able to know with a sufficient measure of certainty what conduct will be regarded as amounting to a 'breach' of these instruments. Given the complex structure of the Geneva Conventions and the Protocols, the commanders often need expert advice on their correct (or, at least, acceptable) interpretation. As mentioned in chapter IV 3.1, Article 82 makes provision for this need, by obliging the said parties to 'ensure that legal advisers are available, when necessary, to advise military commanders *at the appropriate level* on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject'. The idea is that not every platoon leader will need a legal adviser at his side. However, who the commanders at the appropriate level are will ultimately have to be determined in each case on the basis of the factual situation.

While the Protocol deals with the responsibility of superiors for acts of their subordinates, it is silent on the reverse question of the liability to punishment of a subordinate who has either acted pursuant to an order of his government or of a superior and thereby has committed a grave breach of the Conventions or the Protocol, or who has refused to obey such an order precisely because it would constitute a grave breach. In the Diplomatic Conference of 1974-1977 the issue was debated at length and on the basis of numerous written proposals. In the end, none of these proposals acquired a sufficient majority. With that, the question was left to the domestic legislation of states and to further development on the international plane.

Article 88 reinforces and improves the rules in the Geneva Conventions on 'assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol'. Provision has been made in particular for improved co-operation in the matter of extradition.

In the absence of any comparable provisions in Protocol II, punishment of violations of its rules is a matter within the discretion of the parties to the conflict. As noted in chapter IV 2.3, governments do not much favour the idea of armed opposition groups setting up a judiciary of their own. Punishment on the governmental side is often for the hostile acts themselves, that is the participation in the hostilities which is often considered treason, rather than for violations of international humanitarian law.

Making up for this absence of provisions on punishment of violations, Article 6(5) addresses the converse and particularly delicate problem that frequently arises at the end of an internal armed conflict. The termination of hostilities should mean that the one-time adversaries will resume their normal lives next to, and with, each other, as more or less peaceful citizens of the state that until recently was the scene of their violent activities. It will then be important to create circumstances conducive, as far as possible, to such peaceful co-existence. As one means to this end, the paragraph calls upon 'the authorities in power' to 'grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'.

This provision, although broadly worded should not lead to a situation where even the worst offences against humanitarian law (as against human rights) go unpunished, as this may in turn entail deep dissatisfaction with the manner the conflict has been brought to an end. To avoid this requires a careful balance between the requirements of justice and peace. Past history shows that this balance is difficult to find.

### 3.5 Other measures of implementation and enforcement

This heading discusses diverse matters that figure in different places in the 1977 Protocols and are all more or less loosely connected with implementation and enforcement, without fitting under earlier headings of this section.



### 3.5a *Activities of the Red Cross and Red Crescent and other humanitarian organisations*

Article 81 deals with those activities of the named organisations that relate directly to a given armed conflict (and not, therefore, to their peacetime activities).

With respect to the ICRC, the first organisation specifically mentioned in the article, paragraph 1 provides that parties to an armed conflict are bound to grant it ‘all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts’. It adds, for good measure, that the ICRC ‘may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned’.

The Red Cross and Red Crescent organisations of the parties to the conflict are the subject of Article 81(2). They also must be granted facilities, notably ‘the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross’.

It should be noted that the quoted text refers to ‘organisations’ rather than ‘societies’; the term ‘organisations’ was chosen to include bodies that have not yet been, or cannot be, recognised as a Red Cross or Red Crescent society in the proper sense of the term: recently established organisations not yet meeting all requirements for international recognition, or a body like the Palestine Red Crescent society, which cannot be recognised as long as Palestine is not yet an internationally recognised state. Another noticeably difficult problem is that of the Israeli Magen David Adom organisation, which does not find recognition because of its emblem, the Red Star of David. As mentioned earlier, attempts are underway to find a way out of this delicate problem.

The activities of all Red Cross and Red Crescent organisations must be in accordance with the fundamental principles of the Red Cross. For present purposes, the most important are: humanity, impartiality, neutrality, and independence (meaning autonomy from the authorities).

Article 81(3) adds an obligation both for states parties and the parties to the conflict, to ‘facilitate in every possible way the assistance’ which Red Cross or Red Crescent organisations and the International Federation ‘extend to the victims of conflicts’, provided, once again, that this assistance is in accordance with the Conventions, the Protocol, and the aforesaid fundamental principles.

Article 81(4), finally, requires states parties and the parties to the conflict, as far as possible, to ‘make facilities similar to those mentioned in paragraphs 2 and 3 available’ to other humanitarian organisations which are duly authorised by the parties to the conflict and ‘perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol’.

Reference was made in chapter IV 2.5 to Article 18 of Protocol II, which treats the position of ‘relief societies located in the territory’ of the state in conflict, such as Red Cross and Red Crescent organisations. Rather than being granted any specific entitlements, they are simply permitted to ‘offer their services for the performance of their traditional functions in relation to the victims of the armed conflict’.

The ICRC, although not specifically mentioned in Article 18, often performs its ‘traditional functions’ in countries involved in internal armed conflicts. One of its very important (and perhaps more recent rather than traditional) functions in this respect is, as mentioned before, the dissemination of international humanitarian law throughout the country, wherever it can get access and often in close co-operation with the Red Cross or Red Crescent society ‘located in the territory’.

### 3.5b *International activities for the promotion of international humanitarian law*

Attempts to strengthen the role of the international community in the promotion of respect for international humanitarian law have resulted in the introduction into Protocol I of two provisions, one located in Part I (General Provisions) and the other in Part V (Execution of the Conventions and of this Protocol).

Article 7 in Part I provides that the depositary of the Protocol (that is, Switzerland) shall convene a meeting of the states parties, ‘at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol’. The reference to ‘general problems’ indicates that the purpose of such a meeting is not to examine and expose specific alleged violations of the Conventions and the Protocol. Yet delegates at such meetings may wish to illustrate ‘general problems concerning the application’ with specific examples, and in practice it might prove difficult to distinguish such specific examples from direct accusations.

Thus far, Article 7 has only once arguably been applied in practice, although not in name: the relevant meeting was not convened with reference to Article 7. The ‘general problem’ was the application of the occupation régime of the Fourth Convention, and the practical situation underlying the request for the meeting was the Israeli occupation of Palestinian territory. This obviously provides a clear example of the tendency to deal with specifics rather than general problems.

The other provision is Article 89, in Part V. Under the heading of ‘co-operation’ the article provides that in ‘situations of serious violations of the Conventions or of this Protocol’ the states parties ‘undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter’. This is a rather bland statement, leaving all questions about its real significance and practical utility wide open. It may arguably be used as well for a UN-concerted severance of diplomatic relations as for outright armed intervention, again under the aegis of the United Nations.

It may be noted that both the General Assembly and the Security Council have repeatedly passed resolutions calling upon parties to an armed conflict to respect their obligations under relevant instruments of humanitarian law. This both in relation to international armed conflicts and, obviously more frequently, to internal armed conflicts.

UN organs as well as other international bodies have eagerly adopted the term 'serious violation' of rules of international humanitarian law. The term makes its first appearance in Article 89 and is equally utilised in the next article to be dealt with, Article 90.

### 3.5c *International Humanitarian Fact-Finding Commission*

The responsibility of a party to the conflict for violations of the Conventions or of the Protocol presupposes that the violations have actually occurred; that, in other words, the facts have been duly established. It was noted before that with respect to many rules of the Protocol, this will often be very difficult to achieve. Take the case of an alleged attack on a hospital: was the attack directed against the hospital, or against a military objective in its immediate vicinity (which perhaps should not have been there in the first place)? How much damage was really done to the hospital? Was this caused by bombs dropped from the air, or by other factors? An objective observer is rarely present at such occasions, and experience shows that more often than not the parties to the conflict will give diametrically opposed versions of the facts. Whom should one then believe?

In this quandary, Article 90 makes provision for the establishment of an 'International Fact-Finding Commission'. The Commission, composed of 'fifteen members of high moral standing and acknowledged impartiality', was established in 1991 when twenty contracting states had 'agreed to accept the competence of the Commission', by means of a unilateral declaration 'that they recognise[d] *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission to enquire into allegations by such other Party, as authorised by this Article'.

The Commission, which has added 'Humanitarian' to its name to avoid confusion with other fact-finding bodies, is competent to examine the facts concerning alleged serious violations of the Conventions or of the Protocol, and to 'facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol' – a phrase that reflects similar descriptions of competence in human rights instruments. The Commission can exercise its functions on the basis of the concordant unilateral declarations of states involved in an international armed conflict, or, in the absence of such declarations, with the consent of the parties concerned.

Although Protocol II is silent on the matter, the Commission has stated more than once that it is in a position to entertain requests for investigation into alleged violations or good offices in situations of internal armed conflict as well. Obviously, this again requires the consent of the parties concerned. This is a

formidable stumbling-block for the Commission to become actually engaged in any such activity.

The activities provided for in Article 90 may contribute to the speedy and fair settlement of disputes arising from allegations of serious violations of the Conventions or the Protocol, and may help reduce tensions attending such allegations (and, with that, the possibility of recourse to 'reprisals' or its even uglier relative, plain retaliation.)

While the number of states having made the declaration of Article 90 has risen to close to sixty, no situation has yet occurred where the services of the Commission were actually used. It is realised that it has to compete with other fact-finding procedures: both those operating in the human rights sphere and the *ad hoc* teams the UN, and notably the Security Council, are occasionally establishing for such purposes. A case in point was the establishment by the Secretary-General, in 1992, of a commission of experts to collect and sort out evidence concerning allegations of serious violations of international humanitarian law in the territory of the former Yugoslavia. Two members of that commission were actually members of the Fact-Finding Commission as well. The latter Commission was not asked whether it was prepared to carry out this task. It has since repeatedly made it known to UN organs that it holds itself available also for UN-related activities.

## POST-1977 DEVELOPMENTS: SUBSTANTIVE LAW

As noted in earlier chapters, developments in several areas of humanitarian law occurred after the adoption of the 1977 Additional Protocols. This chapter records some significant developments in the areas of conventional weapons (chapter V 1), weapons of mass destruction (chapter V 2 and 3), the protection of cultural property (chapter V 4), and the law of warfare at sea (chapter V 5). Developments in the sphere of international criminal law and other topics relating to compliance and enforcement are dealt with in chapter VI.

### V 1 CONVENTIONAL WEAPONS

#### 1.1 The Weapons Convention of 1980 and Annexed Protocols

As the official title ‘United Nations 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’ implies, the 1980 Weapons Convention has no bearing on questions relating to nuclear, chemical and bacteriological weapons. In a positive sense, the title brings out what the Convention really is about: the category of weapons often indicated as ‘dubious weapons’ (a term coined in the 1960s by the distinguished Dutch international lawyer, Professor Bert Röling); dubious, because the weapons themselves or the manner they are used are deemed to be at variance with principles of humanitarian law. For brevity’s sake we shall simply refer to the Convention as ‘Weapons Convention’.

If reaching agreement on the text of the Additional Protocols of 1977 had been no mean task, the negotiations preceding the adoption of the Weapons Convention with its annexed Protocols involved even greater difficulties. The task in hand was to find agreement on restrictions on the use of specific weapons, many of which had long formed part of the arsenals of armed forces

and, indeed, were in common use in many theatres of war. Accordingly, the positions of delegations at the Conference varied widely. To give just one example: while one group favoured a total ban on use of incendiary weapons, another group saw no reason to protect combatants from the impact of incendiary weapons, nor were they convinced of the need to supplement the rules in Protocol I of 1977 on protection of the civilian population, with rules protecting civilians against the use of such weapons in particular. With the points of departure so far apart, the texts which emerged from the negotiations on this and similar questions cannot but bear all the marks of compromise.

The Weapons Convention itself comprises no more than 11 articles, which do not deal with substantive aspects of the use of certain conventional weapons but, rather, with such matters as scope of application, entry into force and revision of the Convention and its Protocols. The substantive rules are found in the three original annexed Protocols: Protocol I on ‘Non-Detectable Fragments’, Protocol II on ‘Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices’, and Protocol III on ‘Prohibitions or Restrictions on the Use of Incendiary Weapons’, as well as in Protocol IV on ‘Blinding Laser Weapons’ (1995) and in the Amended Protocol II on ‘Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices’ (1996).

### 1.1a *The Convention*

As mentioned in chapter II 4, the Weapons Convention was concluded under the auspices of the United Nations. This sets it somewhat apart from the other treaties on humanitarian law of armed conflict, including the Additional Protocols of 1977. Yet, its subject-matter is closely connected with that of the other treaties. The connection is obvious in the Preamble, where the states parties recall ‘the general principle of the protection of the civilian population against the effects of hostilities’ as well as the principles of unnecessary suffering and protection of the environment: these principles derive directly from Protocol I of 1977.

In a similar vein, the states parties once again repeat the Martens clause, in confirming their determination:

that in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Here, as in 1899, the clause was introduced for a very specific purpose. The negotiations left no doubt that agreement on several proposals was not forthcoming, so that those proposals would not be reflected in any specific rules. For such cases there remains the, admittedly rather vague and ill-defined yet non-negligible, protection of the applicable ‘principles of international law’.

The Preamble brings out another, perhaps less obvious relationship as well: it is the link between the subject-matter of the Convention and its annexed Protocols

with the question of disarmament. On this point, the Preamble expresses the states parties' desire 'to contribute to international détente, the ending of the arms race and the building of confidence among states, and hence to the realisation of the aspiration of all peoples to live in peace', adding that positive results achieved in the area of prohibition or restriction of use of certain conventional weapons 'may facilitate the main talks on disarmament with a view to putting an end to the production, stockpiling and proliferation of such weapons'.

Article 1 defines the scope of application of the Weapons Convention and its annexed Protocols by referring to Article 2 common to the Conventions of 1949 and Article 1(4) of Protocol I of 1977. This means that the Convention and the Protocols apply in international armed conflicts, including wars of national liberation. The implication is that they do not apply in internal armed conflicts. There is one exception: according to its express terms, Amended Protocol II of 1996 is applicable in internal armed conflicts as well (see chapter V 1.1f).

Article 2, excluding any interpretation of the Convention or its Protocols which would detract from 'other obligations imposed on the High Contracting Parties by international humanitarian law applicable in armed conflict', implicitly refers to the Geneva Conventions and the Additional Protocols.

Another implicit reference to, or reliance on, the Conventions and Additional Protocols may be read into Article 6, which obliges states parties 'in time of peace as in time of armed conflict, to disseminate this Convention and those of its annexed Protocols by which they are bound as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction, so that those instruments may become known to their armed forces'. No matter how welcome, this reaffirmation of the need to disseminate the law is the only duty the Convention imposes on the parties in the sphere of implementation. Compliance with and enforcement of the Convention and the annexed Protocols may on the other hand be expected – or at least hoped – to go hand in hand with the efforts to promote the Geneva Conventions of 1949 and the Additional Protocols of 1977.

In other respects, the Weapons Convention stands apart from the earlier treaties. While the 1977 Protocols are open only to states parties to the 1949 Conventions, all states may become party to the Weapons Convention (Articles 3, 4). Yet this does not imply any great difference, given that in November 2000 189 states are party to the Geneva Conventions: that is virtually the whole world. (Even though negotiated under UN aegis, the Convention is not open to accession by that or any other international organisation.)

The perhaps surprising fact that the Convention is itself devoid of substantive rules on use of weapons finds its explanation in the uncertainty at the time as to whether states would eventually 'consent to be bound' by all the prohibitions and restrictions the participants at the Conference might be able to agree on. The solution was to group the rules together according to categories of weapon and distribute them over separate Protocols, which states would be free in principle to accept or not.

This set-up entailed the possibility that some states might be bound by one particular Protocol, and others by a different one. To cope with what might become a confusing situation, Article 4 provides that to become party to the Convention, a state must accept at least two of the (then) three Protocols. At any time thereafter it may 'consent to be bound by any annexed Protocol by which it is not already bound'; all of this through notification to the Depositary: in this case, as provided by Article 10, the UN Secretary-General.

This cleverly devised system, complemented by rules on relations between states parties to the Convention but to different sets of Protocols (Article 7), had little practical significance since rare exceptions apart, states that became party to the Convention accepted all three original Protocols. The system does however apply to the relations ensuing from the adoption of Protocol IV and Amended Protocol II: not all states party to the Convention accepted one or other of the new Protocols at exactly the same date.

For completeness' sake, reference is made to Article 7(4) which makes provision for all the variations and permutations that may arise in the event of the Convention and one or more of its Protocols being applied in a war of national liberation waged under the conditions of Article 1(4) juncto Article 96(3) of Additional Protocol I of 1977.

Another matter for which a rather complex set of rules appeared necessary, concerns review and amendment. The Conference was obviously going to leave a number of calls for prohibitions or restrictions on the use of specific categories of weapons unfulfilled. Those delegations which had seen their proposals rejected, were therefore keen to include in the Convention, rules that would facilitate the subsequent revision of accepted texts and the addition of new rules or even entirely new protocols. Their opponents were more inclined to restrict the possibilities for review and amendment.

Article 8, reflecting this controversy, contains a number of hard-won compromises. It distinguishes between amendments to the Convention and the annexed Protocols (paragraph 1) and the addition of new protocols (paragraph 2). Both paragraphs provide that at any time after the entry into force of the Convention any state party may table relevant proposals. The Depositary notifies such a proposal to all states parties and 'shall seek their views on whether a conference should be convened to consider the proposal'. The conference is only convened if a majority – and at least eighteen – of the states parties so agree, and it then has power to consider and decide upon the proposals. If the purpose is to amend the Convention or a Protocol, only parties to those instruments may adopt the proposals. New protocols, on the other hand, may be adopted by a conference on which all states may be represented, whether they are parties to the Convention or not.

The first Review Conference, held in two sessions in 1995 and 1996, adopted Protocol IV and Amended Protocol II. The second Review Conference is scheduled to be held in 2001.



### 1.1b *Protocol I: non-detectable fragments*

Protocol I consists of one single provision, prohibiting ‘to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays’.

The provision is a direct application of the principle prohibiting the use of weapons ‘of a nature to cause superfluous injury or unnecessary suffering’ (in the terms of Article 35(2) of Protocol I of 1977). It is therefore primarily designed to protect combatants – a rare exception in the whole of the Weapons Convention and Protocols. It is, however of limited practical significance: at the time of the Conference, weapons meeting the above description were only rumoured to exist; and even today, if they do exist at all, they certainly do not belong to the standard arsenals of the vast majority of states. It was, in effect, the rather limited significance of the prohibition in Protocol I which led to the requirement in Article 4(3) of the Convention that a state, in order to become a party, must accept to be bound by at least two of the annexed Protocols: acceptance of nothing but the Protocol on Non-Detectable Fragments would have been devoid of any significance.

The limited significance of the Protocol cannot be better illustrated than by pointing out that it is the sole remnant of attempts to ban entire categories of actually used explosive munition, such as projectiles with a pre-fragmented casing (designed to explode according to a set pattern into fragments of predetermined dimensions) or filled with very small round ‘pellets’ or nail-like ‘fléchettes’. All these attempts had foundered on the argument that compared with other, existing and commonly used types of munition such as the high-explosive bomb or artillery shell, the ‘fragmentation’ types of explosive ammunition could not be said to be of a nature to cause superfluous injury or unnecessary suffering.

### 1.1c *Protocol II: mines, booby-traps and other devices*

While the Non-Detectable Fragments Protocol in 1980 was the almost imperceptible result of efforts that had aimed much higher, the Mines Protocol was its opposite in that, as in most other, respects. A great deal of energy had gone into it, elaborating detailed rules for the use of various types of mine-like munition, in an attempt, to quote the classic formula, to ‘protect the civilian population as much as possible’ against the often horrendous and long-lasting effects of this class of weapon. In the period that followed the adoption of this Protocol, a need to improve the rules was perceived, and this was done in 1996 with the adoption of the Amended Protocol. Since that does not replace the 1980 Protocol and not all states that are party to the 1980 Protocol have also accepted the Amended Protocol of 1996, it remains necessary to expound the 1980 Protocol first.

Apart from providing for the protection of the civilian population, the Protocol also affords some protection to combatants, notably against the effects of

certain booby-traps. Finally, it contains some rules for the protection of United Nations forces and missions.

Article 1 states that the Protocol applies on land, including ‘beaches, waterway crossings or river crossings’, but not to ‘the use of anti-ship mines at sea or in inland waterways’. It encompasses a wide category of weapons which, in contrast with what their name might suggest, need not all be explosive. A ‘mine’ is explosive: as defined in Article 2(1), it is ‘any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle’. The ‘booby-trap’ is not necessarily explosive: Article 2(2) defines it as ‘any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act’. The ‘other devices’ may also be explosive or otherwise: Article 2(3) defines them as ‘manually emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time’.

The goal of protection of the civilian population is pursued, first, by subjecting the use of all of these munitions to general restrictions, inspired by the provisions on the same subject in Additional Protocol I of 1977. As provided in Article 3, they are threefold: a prohibition of the use of the munitions ‘either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians’; a prohibition of indiscriminate use; and an injunction to take all feasible precautions to protect civilians from the effects of use of the munitions. Article 3 defines ‘indiscriminate use’ in terms identical to those used in Protocol I of 1977; the same applies to the definitions of ‘military objective’ and ‘civilian object’ in Article 2(4) and (5).

The ‘general restrictions’ of Article 3 are by no means redundant. States have become party to the Weapons Convention that were not party to Protocol I of 1977. However, even for states bound by both instruments, Article 3 fills the gap that might arise if one were to doubt whether the use of mines, booby-traps and ‘other devices’ falls under the concept of ‘attack’ as defined in Article 49 of Protocol I of 1977.

Articles 4 and 5 contain specific rules for the protection of the civilian population. Article 4 restricts the use of all the weapons (except for remotely delivered mines) in ‘any city, town, village or other area containing a similar concentration of civilians’ if no actual fighting between ground forces is going on or imminent. Use of the weapons in these circumstances is prohibited unless ‘they are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse party’ (in an act of sabotage, for instance); or when they are placed as part of defensive measures, on the condition that ‘measures are taken to protect civilians from their effects, such as the posting of warning signs, the posting of sentries, the issue of warnings or the provision of fences’.

Article 5 deals with ‘the use of remotely delivered mines’ (that is, according to Article 2(1), mines ‘delivered by artillery, rocket, mortar or similar means or

dropped from an aircraft'). Such remote delivery is only permitted 'within an area which is itself a military objective or which contains military objectives', and under the further condition that, either, 'their location can be accurately recorded', or 'an effective neutralising mechanism is used on each such mine' for the event that the mine no longer serves the purpose for which it was placed in position. The article also requires effective advance warning 'of any delivery or dropping of remotely delivered mines which may affect the civilian population, unless circumstances do not permit'.

The rules in Article 6, prohibiting 'the use of certain booby-traps', are designed to protect combatants as much as civilians. Recalling 'the rules of international law applicable in armed conflict relating to treachery and perfidy', paragraph 1 goes on to prohibit, 'in all circumstances', the use, first, of 'any booby-trap in the form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached', and, second, of a long list of booby-traps 'attached to or associated with' such items as (to give just a few examples) the red cross emblem, a sick, wounded or dead persons, medical items or children's toys.

Article 6(2) prohibits, equally 'in all circumstances', the use of 'any booby-trap which is designed to cause superfluous injury or unnecessary suffering'. This prohibition, again a direct application of the well-known principle of 1899, was included in particular with a view to a practice of which the memory was still fresh, of constructing carefully hidden holes with sharp bamboo spears erected on the bottom: the person who fell into such a trap was likely to suffer grievous injuries and die a slow and painful death.

While the above provisions deal with the use of mines (etc.) in the course of hostilities, Article 7 addresses the problem of the dangers that minefields as well as scattered mines and booby-traps continue to pose to the civilian population long after the cessation of active hostilities. The provisions of Article 7 amount to an obligation to record whenever possible the location of all minefields, mines and booby-traps, and to use those records after the cessation of hostilities in taking 'all necessary and appropriate measures' for the protection of civilians, either by the party that had recorded the data or through an exchange of information. A technical annex to the Mines Protocol provides detailed 'guidelines on recording'.

Article 7 does not refer to enemy occupation in so many words; this despite the fact that in such a situation any minefields laid beforehand for the defence of the territory may pose as much of a threat to the civilian population as in any other case of 'cessation of active hostilities'. This ostensible silence finds its explanation in the opposition, in particular, of Yugoslavia (as it then was), whose constitution expressly excluded the acceptance of a situation of enemy occupation. Its delegation was therefore not in a position to accept any rule expressly referring to occupation. In the light of this bit of drafting history, 'cessation of active hostilities' must be interpreted as covering enemy occupation.

Article 8 makes provision for the event that a UN force or mission is performing ‘functions of peacekeeping, observation or similar functions’ in a given area (where, obviously, the presence of mines or booby-traps may severely hamper its movements). Paragraph 1 obliges each party to the conflict, if so requested and to the extent of its abilities, to ‘remove or render harmless all mines or booby-traps in that area’; to take all other necessary measures for the protection of the force or mission, and to make all relevant information in its possession available to the head of the force or mission. For the specific case of a UN fact-finding mission (which may roam over a wider and more unpredictable stretch of territory than other missions), paragraph 2 repeats the duties of protection and information, leaving out the obligation to remove the danger of mines (etc.) from the area of the mission’s activities.

Article 9, finally, urges the parties to co-operate, after the cessation of hostilities, ‘both among themselves and, where appropriate, with other states and with international organisations’, in the removal or neutralisation of minefields, mines and booby-traps placed in position during the conflict.

Even in retrospect, the Mines Protocol remains a carefully balanced instrument that provides significant protection to civilian populations on just one condition: that its rules be scrupulously observed by a professional armed force conducting war with the restraint that is implied in the military principle of economy of force, and in a theatre that lends itself to that type of warfare. Practice, however, has proved very different, with whole countries being literally strewn with all types of land mines and booby-traps of the most perfidious kinds. This massive, unrestricted use in theatres like Afghanistan and Angola led to an outcry of the international community, and this, in turn, to endeavours to further restrict the use of these munitions. While these endeavours have led to positive results, with the adoption of the 1995 Amended Protocol followed by the 1996 Ottawa Convention, the original Protocol II is still in force and hence, whenever applicable, requiring compliance and enforcement.

### 1.1d *Protocol III: incendiary weapons*

Protocol III, on ‘Prohibitions or Restrictions on the Use of Incendiary Weapons’, comprises just two articles, each the result of a hard battle at the Conference. Article 1 defines what, for the purpose of the Protocol, are ‘incendiary weapons’ and what munitions are not included in its scope; it also defines some other notions, such as ‘military objective’ and ‘civilian object’. Article 2 contains rules on the ‘protection of civilians and civilian objects’.

An ‘incendiary weapon’ is defined in Article 1(1) as ‘any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target’. All sorts of munitions meet this description; the paragraph mentions some examples: ‘flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other

containers of incendiary substances'. This list of examples is not, however, of material significance in the Protocol, as none of the incendiary weapons included in the list has been made the subject of separate regulation, whether prohibition or restriction. The same applies to napalm, which, in spite of the strong objections to its use voiced at the time of the Convention, was not even mentioned in the list. (It now has mostly been phased out of military arsenals.)

Of greater practical significance is the enumeration, in the same paragraph, of munitions which the Protocol does *not* regard as incendiary weapons. They are, first, munitions 'which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems'. A tracer is a projectile primarily designed to show the trajectory followed by a stream of projectiles, say, from a machine gun; it does this by radiating light, caused by a chemical reaction of a substance it carries to that purpose. When the tracer hits the target which the other projectiles are also aimed at, the same chemical reaction may cause fire or burn injury: this will then be an incidental rather than a primary effect.

Munitions 'designed to combine penetration, blast or fragmentation effects with an additional incendiary effect' are also excluded. In this category fall, for instance, anti-tank munitions whose armour-piercing effect is based on the development of an extremely high temperature. Munitions of this type, in which 'the incendiary effect is not specifically designed to cause burn injury to persons', are also commonly used against other, so-called 'hard' targets.

As noted above, the other article of the Protocol, Article 2, provides protection for 'civilians and civilian objects'. It does not, in other words, protect combatants in any way against the effects of incendiary weapons, whether included or excluded in the definition, nor, indeed, against the effects of fire by any other cause.

Article 2(1) reaffirms the main rule of protection of the civilian population: 'It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons.' Of course, this prohibition applies to any other weapon as well.

Paragraphs 2 and 3 are both designed to protect 'concentrations of civilians' – a notion already known from Additional Protocol I of 1977. Article 1(2) defines it anew, adding further examples; it 'means any concentration of civilians, be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads'. Civilians in such situations are extremely vulnerable to fire spreading from attacks with incendiary weapons on military objectives located in their midst. Accordingly, Article 2(2) categorically prohibits to make any military objective so located 'the object of attack by air-delivered incendiary weapons'.

As for attacks by other than air-delivered incendiary weapons, paragraph 3 permits these solely under the twofold condition that, first, the military objective 'is clearly separated from the concentration of civilians' and, second, that 'all feasible precautions are taken with a view to limiting the incendiary

effects to the military objective and to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects'. It should be emphasised that the protection provided by these prohibitions covers only the fire caused by incendiary weapons as defined, and not fire as an incidental effect of use of a munition that does not fall under the definition.

Paragraph 4, finally, contains a provision of protection of the environment: 'forests or other kinds of plant cover' must not be made 'the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives'. The built-in series of exceptions, covering all conceivable motives a belligerent party might have to attack a forest by incendiary weapons (or any other weapons, for that matter) deprives the paragraph of practical significance.

### 1.1e *Protocol IV: blinding laser weapons*

As widespread and common as is the use of mines, booby-traps and incendiary weapons, so infrequent and novel appears to be the use of blinding laser weapons. The adoption of Protocol IV in 1995 may therefore be seen as one of those rare instances where limits are put to the use of a specific weapon before it has become entrenched in states' arsenals to the point where its removal becomes almost impossible to achieve.

Over a comparatively short period of time, laser systems have become indispensable in a wide range of military operations, for functions such as target marking or projectile guidance. When the 'target' is a manned weapon system, the chances are that the laser beam hits a human eye, and this can have a temporary or permanent blinding effect. It is also possible to purposely train a laser beam on the eyes of enemy personnel, in an attempt to disable them and with the same effect. While the first case is accidental and the second, as long as it causes no more than a fleeting loss of eyesight, might be a permissible method of disabling the adversary, the assessment was different as regards permanent blinding: this was deemed to inflict unacceptable suffering on the victim as well as to the community he belongs to; hence, Protocol IV.

Article 1 prohibits 'to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision' (that is, with or without glasses or lenses). 'Permanent blindness' is defined in Article 4 as 'irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery'. 'Serious disability' is in turn defined, in terms that will enable an optician to establish with precision whether a person's loss of eyesight meets the definition.

Article 2 prescribes that in the employment of laser systems, contracting states must 'take all feasible precautions to avoid the incidence of permanent blindness to unenhanced vision', *inter alia*, by appropriate 'training of their armed forces and other practical measures'. Article 3 adds that blinding 'as an incidental or collateral effect of the legitimate military employment' of such

systems, including those ‘used against optical equipment, is not covered by the prohibition of this Protocol’.

Article 1 contains an interesting second sentence. It provides that contracting states ‘shall not transfer [weapons as defined in the quoted first sentence] to any State or non-State entity’. This is a disarmament-type provision and, with that, an unusual sight in a humanitarian law text. It is also conspicuous for its reference to non-state entities. This includes terrorist or other opposition groups, regardless of whether they are involved in armed conflict. Again, this is a considerable step beyond the general scope of application of the Weapons Convention.

### 1.1f *Amended Protocol II on mines, booby traps and similar devices*

The process of amending the Mines Protocol has resulted in an instrument that is different in every respect from the four other Protocols to the Weapons Convention. Whereas the other Protocols clearly fit under the umbrella of the Convention, the Amended Protocol II has its own chapter (called Article 1) on scope of application, its own section (called Article 8) on transfers, and its own part (Articles 11-14) on implementation, enforcement, international consultation and co-operation. It is also a highly complicated instrument, of which only highlights are mentioned here.

The first point to highlight is its scope of application. In striking contrast with the Weapons Convention and Protocols I-IV, the Amended Protocol also applies in internal armed conflicts. Article 1 not only expressly provides this (in paragraph 2) but then reiterates (in paragraphs 2-6) all the clauses, including those safeguarding the sovereignty of states, found in Additional Protocol II of 1977. In such an internal armed conflict, ‘each party to the conflict shall be bound to apply the prohibitions and restrictions of this Protocol’ (paragraph 3). It will be no mean task to instruct especially the non-state parties (and perhaps not only those) about their obligations under the Protocol.

From the long list of definitions (Article 2) one is selected here: an ‘anti-personnel mine’ is ‘a mine primarily designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons’ (sub 3). The definition is important because in contrast with its predecessor, the Amended Protocol places restrictions specifically on that type of mine.

Article 3 places a series of general restrictions on the use of mines etc. Some of these correspond to the relevant provisions in the 1980 Protocol, while others reaffirm principles and rules for the protection of combatants (against unnecessary suffering) and civilians (against the effects of hostilities, including the prohibition of reprisals) as found in the Additional Protocols of 1977.

In this mass, Article 3(2) stands on its own, declaring that each contracting state and other party to the conflict is ‘responsible for all mines, booby-traps, and other devices employed by it’. The sentence does not stop there; it continues:

‘and undertakes to clear, remove, destroy or maintain them as specified’ further down in the Protocol. Yet the question may be asked what is the extent of this responsibility: only for the removal of the devices in question, or also for all the harm their illegitimate use may do, including the financial consequences thereof? In view of the gigantic amounts of money potentially involved in the latter interpretation, it may not be the one the drafters had in mind. Even so, it does not appear legally unsound and deserves its day in court.

The use of anti-personnel mines in particular is regulated in (parts of) Articles 4-6. Article 4 prohibits the use of such mines ‘which are not detectable’ (as specified in a technical annex to the Protocol). Article 5 places technical and other restrictions on the use of non-remotely-delivered anti-personnel mines, and Article 6 on remotely-delivered mines, including anti-personnel mines. The restrictions are designed to prevent harm to persons other than enemy combatants.

Article 7, on the use of booby-traps and other devices, reaffirms most of the comparable provisions in the 1980 Protocol. It does not repeat the prohibition to use booby-traps ‘designed to cause superfluous injury or unnecessary suffering’ (which would have only been repetitive). It adds restrictions on the use of booby-traps in areas containing a ‘concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent’. A similar provision in the 1980 Protocol covered mines as well.

The part of the Protocol on implementation contains rules on transfers (Article 8); recording and use of information about mines etc. (Article 9); removal of same, and international co-operation (Article 10); technological co-operation and assistance (Article 11); protection of a variety of missions, including those of the ICRC (Article 12); consultations among contracting states, including an annual conference (Article 13) and, last but not least, compliance (Article 14).

Article 14(1) urges contracting parties to ‘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 references to ‘persons or territory’ and ‘jurisdiction or control’ imply a wide territorial scope for these measures, covering invaded or occupied parts of enemy territory – as well as, and this should not be forgotten, the state’s territory in the event of an internal armed conflict.

Article 14(2) provides that the measures of paragraph 1 ‘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’. While stopping short of explicitly creating a ‘grave breach’ as in the 1949 Geneva Conventions and Protocol I of 1977, this provision undoubtedly defines a ‘serious violation of international humanitarian law’.

All of these innovative steps are most welcome and may contribute to giving the Protocol enhanced effect. More traditional are the obligations in Article 14(3),



requiring contracting parties to ensure that their armed forces get the right instructions and training, and paragraph 4, on the possibility of bilateral or multilateral consultation among the parties.

A final comment concerns, once again, the ostensibly independent character of the Amended Protocol II. True, it has all kind of features that set it apart from the other Protocols annexed to the Weapons Convention. Yet, technically it is just another annexed Protocol; specifically, it has no provisions of its own on ratification, entry into force, treaty relations and so on. In this regard it is interesting to note that one (mini-)state, Monaco, in becoming party to the Convention in 1997, chose to be bound only by Protocol I on non-detectable fragments, and Amended Protocol II on Mines – the least and the most exacting respectively of the five, but including the one that gives it access to the annual review conference.

### 1.1g *Reciprocity and reprisals*

Article 3(2) of the 1980 Mines Protocol and Article 3(7) of the 1996 Amended Mines Protocol prohibit ‘in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians’. Article 6(2) of the 1980 Protocol, which prohibits the use of ‘any booby-trap which is designed to cause superfluous injury or unnecessary suffering’, and Article 3(3) of the 1996 Protocol which does the same in relation to ‘any mine, booby-trap or other device’ which is so designed, are equally reinforced with the phrase ‘in all circumstances’, and so is the prohibition in Article 2 of the Incendiary Weapons Protocol ‘to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons’. These latter provisions do not add the reference to reprisals.

The phrase ‘in all circumstances’ in these provisions implies that the specified use of the weapons in question on grounds of (negative) reciprocity will be unlawful. This is precisely, however, where the notion of ‘reprisal’ comes in: a reprisal is by definition an unlawful act but one which is legitimate by its purpose (to compel the adverse party to mend its ways) and by the strict conditions under which it can be resorted to.

As concerns reprisal attacks against the civilian population or individual civilians, the Mines Protocols explicitly prohibit such recourse but the Incendiary Weapons Protocol has no comparable clause. The difference does not imply any significant conclusions, though. The reference in the Mines Protocols to ‘reprisals’, as a sort of logical follow-up to ‘offence or defence’, merely reiterates the general prohibition of reprisal attacks against the civilian population or civilians embodied in Article 51(6) of Additional Protocol I. The absence of the comparable phrase in the Incendiary Weapons Protocol is simply the consequence of a slightly different construction of the article in question, and the *a contrario* argument that use by way of reprisal of incendiary weapons against the civilian population remains permissible is obviously fallacious.

There remain the ‘superfluous injury or unnecessary suffering’ provisions in the Mines Protocols. These are primarily, if not exclusively, designed to protect combatants, a category of persons protected from reprisals only if they are wounded or sick or are in enemy hands as prisoners of war. Given the lack of specific language on this point in the Mines Protocols, and for want of unambiguous practice one way or the other, the only conclusion one may draw at this stage is that the legitimacy of use in reprisal of mines, booby-traps and other devices, as of other prohibited weapons, against the armed forces of the adverse party remains a debatable point.

## 1.2 The Ottawa Convention on anti-personnel mines

The Convention, officially entitled ‘Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction’, is essentially an inter-state disarmament instrument and is therefore mentioned here only briefly. Although adopted at Oslo, on 18 September 1997, it is usually referred to as the Ottawa Convention after the place where it was opened for signature, on 3 and 4 December 1997. The Convention is the result of a forceful, well-organised and persistent campaign that, convinced that the restrictions of Amended Protocol II did not go far enough, strove (and succeeded) to achieve a categorical ban on all use of anti-personnel mines.

Giving clear expression to the motives underlying the Convention, the first paragraph of the Preamble declares that the states parties are:

Determined to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, and have other severe consequences for years after emplacement.

Another paragraph of the Preamble stresses the role of public conscience and recognises the efforts of ‘the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines, and numerous other non-governmental organisations around the world’. The closing paragraph recalls the fundamental principles of humanitarian law: the absence of an unlimited right to choose methods or means of warfare; the prohibition on use of weapons of a nature to cause unnecessary suffering; and the principle of distinction between civilians and combatants.

Turning to substance, Article 1(1) sets forth the undertaking of each state party ‘never under any circumstances ... to use anti-personnel mines’. This is followed by equally absolute prohibitions on the development, production, acquisition, stockpiling or transfer of these weapons, and on assisting, encouraging or inducing ‘anyone to engage in any activity prohibited to a State Party under this Convention’. Paragraph 2 adds the undertaking ‘to destroy or ensure the destruction of all anti-personnel mines in accordance with

the provisions of this Convention'. It should be noted that while the article categorically prohibits the use of anti-personnel mines in any armed conflict, its disarmament-type prohibitions on development etc. only bind states.

Article 2 defines some key notions. Paragraph 1, defining 'anti-personnel mine', adopts the definition in the 1996 Protocol but leaves out the word 'primarily' as an element qualifying the design of the mine. The next sentence excludes anti-vehicle mines equipped with an 'anti-handling device' that, as explained in paragraph 3, protects the mines from attempts to 'tamper with or otherwise intentionally disturb' them. Such a device, and the mine with it, may be caused to explode by the person doing the tampering. Neither the mine nor the 'anti-handling device' are designed or emplaced in an anti-personnel mode; hence the exclusion.

The remainder of the Convention deals with organisational matters: destruction of mines on stock or in mined areas, co-operation and assistance, regular or special 'Meeting of the States Parties', fact-finding missions, et cetera. Mention is made in particular of Article 9, which obliges states parties to '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 [their] jurisdiction or control'.

A concluding remark may be that after the century-old prohibition on the use of dum-dum bullets and the recent but rather limited prohibition of use of weapons 'the primary effect of which is to injure by fragments which in the human body escape detection by X-rays', the present categorical ban on use of anti-personnel mines is the third, this time highly significant, specific ban in force on what may be classified as a conventional weapon. All other specific rules in this area are confined to placing restrictions, rather than prohibitions, on use.

## V 2 NUCLEAR WEAPONS

The most important events relating to the potential use of nuclear weapons that occurred after the adoption of the 1977 Additional Protocols were in the political field: the fall of the Berlin Wall in 1989; the dissolution of the Soviet Union in 1991, and so on, diffusing some of the tension and fear that had persisted throughout the Cold War period as a result of the threat of 'mutual assured destruction'. The two previous antagonists began to dismantle huge numbers of nuclear warheads, each still keeping a formidable destructive capacity, though. At the same time, other states either had already developed, or now started developing, a nuclear capacity. Efforts to stem this tendency through the 1971 Non-Proliferation Treaty were not completely successful.

In these circumstances, the issue of the legality or illegality of potential use of nuclear weapons retained all its importance. Clearly, it was not ready to be solved through an ICRC- or UN-inspired diplomatic conference. Rather, the UN General Assembly in late December 1994 chose to submit the issue to the

International Court of Justice, by means of a request for an advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'

The Court's Advisory Opinion of 8 July 1996 examines the question from many angles: whether the Court was competent to give the opinion (answer: yes) and whether the request concerned a legal question (again, yes, even though the political connotations of the request were recognised).

One preliminary point is of interest for present purposes. It concerns the fear expressed by several states that the question as formulated by the General Assembly was vague and abstract and 'might lead the Court to make hypothetical or speculative declarations outside the scope of its judicial function'. On this, the Court held (para. 15) that to arrive at its advisory opinion, it did not need

to write 'scenarios', to study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information. The Court will simply address the issues arising in all their aspects by applying the legal rules relevant to the situation.

This is a remarkable simplification, not of the question as phrased by the General Assembly but of the Court's approach. Whole libraries are filled with literature on the great diversity of weapons that fall under the general heading of 'nuclear weapon': differences in explosive force, primary and secondary radiation, potential conditions of use, short-term and long-term effects of such use, and so on and so forth. It appears a contradiction in terms to state, as the Court did, that it would 'address the issues in *all their aspects*' simply by 'applying the legal rules relevant to *the situation*'. This apparently non-technical approach becomes all the more surprising when the Court observes (para. 35) that 'The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilisation and the entire ecosystem of the planet'. Nuclear weapons figure here as an evil force all by themselves.

On substance, the Court concluded that 'the most directly relevant applicable law' to be taken into account is 'that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant' (para. 34).

The Charter recognises the right of self-defence against an armed attack; a right the exercise of which is subject to 'the conditions of necessity and proportionality' as a rule of customary law. These conditions apply both to the threat and the use of nuclear weapons in self-defence.

Turning next to 'the law applicable in situations of armed conflict', the Court noted the absence of treaty law expressly dealing with the use of nuclear weapons (para. 37) but at the same time, the existence of a great many rules that are 'fundamental to the respect of the human person' and that it regards as binding on all states because they represent 'intransgressible principles of international

customary law' (para. 79). As for Protocol I, it 'recalls that all states are bound by those rules [in it] which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens clause' (para. 84). It rejected the view that nuclear weapons, because of their newness, did not fall under the 'established principles and rules of humanitarian law', adding that such a conclusion would be incompatible with the 'intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future'. (para. 86)

While all this is hardly disputed, the conclusions to be drawn from it (and from the principle of neutrality protecting states not participating in the armed conflict, which the Court examined in paras. 88 and 89) are 'controversial' (para. 90). The Court juxtaposed two views: one, that the legality of use of a given nuclear weapon must be assessed on the basis of its characteristics and the specific circumstances of its use (para. 91); the other, that any recourse to nuclear weapons is prohibited in all circumstances (para. 92).

As for the first view, the Court observed that its proponents had not 'indicated what would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons', following this with the statement that 'the Court does not consider that it has a sufficient basis for a determination on the validity of this view'. (para. 94). Here, one wonders how to match this complaint with the Court's earlier statement that it would simply apply the rules to the situation, as if there could be no relevance whatsoever to different modes of use of different types of nuclear weapon.

As for the second view, the Court arrived at a similar conclusion: 'it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance' (para. 95).

After further references to 'the fundamental right of every State to survival, and thus to its right to resort to self-defence', to 'the "policy of deterrence"', to which an appreciable section of the international community adhered for many years', and to 'reservations which certain nuclear-weapons States have appended to the undertakings they have given [under certain treaties] not to resort to such weapons' (paras. 96, 97) by seven votes to seven by the President's casting vote, the Court arrived at the conclusion (para. 97) that:

in view of the present state of international law viewed as a whole, ... and of the elements of facts at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

One notes that the Court has been 'led to observe' all this because it did not of its own accord set out to discover the facts about possible use of various types of

nuclear weapon in different scenarios. Another comment is that the reasoning in the body of the Opinion does not support the tail-end of the Court's conclusion, referring as it does to 'an extreme circumstance of self-defence, in which [a state's] very survival would be at stake'. Since it did not feel sufficiently informed to choose between 'lawful for some weapons in some circumstances' and 'always unlawful', that was the only conclusion the Court could draw. The rest was a well-meant attempt to give a piece of its own mind – or, at any rate, of the minds of the seven members of the Court who voted in favour of the quoted paragraph in the Opinion.

It is to be regretted that with this Advisory Opinion, no greater clarity about the legality or illegality of the use of nuclear weapons has been obtained. It probably is and remains an issue that cannot be resolved by law (except in *ex post facto* proceedings, as in the case decided in Japan relating to the use of 'atomic bombs' against Hiroshima and Nagasaki). In this situation, one can merely express the wish that nuclear devices will not fall into irresponsible hands, and that the 'responsible hands' now holding them will think, not twice but a hundred times before resorting to the use of these weapons. In that respect, the past, with its long non-use of nuclear weapons even in situations where such use was seriously considered, may hold out some hope for the future as well.

### V 3 BACTERIOLOGICAL AND CHEMICAL WEAPONS

As noted in earlier chapters, the use of this category of weapons was prohibited by the Geneva Protocol of 1925, but their production, possession and so on was not. Nor was it altogether clear whether they may or may not be used in reprisal against earlier enemy use, either, of the identical means of warfare, or of one belonging to the same category of 'weapons of mass destruction'. The fact that for several decades now, the prohibition on use of these weapons is regarded as a rule of customary law, does not resolve this point: conceivably, a customary prohibition on use of a given weapon may be accompanied by an equally customary recognition of the right to resort to reprisal in the event of violation of the prohibitory rule.

Attempts to mend this situation resulted, in 1972, in the adoption of a Convention banning bacteriological weapons, and in 1993, of a Convention banning chemical weapons. As primarily disarmament treaties, these Conventions are discussed here only so far as relevant to our purposes.

The 1972 Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, while in its title still maintaining the term 'bacteriological' as used in the 1925 Protocol, in effect covers much more ground than the instrument that preceded it.

Article I states the fundamental obligation of the states parties:

Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

1. microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
2. weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

The broader scope of the Convention is evident from the description of the agents and toxins that fall under the prohibition. These are, interestingly, defined in a negative fashion, as having ‘no justification for ... peaceful purposes’. The undertaking of the states parties does not repeat the prohibition on use, already laid down in the 1925 Protocol. It does, on the other hand, cover the development (etc.) ‘in any circumstances’ – even the most adverse, it may be concluded: even, therefore, in the event of use of such weapons by the adverse party. Recourse to reprisals thus appears to be excluded.

Indeed, any violation of the Convention – and, *a fortiori*, any wartime use of a biological weapon or toxin – *may* lead to a complaint before the UN Security Council, which then, again, *may* initiate an investigation, the results of which it *shall* communicate to the states parties (Article VI). What measures, if any, the Security Council decides upon depends on its appreciation of the situation in the light of the relevant Charter provisions. Article VII of the Convention makes provision for the event that the Council ‘decides that [a] Party has been exposed to danger as a result of violation of the Convention’; this party may then request assistance, and ‘each State Party to this Convention undertakes to provide or support [such] assistance, in accordance with the United Nations Charter’. Not a particularly effective enforcement system, and one that would certainly be insufficient in relation to any militarily more significant weapons – such as chemical weapons.

It took another 20 years for the international community to agree on the text of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. Accordingly, it is as complex and sophisticated as the Bacteriological Weapons Convention is simple and basic. Whereas the latter has no supervisory machinery, the Chemical Weapons Convention boasts a complete Organisation for the Prohibition of Chemical Weapons, established pursuant to Article VIII of the Convention and with headquarters at The Hague.

As the title indicates, the Convention does not stop at prohibiting the development (etc.) of chemical weapons, but reaffirms and reinforces the prohibition on their use as well. The sixth paragraph of the Preamble emphasises this:

Determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention, thereby complementing the obligations assumed under the Geneva Protocol of 1925,...

Largely copying the opening article of the Bacteriological Weapons Convention, Article I(1) again reaffirms the undertaking of each state party ‘never under

any circumstances' to develop (etc.) chemical weapons. Two differences should be noted. The Article does not describe or define 'chemical weapons', and paragraph 1 lists under (b) the prohibition 'to use chemical weapons'.

The matter of definition was a hot issue at the negotiating table. The result occupies the larger part of the long Article II. Yet, in some respects the article follows the scheme of the Bacteriological Weapons Convention: identification of certain 'toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes' (sub-paragraph 1(a)), and of certain 'munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in sub-paragraph (a), which would be released as a result of the employment of such munitions and devices' (sub-paragraph 1(b)). These are chemical weapons, 'together or separately': a toxic chemical not intended for non-prohibited purposes constitutes by itself a chemical weapon.

More definitions follow: 'toxic chemical' ('Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals'); 'precursor' ('Any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical'); 'key component of binary or multicomponent chemical systems' ('The precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system'), and so on.

A crucial concept in the system is that of 'purposes not prohibited under this Convention'. As defined in Article II(9), such purposes mean:

- (a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;
- (b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;
- (c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;
- (d) Law enforcement including domestic riot control purposes.

It may be noted that apart from 'peaceful purposes', this definition recognises the continuing need to prepare for protection, not only against toxic chemicals, but also against (the use of) chemical weapons; a poignant element of realism.

Equally realistic is the inclusion of 'domestic riot control purposes' among the non-prohibited purposes. Tear gas and similar chemicals are in use as 'riot control agents' in many countries. Article II(7) defines riot control agents as 'Any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure'. The notion of 'Schedule' is clarified in



notes to the sub-paragraphs defining ‘toxic chemicals’ and ‘precursors’: they are ‘contained in the Annex on Chemicals’ and list those chemicals which ‘have been identified for the application of verification measures’.

The existence of riot control agents implies the possibility of their use in situations of armed conflict. As set forth in chapter III 3.2, this is undesirable and ought to be prevented. Article I(5) accordingly contains the separate undertaking ‘not to use riot control agents as a method of warfare’. Although not expressed in terms equally categorical as the general prohibition on chemical weapons (‘never under any circumstances’) this undertaking, together with all other provisions of the Convention, ‘shall not be subject to reservations’ (Article XXII). It may be recalled that the United States in 1975 reserved the right of ‘first use of riot control agents ... in defensive military modes to save lives’, giving as an example such use against rioting inmates of a prisoner-of-war camp. This reservation it need not make anew, since such use does not qualify as use ‘as a method of warfare’. (The same goes for its reservation on first use of herbicides, which equally concerns protective, non-warfare purposes.)

The rather vague reference to use ‘as a method of warfare’ leaves open the question of whether this covers all armed conflicts, or only international ones. The 1925 Geneva Protocol doubtless applies to ‘war’, that is, international armed conflict only. Arguably, the customary prohibition on use of chemical weapons had come to cover internal armed conflict as well. The tolerance of riot control agents in the Chemical Weapons Convention gives rise to the problem, however, that in a country that is the theatre of an internal armed conflict, tear gas may be used on one corner of the street in a ‘riot control’ mode to quell a local disturbance, and on another corner ‘as a method of warfare’ to facilitate the capturing of members of an armed opposition group. It remains to be seen whether such warlike use in internal armed conflict can be – and should be – effectively precluded.

This is where we leave the Chemical Weapons Convention, for the time being. Even to sketch the system designed to ensure its faithful implementation and effective verification and enforcement, would lead us too far astray.

## V 4 CULTURAL PROPERTY

As indicated in chapter III 3.6, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict was adopted in May 1999. It ‘supplements the Convention in relations between the Parties’ (Article 2) and is open to states parties to the Convention (Articles 41 and 42 juncto Article 1(d)). Maintaining the definition of ‘cultural property’ given in Article 1 of the Convention (Article 1(b)), it makes important changes to the rules on general protection (chapter 2) and introduces an entirely new system of ‘enhanced protection’ (chapter 3) that for all practical purposes replaces the system of ‘special protection’ in the Convention. It has its own rule on ‘scope of application’ (Article 3) and adds chapters on ‘criminal responsibility and jurisdiction’ (chapter 4) and ‘institutional issues’ (chapter 6).

The Protocol, like the Convention, applies in situations of international armed conflict. Then, while the only provisions of the Convention applicable in internal armed conflict are those on ‘respect of cultural property’, the Protocol generously applies *in toto* in such situations (Article 3(1) juncto Article 22(1)). Yet non-state parties to the conflict are not ‘bound by the Protocol’. Article 3(2) provides that when ‘one of the parties to an armed conflict is not bound by this Protocol, the Parties to this Protocol shall remain bound by it in their mutual relations’, and such relations will also extend to ‘a State party to the conflict which is not bound by it, if the latter accepts the provisions of this Protocol and so long as it applies them’. The difference between a party (with a small p) and a Party (with capital P) is that the latter is by definition a state party to the Protocol (Article 1(a)).

Article 22 (which constitutes chapter 5, on ‘The Protection of Cultural Property in Armed Conflicts not of an International Character’) in paragraphs 2-7 deals with the consequences of the generous extension of application of the Protocol. It ‘does not apply to internal disturbances and tensions’ (etc.); it does not affect ‘the sovereignty of a State’ (etc.); it does not ‘prejudice the primary jurisdiction’ of the state over violations of the Protocol; it provides no justification for intervention; it ‘shall not affect the legal status of the parties to the conflict’; and, last but not least, ‘UNESCO may offer its services to the parties to the conflict’ – a privilege it then shares with the ICRC, though each in accordance with its respective mandate.

The main feature of chapter 2, on ‘General Provisions regarding Protection’, is that it largely rewrites the rules of 1954 in the language of the 1977 Protocols. ‘Imperative military necessity’, employed in the Convention to indicate when ‘respect’ may be waived, is no longer the sole determinant for this step and has been supplemented with a set of conditions that are derived from Additional Protocol I. Central is the condition that a waiver on that basis ‘may only be invoked to direct an act of hostility against cultural property when and for as long as: (i) that cultural property has, *by its function*, been made into a military objective’ (Article 6(a)). A ‘military objective’ is defined in Article 1(f) in terms identical to Article 52(2) of Protocol I, requiring both that the object ‘by its nature, location, purpose or use makes an effective contribution to military action’ and that its ‘total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage’. The term ‘function’ in Article 6(a) serves to emphasise that cultural property cannot very well be a military objective by its nature or purpose (although one wonders about the Netherlands ministry of defence).

Invocation of the waiver should be a high-level decision. Article 6(c) prescribes that it ‘shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise’. The concluding part of the sentence betrays the same sense of realism that may be perceived in the next sub-paragraph, where ‘an effective advance warning’ is required ‘whenever circumstances permit’. General protection, in one word, is bound to remain contingent on circumstances.

Articles 7 and 8 introduce the notions of ‘precautions in attack’ and ‘precautions against the effects of hostilities’, in terms borrowed from

Articles 57 and 58 of Protocol I. Article 9 aims to reinforce the rules in the Convention for the protection of cultural property in occupied territory. It may be noted in passing that since the Protocol is supplementary to the 1954 Convention, it needed not repeat the prohibitions to direct any act of hostility, and in particular any act by way of reprisals, against cultural property, as embodied in Article 4(1) and (4) of the Convention.

Cultural property can only be placed under ‘enhanced protection’ if it meets the conditions set out in Article 10, and the protection is granted according to a procedure set forth in Article 11 and by decision of the 12-member Committee for the Protection of Cultural Property in the Event of Armed Conflict, established pursuant to Article 24. The conditions are that the property is: (a) ‘cultural heritage of the greatest importance to humanity’; (b) ‘protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection’, and (c) ‘not used for military purposes or to shield military sites’, and ‘the Party which has control’ over the property must have made ‘a declaration ... that it will not be so used’.

The procedure starts out with a request by the state ‘which has jurisdiction or control over the cultural property’ that it be included in the List of Cultural Property under Enhanced Protection (Article 27(1)(b); see hereafter). It continues with the request being sent to all states parties, who may object (by a ‘representation’); as the case may be, consultation of governmental or non-governmental organisations and individual experts; and decision by the Committee, in the event of a representation, by a four-fifth majority. Article 11 also provides for an emergency procedure in the event of an outbreak of hostilities, which may lead to a provisional enhanced protection, pending the outcome of the regular procedure.

‘Enhanced protection shall be granted to cultural property by the Committee from the moment of its entry in the List’ (Article 11(10)). This makes the Committee the grantor for the duration of the ‘enhanced protection’. The Parties (with capital P) to a conflict are the ones who have to ‘ensure the immunity’ of cultural property so protected, ‘by refraining from making [it] the object of attack or from any use of the property or its immediate surroundings in support of military action’ (Article 12).

Cultural property may lose its enhanced protection. One way this can come about is by the Committee suspending or cancelling the protection (Article 13(1)(a)). Suspension requires a ‘serious violation of Article 12 in relation to [the property concerned] arising from its use in support of military action’; while cancellation requires the violations to be continuous: in this exceptional case, the property may be ‘removed from the List’. In either case, all parties must be notified of the decision (Article 14)

At this stage, one may begin to feel slightly confused. Whereas one condition for recognition was stated to be that cultural property is ‘not used for *military purposes* or to *shield military sites*’, enhanced protection, once granted,

requires the parties to a conflict to refrain ‘from any use of *the property or its immediate surroundings in support of military action*’; and loss of enhanced protection may arise ‘from *its use in support of military action*’. ‘In support of military action’ may be narrower than ‘military purposes’, and ‘it’ is narrower than ‘it and its immediate surroundings’. It will be interesting to see how these terms are going to be interpreted in practice.

Loss of enhanced protection through suspension or cancellation causes the property to fall back into its status as ‘cultural property’ and, with that, under the rules for the general protection of such property.

Worse will occur when the second ground for loss of enhanced protection obtains. This is defined in Article 13(1)(b), as follows: ‘if, and for so long as, the property has, *by its use, become a military objective*’. In those circumstances, the property may be ‘the object of attack’, but only under the stringent conditions listed in paragraph 2: (a) the attack is the only feasible way to terminate the use; (b) all feasible precautions are taken to avoid, or in any event minimise, damage to the property; (c) ‘unless circumstances do not permit, due to requirements of immediate self-defence’: order given ‘at the highest operational level of command’, effective advance warning requiring termination of the forbidden use has been given, and reasonable time left the adversary to ‘redress the situation’.

It should be noted that, while any cultural property may lose its protection when it ‘has, by its *function, been made into a military objective*’, property under enhanced protection suffers that fate only when its *use* (by which it ‘makes an effective contribution to military action’) has brought this about. This obviously is again narrower and more precise than ‘use in support of military action’.

In sum: use in support of military action may lead to suspension of enhanced protection or, if continuous, to loss of that protection; these are Committee decisions and are duly published. The decision that cultural property under enhanced protection has by its use become a military objective and thus exposed to attack is a military decision, to be taken at the highest operational level (or lower, in a situation of immediate self-defence). ‘Military necessity’, whether imperative or other, is no longer mentioned, and the contingency factor has been reduced to the barest minimum.

While the new system of enhanced protection is not yet operative and ‘the proof of the pudding is in the eating’, it looks promising. The test may come in two phases. One concerns the List, without which there can be no enhanced protection. The procedure leading up to its creation starts only after the entry into force of the Protocol (three months after 20 states have deposited their instruments of ratification or accession with the Director-General of UNESCO; Article 44). It begins with a Meeting of the Parties (convened at the same time as the General Conference of UNESCO; Article 23(1)), which ‘elect[s] the Members of the Committee’ (Article 23(3)(a)). The ‘Members’ are ‘Parties’, i.e., states parties to the Protocol.

The Members choose ‘as their representatives persons qualified in the fields of cultural heritage, defence or international law, and they shall endeavour, in consultation with one another, to ensure that the Committee as a whole contains adequate expertise in all these fields’ (Article 24). Once all this done, the Committee may start receiving and assessing requests for the granting of enhanced protection. In deciding upon such requests it may only be guided by the criteria mentioned in Article 10 (thus Article 11(7)). And so, in the end, the List will be established.

This sketch of the first phase shows that the procedure may work well, provided the Parties and their representatives manage to avoid politics: the former, in appointing the persons who represent them; the latter, in taking their decisions.

The second phase of the test will occur when in a situation of armed conflict, the Committee must decide on suspension or cancellation of enhanced protection, or a party to the conflict finds that it must attack such protected cultural property, as a ‘military objective’. This hopefully is still a long way off – and may actually arise in a situation of internal armed conflict.

Article 15, opening chapter 4 (Criminal responsibility and jurisdiction), introduces the notion of ‘serious violations’. These are any of the acts, committed ‘intentionally and in violation of the Convention or this Protocol’, that are enumerated in paragraph 1 on a descending scale of gravity:

- (a) making cultural property under enhanced protection the object of attack;
- (b) using such property or its immediate surroundings in support of military action;
- (c) extensive destruction or appropriation of cultural property protected under the Convention and the Protocol;
- (d) making such property the object of attack;
- (e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

Article 15(2) requires the Parties to the Protocol to do the necessary to ensure that these acts are ‘criminal offences’ under their domestic law and are ‘punishable by appropriate penalties’. In doing so, they must ‘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’. This is a decidedly much shorter provision than the lengthy ones in the ICC Statute on the same subject (see hereafter, chapter VI 2).

Article 16(1) requires each Party, again, to do the necessary to establish its jurisdiction over the offences of Article 15, as follows (see hereafter, chapter VI 2).

- in respect of all those offences, when the offence is committed in its territory or by one of its nationals (the territoriality and nationality principles of jurisdiction);
- in respect of the (especially serious) offences listed under (a)-(c), ‘when the alleged offender is present in its territory’ – an application of the so-called universality principle.

Article 16(2) leaves open the possibility that jurisdiction may obtain on other grounds, and specifies that if a non-party state (but party to a conflict) accepts and applies the provisions of the Protocol, its provisions on criminal responsibility and jurisdiction nonetheless do not apply to the members of the armed forces of that state.

Articles 17 to 20 provide rules concerning prosecution, extradition and mutual legal assistance, and grounds for refusal of extradition or mutual legal assistance. Article 21, closing chapter 4, obliges Parties to adopt the requisite measures ‘to suppress the following acts when committed intentionally’: (a) any use of cultural property in violation of the Convention or the Protocol, and (b) any ‘illicit export, other removal or transfer of ownership of cultural property from occupied territory’, once again, in violation of the Convention or the Protocol.

Chapter 6 on Institutional Issues provides for the establishment of three organs: the Meeting of the Parties and the Committee for the Protection of Cultural Property in the Event of Armed Conflict, both mentioned above, and a Fund for the Protection of Cultural Property in the Event of Armed Conflict, designed to provide financial or other assistance in peacetime in support of certain preparatory measures and, during or after armed conflict, in relation to emergency or other measures for the protection or recovery of cultural property (Article 29).

Chapter 7 contains provisions on dissemination and instruction, specifying that ‘Any military or civilian authorities who, in time of armed conflict, assume responsibilities with respect to the application of this Protocol, shall be fully acquainted with the text thereof’ (Article 30(3)); on international co-operation in situations or serious violations (Article 31; a copy of Article 89 of Additional Protocol I, with the addition of UNESCO besides the UN); and on ‘international assistance’ by the Committee in particular in respect of cultural property under enhanced protection (Article 32), and ‘technical assistance’ by UNESCO (Article 33).

Opening chapter 8 on Execution of this Protocol, Article 34 provides that the Protocol ‘shall be applied with the co-operation of the Protecting Powers responsible for safeguarding the interests of the Parties to the conflict’. Article 35 defines a ‘good offices’ function the Protecting Powers may fulfil ‘where they may deem it useful in the interests of cultural property’. Article 36 makes provision for the event that no Protecting Powers are appointed, attributing a conciliatory role to the Director-General of UNESCO as well as to the Chairman of the Committee.

## V 5 WARFARE AT SEA

Like the law of war on land, law relating to warfare at sea has been in existence for centuries. However, apart from the rules for the protection of the wounded, sick and shipwrecked at sea in the Second Geneva Convention of 1949, its codification stopped almost completely after the Second Hague Peace

Conference of 1907. The Diplomatic Conference of 1974-1977 had no mandate to include the law of warfare at sea in its work, and the successive conferences of the last half-century that codified and developed the general law of the sea, although well aware of the problem, had no such power either.

Many factors have contributed to this state of affairs. To mention just a few: matters are much more complicated now than they were in the pre-UN era; the sea is split up into more areas, the existence and activities of the United Nations have affected the relevance of neutrality, and the techniques of warfare on, beneath and over the sea waters have radically changed. Then, relatively few states are actively involved in warfare at sea, and some of these are not keen to see the law relating thereto codified at a broadly composed international conference where all kinds of interests other than their own may determine the outcome.

In this situation, as mentioned in chapter II 4, the International Institute of Humanitarian Law at San Remo undertook to prepare and publish a document that, although not a treaty, provided a reliable restatement of the law. The document was elaborated by a group of legal and naval experts from, or close to governments, but who participated in the work in their personal capacity, and representatives from the ICRC. It was published in 1994 as the San Remo Manual on International Law Applicable to Armed Conflicts at Sea.

The Manual covers a wide range of issues, several of them beyond the scope of this section (for instance, the relations between armed conflict and the law of self-defence; belligerent conduct and the position of neutrals in various regions of operations; interception, visit and search, diversion and capture of vessels and goods). Of interest for our purposes are Parts III (Basic rules and target discrimination) and IV (Methods and means of warfare at sea).

Section I (Basic rules) of Part III restates well-known principles: the absence of an unlimited right to choose methods or means of warfare; the principle of distinction between civilians and combatants and between civilian objects and military objectives; the definition of 'military objective' as in Protocol I; and the requirement that attacks be limited to military objectives – specifying that 'Merchant vessels and civil aircraft are civilian objects unless they are military objectives in accordance with the principles and rules set forth in this document'; the prohibition of methods or means of warfare that 'are of a nature to cause superfluous injury or unnecessary suffering' or are indiscriminate; the prohibition of conduct of hostilities on the basis of 'no survivors'; the requirement that due regard be given to the natural environment; and, last but not least (in the light of history): 'Surface ships, submarines and aircraft are bound by the same principles and rules.'

Section II (Precautions in attack) repeats the rules on that subject in Protocol I. Section VI adds specific precautions regarding civil aircraft.

Section III lists classes of enemy vessels and aircraft that are exempt from attack; and the conditions for, and loss of such exemption. Exempted are, for instance: hospital ships and medical aircraft; vessels carrying supplies indispensable to the

survival of the civilian population or engaged in relief actions; passenger vessels (when engaged only in carrying civilian passengers) and civil aircraft. For vessels to be exempted they must : ‘(a) be innocently employed in their normal role; (b) submit to identification and inspection whenever required, and (c) do not intentionally hamper the movement of combatants and obey orders to stop and move out of the way when required’ (rule 48). Non-compliance with these conditions results in loss of exemption and, with that, exposure to attack; in the case of the hospital ship, attacks are permitted only as a last resort and after other measures to mend the situation have remained without success (rules 49-51).

Both for hospital ships and other vessels that have lost exemption, attack may only follow if (rules 51, 52):

- (a) diversion or capture is not feasible;
- (b) no other method is available for exercising military control;
- (c) the circumstances of non-compliance are sufficiently grave that the vessel has become, or may be reasonably assumed to be, a military objective; and
- (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or expected.

Similar rules apply to the loss of exemption of enemy aircraft and the consequences of such loss (rule 57).

For a vessel or aircraft to be, or ‘be reasonably assumed to be’, a military objective it must make ‘an effective contribution to military action’. In this regard, rule 58 prescribes that ‘In case of doubt whether a vessel or aircraft exempt from attack is being used to make an effective contribution to military action, it shall be presumed not to be so used’.

All other enemy merchant vessels may be attacked only if they meet the definition of a military objective. Section IV enumerates the activities that may render such vessels military objectives, for instance: carrying troops; being incorporated into the enemy intelligence gathering system; sailing under convoy; or ‘otherwise making an effective contribution to military action, e.g., carrying military materials’. The Section provides similar rules for enemy civil aircraft.

Section V sets forth comparable rules determining the conditions under which neutral merchant vessels and civil aircraft may be attacked, including the reasonable belief that a vessel is carrying contraband or breaching a blockade, or a civil aircraft is carrying contraband.

Section I of Part IV deals with means of warfare: missiles and other projectiles, torpedoes and mines. According to rule 78 ‘missiles and other projectiles, including those with over-the-horizon capabilities, shall be used in conformity with the principles of target discrimination as set out’ in the basic rules and those on ‘precautions in attack’. Torpedoes must ‘sink or otherwise become harmless when they have completed their run’ (rule 79). Much more elaborate are the rules on use of mines (80-92). They permit ‘the denial of sea areas to the enemy’ but add that this ‘shall not have the practical effect of preventing



passage between neutral waters and international waters’, and due regard must be paid to ‘the legitimate uses of the high seas by, *inter alia*, providing safe alternative routes for shipping of neutral States’. Other rules lay down technical requirements for various types of mines, and provide for measures parties to the conflict are required to take after the cessation of active hostilities in order to ‘remove or render harmless the mines they have laid, each party removing its own mines’.

Section II, on ‘Methods of warfare’, is in two parts. One, on blockade, begins by restating the traditional rules on that topic (including the wondrously simple rule 95 that ‘A blockade must be effective. The question whether a blockade is effective is a question of fact’.). It then incorporates rules taken from other areas of humanitarian law: the prohibition of using blockades as a means of starving the civilian population, or in circumstances where a blockade may be expected to cause excessive damage to the civilian population ‘in relation to the concrete and direct military advantage anticipated from the blockade’ (rule 102); the obligation to provide for free passage of foodstuffs and other essential supplies the civilian population in the blockaded territory is inadequately provided with, subject to the right to prescribe technical arrangements and to the condition that the supplies are distributed ‘under the local supervision of a Protecting Power or a humanitarian organisation which offers guarantees of impartiality, such as the International Committee of the Red Cross’ (rule 103); and the obligation to ‘allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces’, again subject to a right to prescribe technical arrangements (rule 104).

The other part deals with the practice of naval powers to declare, at times huge, sea areas closed to all shipping that has no express permission to sail through such ‘exclusion zones’. Tolerating the establishment of such a zone, at most, ‘as an exceptional measure’, the Manual emphasises that a belligerent cannot thereby be ‘absolved of its duties under international humanitarian law’, and specifies a series of rules the belligerent must respect to minimise the adverse effects of the establishment of the zone.

Section III provides rules on deception, ruses of war and perfidy. One (rule 109) relates to military and auxiliary aircraft in particular: these ‘are prohibited at all times from feigning exempt, civilian or neutral status’.

Rule 110 states that ‘ruses of war are permitted’. Instead of providing examples of permissible ruses, the rule goes on to provide a catalogue of acts that are prohibited: ‘launching an attack whilst flying a false flag’, and ‘actively simulating the status’, for instance, of hospital ships or other vessels entitled to be identified by the emblem of the red cross or red crescent or on humanitarian missions, or of passenger vessels carrying civilians.

According to rule 111 ‘perfidy is prohibited’. This provision then repeats the definition of acts constituting perfidy in Article 37(1) of Additional Protocol I of 1977. Instead of the list of perfidious acts in that article, rule 111 provides its own set of examples: ‘Perfidious acts include the launching of an attack while

feigning: (a) exempt, civilian, neutral or protected United Nations status; (b) surrender or distress by, e.g., sending a distress signal or by the crew taking to life rafts.’

The San Remo Manual covers much more ground than could be reflected here. Even the above summary of Parts III and IV may be enough to show that the authors of the document achieved the impressive feat of merging the traditional law of sea warfare with principles and rules taken from other areas of humanitarian law, working the whole into a set of realistic rules that should be acceptable to naval powers.

## CHAPTER VI

# POST-1977 DEVELOPMENTS: IMPLEMENTATION AND ENFORCEMENT

The last quarter of the 20th century, and in particular its closing decade were characterised by a high incidence of at times exceedingly violent armed conflicts, with many of the long-established rules and principles of humanitarian law being openly flouted on all sides. Paradoxically, this had the positive effect of leading to stronger reactions than had long been habitual. In the international community, ‘concern’ shifted to ‘condemnation’ and from there, the biggest step of all, to the creation of the *ad hoc* Tribunals for Yugoslavia (1993) and Rwanda (1994). In other respects too, a more active stance could be noticed both at the international and domestic levels towards the promotion of respect for humanitarian law.

As for the United Nations, it was noted in chapter II 3 that its interest in humanitarian law and its development was long mainly rhetoric, with the General Assembly passing resolutions about items on its agenda under the heading ‘human rights in armed conflicts’. Changes in the political climate gradually led to a more active stance, in particular of the Security Council. Acting under its Charter mandate, this body began to speak out against situations of gross violations of human rights and humanitarian law. Interestingly, in its resolutions or in Presidential statements (a means of expression below the level of a formal resolution) no distinction was (or is) usually made between international and internal armed conflicts, and the rules of humanitarian law were and are simply referred to without any specificity, although often with special reference to the need to respect and protect the civilian population.

Apart from resolutions and statements on specific situations, the Security Council occasionally holds general debates on particular issues, based on reports by the Secretary-General. Thus, the Council has repeatedly held debates on the fate of the civilian population in armed conflicts. Another topic that was recently brought up for discussion is the proliferation of small arms, and what can be done to stem their rapid spread. Such debates, although not necessarily resulting in immediate concrete measures, are useful as policy-setting devices and as a means to spur UN Members and others towards further action in the fields concerned.

In addition to adopting resolutions and holding thematic debates, the Security Council has also developed a practice of more specific action. Thus, in the war between Iraq and Iran, in 1980-1988, the Secretary-General, on the instructions of the Council, repeatedly sent missions to the field to verify whether chemical weapons had been used, and the successive reports that confirmed these allegations each time led to sharp rebukes from the Council for such use which, unfortunately, were not enough to bring about a change in the policy of the accused party.

While such rebukes of the Security Council were addressed to the party or parties concerned, its decisions to establish the Yugoslavia and Rwanda Tribunals were based on the notion of individual criminal liability. The same applies to the creation of the International Criminal Court (ICC), established by a diplomatic conference and destined to take its place alongside the International Court of Justice, the UN organ that deals with matters of state responsibility.

The Tribunals and the ICC are designed to fulfil a number of objectives: to bring war criminals to justice, particularly where states are unwilling or unable to do so; to encourage states to investigate crimes and bring offenders before their national courts; to contribute to the prevention of international crimes; and, finally, and more generally, to enhance international peace and security by promoting the rule of law in countries suffering from conflicts and war crimes.

Although exciting steps forward on the road towards improved enforcement of international humanitarian law, neither the *ad hoc* Tribunals nor, when its time comes, the ICC by themselves provide a complete answer to the issue of enforcing compliance. Their jurisdiction is limited to particularly serious violations of the law, leaving other less serious violations out of their reach. Furthermore, if a party to the conflict has decided on a policy that violates certain rules of humanitarian law, the prosecution and trial of individual violators of those rules may not by itself be enough to bring about a change in that policy. Therefore, all the other means that may contribute to improving compliance with the parties' obligations under international humanitarian law remain as necessary as ever.

## VI 1 THE YUGOSLAVIA AND RWANDA TRIBUNALS

In 1991, Yugoslavia began to disintegrate. The armed conflicts that ensued led to increasingly alarming reports in the media about horrifying acts being committed, often centring around the practice of 'ethnic cleansing'. In October 1992, at the instigation of the Security Council, the UN Secretary-General set up a commission of experts to collect and analyse the available information about serious violations of humanitarian law; it submitted its final report in May 1994. In the meantime, in May 1993, the Security Council had established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (the Yugoslavia Tribunal).

Less than a year after the creation of the Yugoslavia Tribunal, a major ethnic conflict broke out in central Africa, in the course of which 500,000 members of the Tutsi group were murdered by members of the Hutu group in Rwanda. The Security Council, criticised for failing to take prompt action to prevent the massacre, again reacted by creating an international *ad hoc* Tribunal similar to the Yugoslavia Tribunal, with jurisdiction over genocide and other violations of international humanitarian law committed in Rwanda in 1994 (the Rwanda Tribunal).

The Yugoslavia and Rwanda Tribunals are based on resolutions of the Security Council, adopted under chapter VII of the UN Charter (Action with respect to threats to the peace, breaches of the peace, and acts of aggression). The jurisdiction of the Yugoslavia Tribunal is limited to the territory of the former Yugoslavia. That of the Rwanda Tribunal covers, apart from the genocidal events in Rwanda, also violations of humanitarian law committed by Rwandan citizens in the territory of neighbouring states but is, on the other hand, temporally limited to acts committed in 1994, with the effect that the subsequent killing of thousands of people who fled the scene of the Rwandan conflict falls outside its jurisdiction.

In contrast, the temporal jurisdiction of Yugoslavia Tribunal is open-ended. Article 1 of its Statute simply refers to 'serious violations ... committed ... since 1991', and Security Council Resolution 827 (1993), by which it was created, speaks of such violations committed 'between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace'. Its jurisdiction thus includes serious violations of humanitarian law committed in Kosovo, a province of Yugoslavia, in 1998 and 1999. (It may thus be asked whether the phrase 'ad hoc' in references to the two Tribunals is as appropriate for the Yugoslavia Tribunal as it is for the Rwanda one; yet this consideration gives us no reason to deviate from the generally accepted use.)

The jurisdiction of the two Tribunals covers 'serious violations of international humanitarian law' (Article 1 of either Statute). The phrase 'international humanitarian law' as used in this article covers war crimes as well as crimes against humanity and genocide. We shall confine ourselves to the category of war crimes.

Article 2 of the Statute of the Yugoslavia Tribunal gives it jurisdiction over grave breaches of the Geneva Conventions, while Article 3 empowers it to prosecute violations of 'the laws or customs of war'. Article 3 lists, in a non-exhaustive manner, the following acts: 'employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; wanton destruction of cities, towns or villages, or devastation not justified by military necessity; attack or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; seizure of, destruction or wilful damage done to instruction dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; plunder of public or private property'. The Tribunal in its case law has interpreted the notion of 'laws or customs of war' as applying in internal armed conflicts as well. As the Rwandan

situation was from the start seen to be a purely internal conflict, Article 4 of the Statute of the Rwanda Tribunal explicitly lists serious violations of common Article 3 of the 1949 Geneva Conventions and of Protocol II as punishable crimes. The recognition that violations of humanitarian law applicable in internal conflicts entail individual criminal liability is an historic event. Until recently, it was generally held that the notion of 'war crime' has no place in internal armed conflict; indeed, neither common Article 3 nor Protocol II expressly address individual responsibility. Therefore, even though the rules applicable in internal armed conflict still lag behind the law that applies in international conflict, the establishment and work of the *ad hoc* Tribunals has significantly contributed to diminishing the relevance of the distinction between the two types of conflict.

The personal jurisdiction of the Tribunals for the former Yugoslavia and Rwanda is limited to natural persons (Article 6 of the Yugoslavia Tribunal Statute, Article 5 of the Rwanda Tribunal Statute). Parties to the conflict as well as any other collective entities, be they states or armed opposition groups therefore fall outside the jurisdiction of the Tribunals (as had been the case with the Nuremberg Tribunal). It is irrelevant whether persons are linked to a particular state.

The Statutes of the Yugoslavia and Rwanda Tribunals, in Articles 7 and 6 respectively, set out the principle of individual criminal responsibility. These secure that all those who contributed to the commission of a crime are held responsible. Accordingly, Article 7(1) of the Yugoslavia Tribunal Statute and Article 6(1) of the Rwanda Tribunal Statute broadly cover any person who 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime' referred to in the Statutes. The principles relating to 'official position', 'command responsibility', and 'superior orders' guarantee the accountability of all persons throughout the chain of command. This includes Heads of State or Government, government officials and other superiors. Article 7(3) of the Statute of the Yugoslavia Tribunal and Article 6(3) of the Statute of the Rwanda Tribunal deal with the principle of command responsibility, stipulating that:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Article 7(4) of the Yugoslavia Tribunal Statute and Article 6(4) of the Rwanda Tribunal Statute reject the notion that a subordinate who committed a crime may be relieved of responsibility by proving that he acted pursuant to orders of a superior, although these articles recognise that superior orders 'may be considered in mitigation of punishment if the International Tribunal determines that justice so requires'.

Finally, it should be mentioned that, in case of concurrent jurisdiction by the Tribunals and national courts, Article 9 of the Statute of the Yugoslavia Tribunal and Article 8 of the Statute of the Rwanda Tribunal give the Tribunals primacy over national courts.

## VI 2 INTERNATIONAL CRIMINAL COURT

Shortly after the establishment of the Yugoslavia Tribunal, the International Law Commission, profiting from the favourable political climate of the moment, could finally complete the work on a statute for an international criminal court it had begun in the early years of the United Nations. In 1994 it submitted the draft statute to the UN General Assembly. This set up a committee to prepare a broadly acceptable text for submission to a diplomatic conference; the committee held a series of sessions from 1996 to 1998. The General Assembly at its fifty-second session decided to convene a diplomatic conference, to be held in Rome from 15 June to 17 July 1998, 'to finalise and adopt a convention on the establishment of an International Criminal Court'. On 17 July 1998 the Conference adopted the Statute of the ICC, which was subsequently signed by 139 states.

The Statute will enter into force after the 60th ratification. To date, 27 states have done so. It is an open question how many states will actually become party to the ICC Statute. The point is important, because the obligation of states to cooperate with the Court and to recognise its judgements extends only to the states parties to the Statute.

While the *ad hoc* Tribunals for the former Yugoslavia and Rwanda, given their geographically and temporally limited jurisdiction, are open to the criticism of selective justice, the ICC, as a permanent court, will be able to operate without such criticism. Yet, it should be borne in mind that, giving effect to the principle of non-retroactivity of criminal rules, Article 24 of the Statute stipulates that 'No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute'.

The opening words of Article 5 on 'Crimes within the jurisdiction of the Court' state that 'The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole'. Its jurisdiction encompasses war crimes, crimes against humanity, genocide, and the crime of aggression. Since there is no agreement yet on a generally acceptable definition of 'aggression', Article 5 adds that the Court shall *exercise* jurisdiction over this crime only once such agreement has been reached, and this both on the definition of the crime and on the conditions under which the Court may exercise this part of its jurisdiction. The resolution of this thorny issue, which includes the difficult problem of the relations between the jurisdiction of the Court and the powers of the Security Council is thus left to further negotiations among interested parties.

Article 8 defines the jurisdiction of the Court in respect of war crimes. Paragraph 1 indicates that it shall have jurisdiction over such offences 'in particular when

committed as part of a plan or policy or as part of a large-scale commission of such crimes'. This phrase poses a certain threshold to the exercise of jurisdiction of the Court, although not an absolute one, as the words 'in particular' indicate: the Court retains the power to deal with isolated war crimes.

Article 8(2) defines four different categories of war crimes, with the first two applying to international conflicts and the last two to internal conflicts. In so doing, the Statute maintains the distinction between the two types of situations (as it is done in the Statutes and practice of the two *ad hoc* Tribunals).

Paragraph 2 (a) lists grave breaches of the Geneva Conventions, and paragraph 2 (b) 'other serious violations of the laws and customs applicable in international armed conflict'. The quite extensive list in the latter sub-paragraph contains rules of warfare already recognised in the 19th century, but equally takes into account recent developments in international humanitarian law, some of which are laid down in Protocol I: for instance, the provisions criminalising various acts against UN peace-keepers and humanitarian organisations, their installations, material, units and vehicles; the transfer by an Occupying Power of civilians into or out of certain territories; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence; intentional starvation of civilians as a method of warfare; and conscripting or enlisting children younger than fifteen into the national armed forces or having them actively participating in the hostilities.

As regards the employment of prohibited weapons, the list is confined to two items: poison or poisonous weapons, asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, and bullets which expand or flatten easily in the human body. According to paragraph 2 (b)(xx), the employment of 'weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict' will not in general fall under the jurisdiction of the ICC, but only once such weapons and methods of warfare 'are the subject of a comprehensive prohibition and are included in an annex to this Statute' by a proper amendment in accordance with the relevant rules. This means that the ICC has no power to determine that employment of a particular weapon violates these principles and is therefore punishable as a war crime. This includes nuclear weapons: any reference to these weapons was ultimately kept out of the Statute.

The list of war crimes in internal armed conflicts in Article 8(2), though considerable, is far shorter than that for international armed conflicts. Paragraph 2 (c) mentions serious violations of common Article 3, the provisions of which are thus for the first time made the subject of a penal treaty provision. Paragraph 2 (e) renders punishable as 'other serious violations of the laws and customs applicable in armed conflicts not of an international character', a series of acts which are drawn from Protocol II as well as from provisions of customary law in the Hague Regulations, the Geneva Conventions and Protocol I. Like the provisions on international armed conflict, those on internal conflict include the protection of UN and other humanitarian personnel and



assets, and gender-based crimes. The inclusion of ‘conscripting or enlisting children under the age of fifteen into armed forces or groups or using them to participate actively in hostilities’ also runs parallel with the provision on such use in international conflicts. The use in an internal conflict of weapons classified as prohibited in the context of international armed conflict is not, however, listed among the war crimes that fall within the jurisdiction of the ICC.

As for the conditions for applicability of the provision criminalising serious violations of common Article 3, paragraph 2 (d) prescribes that it shall not apply to ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature’. Paragraph 2 (f) repeats the same form of words in relation to paragraph 2 (e), adding that this only ‘applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups’. This language, based in principle on Article 1(1) of Protocol II, deviates from that article in several respects. It includes conflicts between the armed opposition groups (which are also included in common Article 3 but were left out of Article 1 of the Protocol); and it leaves out the element of control over a part of the state’s territory enabling a group ‘to carry out sustained and concerted military operations and to implement [the] Protocol’. While these are significant improvements, paragraph 2(f) unfortunately adds the qualification ‘protracted’ which finds no basis in Protocol II (and which has been copied from a judgment delivered by the Yugoslavia Tribunal in an early phase of its first case, the *Tadic* case (jurisdiction)).

Paragraph 3 of Article 8 is derived from Article 3 of Protocol II, stating that nothing in the paragraphs dealing with internal conflicts ‘shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means’.

In view of the concern that the crimes as defined in the Statute might not meet the requirements of the principle of legality, Article 9 stipulates that ‘Elements of Crimes shall assist the Court in the interpretation and application’ of the articles containing the crimes. A final draft of the Elements of Crimes, which must be consistent with the Statute, has been finalised by a Preparatory Commission for the ICC but will have to await the entry into force of the Statute and a first meeting of the Assembly of States Parties for their final adoption (by a two-thirds majority).

One of the core issues regarding the International Criminal Court is the question of its jurisdiction. Article 12 of the Statute lays out the ‘preconditions to the exercise of jurisdiction’. The general requirement is that either the state on whose territory the crime was committed or the state of nationality of the accused has accepted the jurisdiction of the Court, or that the Security Council acting under chapter VII of the UN Charter refers a case to it. A state which becomes a party to the Statute thereby accepts the Court’s jurisdiction. It is also possible for a state to accept its jurisdiction *ad hoc*, with respect to a particular crime. It may be emphasised that in cases referred by the Security Council the

Court may have jurisdiction over a crime committed in a state that is not a party to the Statute and by a national of such a state.

Provided the preconditions for exercise of jurisdiction are met, the next question is who or what triggers the actual exercise of jurisdiction. Article 13 mentions three possibilities: a case may be referred to the Prosecutor by a state party or by the Security Council, or the Prosecutor may himself have initiated an investigation. The possibility for the Prosecutor to do this is provided in Article 15, stating that 'The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court'.

The ICC is not meant to replace or supersede national courts. The preamble of the Statute recalls 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. In the same vein, Article 1 provides that the Court 'shall be complementary to national criminal jurisdictions'. The principle of complementarity is of considerable importance since most states rather jealously guard their jurisdiction. The ICC is supposed to take over only when a state which has jurisdiction over a case 'is unwilling or unable genuinely to carry out the investigation or prosecution', or when its decision not to prosecute the accused 'resulted from the unwillingness or inability of the State genuinely to prosecute' (Article 17(1)). Such situations are particularly likely to arise when international crimes involve the direct or indirect participation of individuals linked to the state, as governments often lack the political will to prosecute their high-level officials; and *a fortiori* when the crimes are committed in execution of a set government policy. The Court is also likely to come into play when national institutions have broken down, as was the case in Rwanda in 1994.

Part 3 of the Statute sets out the general principles of criminal law. These include the principles of *nullum crimen sine lege* and *nulla poena sine lege* (no crime nor punishment without previous legislation); the principle of non-retroactivity of criminal law; the various forms of individual responsibility; the responsibility of superiors; the mental element; and the grounds for excluding individual criminal responsibility. As the ICC Statute is the first treaty to lay down these key principles of criminal law, it contributes significantly to the development of international criminal law and meets the vital requirement of specificity.

The ICC has jurisdiction over natural persons (as distinguished from juridical persons; Article 25(1)). Paragraph 2 emphasises that 'A person who commits a crime within the jurisdiction of the Court shall be individually responsible'. Far from being restricted to the actual perpetration of the act, the notion of 'committing a crime' is elaborated in paragraph 3. This lists a wide range of forms of committing (whether as an individual or jointly), contributing, facilitating and assisting in the commission of a crime, including: ordering, soliciting, inducing, aiding, abetting or providing the means for the commission of a crime. Contributing in any other way to the commission or the attempted commission of a crime by a group of persons acting with a common purpose is also punishable when the contribution is intentional and is made with the 'aim

of furthering the criminal activity or criminal purpose of the group' or 'in the knowledge of the intention of the group to commit the crime'. Especially in respect of genocide, the direct and public incitement of others to commit genocide (as was done in Rwanda) is brought under the notion of 'committing a crime'.

Article 25(4) provides that nothing in the Statute 'relating to individual criminal responsibility shall affect the responsibility of States under international law'. Evidently, the reverse is equally true: a person belonging to the state apparatus who has committed a crime within the jurisdiction of the Court, is not exempted from criminal responsibility under the Statute by the fact that the state is internationally responsible for his act. Article 27 specifically provides in this respect that no official capacity, including that as a Head of State or Government, exempts a person from such criminal responsibility under the Statute.

Article 28 deals with the complex issue of command responsibility. It distinguishes between 'military commanders or persons effectively acting as a military commander' and other 'superior and subordinate relationships'. As regards the military commander or person effectively acting as such, the article provides under (a) that such person:

shall be criminally responsible for crimes ... committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (i) That military commander or person either knew or, *owing to the circumstances at the time, should have known* that the forces were committing or about to commit such crimes; and
- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

With respect to the other 'superior and subordinate relationships' the article under (b) contains a similar provision. The difference lies in that, instead of the broad rule on information in (a)(i), the rule in (b)(i) is that 'The superior either knew, or *consciously disregarded information which clearly indicated*, that the subordinates were committing or about to commit such crimes'. An additional requirement, laid down in (b)(ii), is that 'The crimes concerned activities that were within the effective responsibility and control of the superior'; a requirement that in respect of the military commander needed not be made.

An important point is that this entire doctrine of 'command responsibility' as defined in the Statute applies equally to international and internal armed conflicts. In internal armed conflicts in particular, the political and/or military leaders of armed opposition groups will come to fall under the terms of this article.

Article 29 provides that 'The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations'. Conceivably, such a crime may be

subject to a statute of limitations under the domestic legislation of the state concerned, so that this state, in the terms of Article 17(1), is 'genuinely unable to carry out the investigation or prosecution' of that crime. That would make the case admissible to the ICC.

Articles 31 and 32 address grounds for excluding criminal responsibility, including self-defence and mistake of law.

Article 33 deals with superior orders, or, more precisely, crimes committed 'pursuant to an order of a Government or of a superior'. It provides that such orders do not relieve a person of responsibility, unless that person was (a) legally obliged to obey the order, (b) did not know that the order was unlawful, *and* (c) the order was not manifestly unlawful. Note that the three conditions are cumulative. In respect of condition (c) in particular, paragraph 2 adds that 'For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful'. Apart from that, if all three conditions are fulfilled, a valid defence will have been established freeing the accused from criminal responsibility.

The Statute goes on to provide in minute detail for the composition, administration and work of the Court (Parts 4 to 8), international co-operation and assistance (Part 9), the enforcement of sentences (Part 10), the Assembly of States Parties (Part 11), financing (Part 12) and final clauses (Part 13). Leaving all these matters aside, we finally mention that, as provided in Article 3, the seat of the ICC will be 'at The Hague in the Netherlands'.

### **VI 3 OBSERVANCE BY UN FORCES OF INTERNATIONAL HUMANITARIAN LAW**

An item that has long been on the international agenda, is the question of respect for humanitarian law by UN forces. After prolonged debate and negotiations between the Secretary-General himself, the ICRC and troop-providing states, the Secretary-General published the 'Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law', which, according to its terms, entered into force on the 12th of August, 1999 (the 50th anniversary of the Geneva Conventions). Stopping short of simply making the Conventions, the Additional Protocols or the Weapons Convention applicable to those forces, the Bulletin provides detailed guidelines, derived from those treaties, on topics such as protection of the civilian population, means and methods of combat, treatment of detained persons, and protection of the wounded and sick and of medical and relief personnel.

Without squarely addressing the issue of the responsibility of the UN for violations by members of its forces, Section 3 of the Bulletin specifies that regardless of whether there is a status-of-forces agreement between the UN and the state in whose territory the force is deployed, the UN 'undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel'.

Section 4 states that ‘In cases of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts’. Since the Bulletin is not a binding instrument, this provision may be little more than a statement of the obvious, which is that the UN does not itself have an in-house judiciary competent to deal with such cases and the troop-sending states are therefore themselves obliged to prosecute and try the perpetrators of such acts. An *a contrario* reading of the provision so as to exclude the submission of such cases to any other, domestic or international, competent criminal court does not appear warranted.

#### VI 4 COLLECTIVE RESPONSIBILITY AND COMPENSATION FOR VIOLATIONS

As mentioned in chapter III 5.3c, in the 1990s the Japanese courts were seized of a series of cases against the Japanese Government. The cases were brought by individuals who claimed that as prisoners of war or civilian detainees, or as ‘comfort women’ (forcibly prostituted women and girls) in occupied territory during the Second World War, they had been the victims of ill-treatment at the hands of the Japanese armed forces. They also claimed to have been insufficiently compensated, or not compensated at all, for the injury and damage inflicted upon them in violation of international humanitarian law. While a number of the claimants had in the past received some token payment from their national authorities out of the money paid by Japan on the basis of a lump-sum agreement, usually pursuant to a peace treaty, in other cases no such agreement existed or, as in the case of the Philippine ‘comfort women’, the victims had not ventured to claim damages in the past because for decades they simply were unable to speak openly about what had been done to them.

Several of these cases have had a negative outcome; at the moment of writing, other ones are still pending. A crucial issue in the cases is whether individuals can bring such claims based on international humanitarian law against a foreign state. Regardless of the outcome, the point is that the effort has been made at all, not just by the claimants but by their Japanese counsel as well.

The invasion and occupation of Kuwait by Iraq, 1990-91, has provided another opportunity for application of the obligation to make reparations for violations of the law, including in respect of individual victims. The Security Council by Resolution 687 (1991) created the UN Compensation Commission, the body entrusted with reviewing and awarding claims for compensation for losses suffered as a direct result of Iraq’s invasion of Kuwait. Although the Commission deals principally with losses arising from Iraq’s unlawful use of force, it has also awarded compensation for violations of international humanitarian law suffered by individuals. On some occasions it did so without expressly referring to this body of law, although the underlying acts could have been seen as violations, such as for example, hostage-taking or pillage of private property, but on one occasion express reference was made to international humanitarian

law. Although military costs and the claims of military personnel are excluded from the competence of the Commission, compensation was nevertheless awarded to members of the Allied Coalition Armed Forces held as prisoners of war whose injury resulted from mistreatment in violation of international humanitarian law.

The events in the territory of the former Yugoslavia have given rise to yet another type of case, this time at the inter-state level, when Bosnia-Herzegovina in 1993 asked the International Court of Justice to condemn the Federal Republic of Yugoslavia (i.e., Serbia and Montenegro) for violations of the Genocide Convention. It added a request for the indication of provisional measures for the immediate cessation of acts of genocide against the Bosnian people, leading to a counter-request by Yugoslavia. Always in 1993, the Court indicated provisional measures with a view to the protection of rights under the Genocide Convention. In 1996, it decided that it had jurisdiction in the case and the Application of Bosnia-Herzegovina was admissible. In 1997, it held that counter-claims submitted by Yugoslavia were also admissible; in these claims, Yugoslavia requested the Court to hold Bosnia-Herzegovina responsible for acts of genocide committed against the Serbs in the latter country. At the moment of writing, a judgment on the merits of either party's claims has not been delivered.

The case is of interest because it illustrates the possibility for states to vindicate their rights and those of their nationals under international humanitarian law by having recourse to the law on state responsibility and the procedures of general international law for the settlement of disputes. It also illustrates the point that such a procedure may run simultaneously with procedures before an international judicial body (the Yugoslavia Tribunal) against individuals held criminally responsible for the identical facts that underlie the inter-state case.

## **VI 5 NATIONAL JURISDICTIONS AND INDIVIDUAL RESPONSIBILITY**

In apparent reaction to the events in various recent armed conflicts, states are showing a greater readiness to take up matters relating to violations of international humanitarian law than has long been the case. Thus, the very first case to come to the Yugoslavia Tribunal, against Dusko Tadic, a Bosnian Serb, began with his arrest in 1994 in Germany and by the German authorities on suspicion of having committed offences in Bosnia-Herzegovina, including torture and aiding and abetting the commission of genocide, which, both in terms of substance and of jurisdiction, could be tried in Germany. A formal Request for Deferral brought the case to the Yugoslavia Tribunal.

Since then, numerous cases arising out of the events in the former Yugoslavia and Rwanda have been dealt with in various national jurisdictions, in situations where the Tribunals saw no grounds for asking for a deferral. In Rwanda in particular, the vast majority of the cases arising out of the massacres of 1994 were left for the national courts of that country to deal with.

Always as a consequence of recent events in the former Yugoslavia, Rwanda and elsewhere, it has been realised anew that a state's criminal laws and rules on jurisdiction must enable the prosecution and trial of serious violations of humanitarian law committed outside that state by nationals of another state who subsequently are found in its territory (as Tadic was in Germany). In several countries this has resulted in an adaptation of existing legislation, and in others work on appropriate amendments is in progress. In this context, mention may be made of the ICRC Advisory Services, set up as a tool to assist states in these efforts (see also hereafter, chapter VI 6).

Finally, reference should be made to the cases brought in the US under the Alien Tort Claims Act by a group of Bosnian nationals who sought compensation from Radovan Karadzic for genocide, rape, forced prostitution, torture and other cruel inhuman and degrading treatment committed during the conflict in the former Yugoslavia. At the jurisdiction stage the US court held that the Act gave it jurisdiction over claims based on genocide and war crimes, which it considered included violations of common Article 3 of the Geneva Conventions.

## VI 6 THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT AT WORK

The gross and systematic violations in recent armed conflicts, of almost every conceivable rule of humanitarian law, including those protecting Red Cross and Red Crescent workers or other specially protected personnel, could not fail to lead to reactions on the part of the Red Cross and Red Crescent community. An appropriate forum for this purpose is provided by the International Conference of the Red Cross and Red Crescent, which meets every four years or so and brings together representatives of states parties to the Geneva Conventions, national Red Cross and Red Crescent societies, the International Federation of these societies and, last but not least, the ICRC.

The 27th Conference, held in 1999 in Geneva, adopted a 'Plan of Action for the years 2000-2003', the first part of which is devoted to 'protection of victims of armed conflict through respect of international humanitarian law'. Among its goals are: integration of states' obligations under this law in relevant educational and training curricula; an 'effective barrier against impunity' through 'implementation by states of their international obligations regarding the repression of war crimes, co-operating with each other in doing so where necessary', and the 'examination of an equitable system of reparations'.

A particularly interesting suggestion is made under the goal of full compliance by all the parties to an armed conflict with their obligations under international humanitarian law:

Organised armed groups in non-international armed conflict are urged to respect international humanitarian law. *They are called upon to declare their intention to respect that law and teach it to their forces.*

The italicised phrase is precisely what is lacking in Protocol II. The question remains what will be the effect of such a unilateral declaration, in the perception of the party making it and in that of the government. Even so, in the absence of an express agreement between the parties on the application of (parts of) humanitarian law, a declared intention on the part of the armed opposition group – as, for that matter, on the part of the government – might significantly contribute to an improved respect for the law.

Needless to say, the ICRC has done its utmost throughout the recent decades to stem the wave of non-respect for even the most fundamental principles of humanitarian law. Wherever it can, it spreads knowledge about the law, by any available means and into the most remote corners of countries involved in armed conflict. Whenever possible, it co-operates in this effort with state and local authorities and the national Red Cross or Red Crescent society.

A recent useful addition to the array of means for the promotion of respect for humanitarian law is the ‘ICRC Advisory Service on International Humanitarian Law’. Its purpose is to advise and assist states in need of such help, and that are willing to accept it, in their efforts to adopt national measures of implementation.

This is the place to bring together and complete information about the ICRC and its two-fold mandate: to provide assistance and protection to victims of armed conflicts (a function it has performed since its creation in 1863), and to act as promoter and guardian of international humanitarian law.

Over the years, its work has been recognised by the international community and has found its way into multilateral treaties such as the Geneva Conventions and Protocol I. As discussed above, these instruments mention the ICRC in a number of articles and authorise it to undertake a wide variety of activities. The ICRC can thus offer its services to the parties to an armed conflict; and its delegates are entitled to visit prisoners of war and civilian internees and detainees and must be permitted to conduct private interviews with them without witnesses. As discussed above, the ICRC can also act as a Substitute of a Protecting Power. Furthermore, through its Tracing Agency, the ICRC acts as an intermediary between parties to an armed conflict, transmitting information on visited prisoners of war and interned civilians and detainees to the other party in the conflict, who in turn inform the relevant families. The system is also used to inform the families of combatants who have died.

According to Article 81 of Protocol I, parties to an international armed conflict must grant the ICRC all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and the Protocol in order to ensure protection and assistance to the victims of conflicts. Protocol II does not contain a similar provision for internal armed conflicts. It may be recalled, however, that common Article 3 provides that ‘An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict’.



In addition to the Geneva Conventions and Protocol I, the ICRC finds a basis for its activities in the Statutes of the International Red Cross and Red Crescent Movement. According to Article 5 of the Statutes, the ICRC is entrusted *inter alia* with the following roles:

- to work for the faithful application of international law applicable in armed conflicts;
- to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results;
- to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof.

In addition, Article 5(3) reaffirms that ‘The International Committee may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution’.

The ICRC’s function of promoter and guardian of international humanitarian law has the following three facets: monitoring compliance with humanitarian law; promotion and dissemination of the law; and contribution to its development.

Its work for the ‘faithful application’ of humanitarian law means in concrete terms that its field delegates monitor the application of humanitarian law by the parties to conflicts. If the law is violated the ICRC attempts to persuade the relevant authority – be it a government or an armed opposition group – to correct its behaviour. The ICRC endeavours to build a constructive relationship with all involved in the violence and conducts what could be called ‘discreet diplomacy’. Given the principle of confidentiality under which the ICRC operates, it claims that it cannot be required to provide evidence before national or international courts. Exemptions to this effect have been expressly recognised by the Yugoslavia Tribunal in the *Simic* case, in the Rules of Procedure and Evidence of the ICC and in headquarters agreements establishing the privileges and immunities of the ICRC in the various states where it has a presence.

This being said, if all confidential interventions fail to produce the desired results, the ICRC reserves its right to publicly denounce the violations. The aim of speaking out is not to single out individual responsible persons but, rather, to appeal to the parties to the conflict to respect humanitarian law. The ICRC also frequently appeals to other states to intervene with the parties concerned.

Through its Advisory Service on International Humanitarian Law the ICRC encourages states to adopt national legislation for the implementation and application of humanitarian law at the national level. ICRC legal experts at its headquarters in Geneva and in the field provide states with technical

assistance, for example, on legislation to prosecute war criminals or protect the red cross and red crescent emblems.

Although states have primary responsibility for the teaching of humanitarian law, over the years the ICRC has developed a considerable expertise in that field and its delegates often give courses, especially to armed and security forces, state employees and diplomats as well as civilians in general. In these activities, the ICRC whenever possible co-operates with the local Red Cross and Red Crescent societies, as, indeed, with the International Federation of Red Cross and Red Crescent Societies.

## **VI 7 HUMAN RIGHTS BODIES AND INTERNATIONAL HUMANITARIAN LAW**

In recent times, both intergovernmental and non-intergovernmental human rights bodies have become increasingly inclined to include humanitarian law in their activities. Factors stimulating this development are, first, the fact that their activities often take place in areas of armed conflict where, apart from human rights norms, rules of humanitarian law are applicable; second, the noticeable overlap and, indeed, similarity in substance (for example, the principles of the right to life, and of the inviolability of the human person) between the two bodies of law.

At the UN level, this tendency may be observed, for instance, in the practice of the UN High Commissioners for Human Rights and for Refugees. A case in point is the Office of the High Commissioner for Human Rights in Colombia, whose mandate encompasses the reporting of violations of human rights and humanitarian law without distinction and regardless of whether committed by the state or by armed opposition groups. The Office reports to the governmental authorities and, in general terms, to the UN.

The UN Commission on Human Rights and the Rapporteurs it appoints for specific countries or areas of law, also often incorporate international humanitarian law, alongside human rights, in their resolutions and reports.

On the regional level, the Inter-American Commission on Human Rights is similarly active. It has, in effect, gone one step further, explicitly evaluating incidents that have occurred in countries involved in armed conflict, both in terms of human rights and humanitarian law. It has had recourse to rules of humanitarian law both as a device for the interpretation of applicable human rights rules (which are not drafted with an eye to the specificity of situations of armed conflict), as well as to add an extra basis for decisions that specific conduct has violated fundamental precepts of humanity.

In its reports on the human rights situation in given countries at war, the Commission can and does include information about the behaviour of all the parties, both in terms of human rights and humanitarian law and, as the case may be, exhorts these parties, or even specifically one or other armed opposition group to respect these laws. When it comes to formulating a

decision in terms of international responsibility, however, the Commission can address such a decision only to the government as the representative of the state party to the American Convention on Human Rights. Thus, in its report on Colombia of 1999, the Commission extensively reported on, and analysed, the conduct of all the parties to the armed conflict in that country in the light of applicable rules of humanitarian law, but it had to admit that, in terms of responsibility, the many serious violations of humanitarian law committed by the guerrilla and paramilitary groups did not fall within its jurisdiction.

The obstacle met by the Inter-American Commission on Human Rights would equally frustrate attempts of other intergovernmental human rights bodies that might wish to take up and decide individual cases in terms of international responsibility for violations of humanitarian law. For all of these bodies, the possibility remains however to refer to humanitarian law in the same breath as human rights in a more rhetoric capacity, of ‘deploring’ or ‘condemning’ certain conduct and ‘exhorting’ parties to mend their ways.

Among non-governmental human rights bodies, Human Rights Watch has been the first to openly investigate and report on situations of armed conflict in terms of both human rights and humanitarian law. As an NGO, its competence to act is not based on (nor limited by) any treaty. It is therefore free to ‘accuse’ any parties or individuals of violations of these bodies of law. In doing so, it strives to be, and to be seen as, a credible source of information.

Amnesty International, on the other hand, had long been unwilling to take humanitarian law into account in its reporting on situations of gross violation of human rights, even where the countries involved were obviously the scene of armed conflict and the violations therefore also, or even primarily, encroachments of humanitarian law. It has recently changed this posture, in particular to be able to speak out against violations of humanitarian law committed by armed opposition groups.

In sum, although the practice of human rights bodies described above is still limited, it provides a welcome addition to the admittedly limited array of international means to enforce compliance with international humanitarian law by parties to armed conflicts. The strength of these bodies lies in their capacity to speak out openly, to reprimand, to exhort and to find violations. Their weaknesses are that they are not all equally well versed in humanitarian law, and that at all events they have no power to authoritatively hold parties responsible for violations of that law. Therefore, while their interest in international humanitarian law should be supported and encouraged, their activities in this area do not remove the need to develop supervisory mechanisms specifically mandated to enforce compliance with humanitarian norms.



## CHAPTER VII

# CONCLUSION

The international humanitarian law of armed conflict, rather than being an end in itself, constitutes a means to an end: the preservation of humanity in the face of the reality of war. That reality confronts us every day; the means remains therefore necessary.

The preceding chapters provide a sketch of the development of humanitarian law and of some of its problems. These problems are a good deal more varied and complicated than usually emerges in public debate, with its tendency to take notice of humanitarian law only in the context of given ‘topics of the day’: one moment the potential use of nuclear weapons, the next the position of guerrilla fighters in wars of national liberation, and then the fate of the civilian population in an internal armed conflict, or the wanton attacks on Red Cross or Red Crescent personnel with total disrespect of the protective emblem. Important though each of these issues may be, we should not lose sight of the ties that link them to other aspects of humanitarian law, equally worthy of attention.

The questions at issue in humanitarian law, no matter how varied and complicated, can be reduced to two fundamental problems: viz., the problem of balancing humanity against military necessity, and the obstacles to doing so posed by state sovereignty. Sovereignty and military necessity are the two evil spirits in our story – and evil spirits we will not be able to exorcise soon. Although many nowadays regard state sovereignty as the main obstacle to a better society, it is cherished by states themselves, both old and new, as their greatest asset and as an indispensable means to safeguard them against encroachments of their territorial integrity and political independence. Any ostensible interference with, or supervision of, their behaviour in time of armed conflict, and especially in a situation of internal armed conflict, is all too quickly interpreted as an encroachment of this precious sovereignty.

Military necessity was an even more dominant theme in the previous chapters. This could hardly be otherwise, as the concept constitutes an integral part of the phenomenon of armed conflict. It should be understood that ‘military necessity’ is

nothing more than the argument that certain things are permitted in armed conflict, on no other ground than that they must be done. The opposite argument is that even in armed conflict certain things are not allowed, because they amount to an intolerable encroachment of humanity. In view of everything that has been said in the previous chapters, the difficulty of balancing these two opposing arguments can no longer be a matter of doubt. The century of international conferences on these matters, from 1899 to 1999, has made this abundantly clear.

This long series of conferences has resulted in the adoption of a growing number of important treaties. Taken together, they constitute an impressive body of law. This is not to suggest that now everything has been regulated to everyone's satisfaction: this indeed appears impossible, and new demands on the international legislator cannot fail to arise in the wake of future events.

It should immediately be added that neither the adoption of treaty texts nor even their gradual incorporation into the body of international customary law of armed conflict is a guarantee for their application in practice. Observance of the obligations restricting belligerent parties in their conduct of hostilities is rarely an automatic thing: more often than not, it must be fought for step by step, so as to prevent armed conflict from degenerating into the blind, meaningless death and destruction of total war. This battle for humanity is not always won. Yet, each even partial success means that a prisoner will not have been tortured or put to death, a hand-grenade not blindly lobbed into a crowd, a village not bombed into oblivion: that, in a word, man has not suffered unnecessarily from the scourge of war.

The above-mentioned goal of the humanitarian law of armed conflict, to preserve humanity in the face of the reality of war, is a secondary one: our primary goal must be to prevent armed conflict.

The complete realisation of this primary goal, no matter how earnestly sought by many, appears to lie, as yet, beyond our reach. It is for this very reason that the present authors felt justified in drawing the reader's attention to the often awkward relationship between war and humanity.

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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.

# CONSTRAINTS ON THE WAGING OF WAR

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